Vol. I

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 29

THE UNITED STATES, PETITIONER,

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED OCTOBER 24, 1956

CERTIORARI GRANTED JANUARY 14, 1957

(Pages (1 to 862)

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VOL. I

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3—Preference Rating Order No. P-23, dated July 29, 1941	2218	1250
4—Preference Rating Order No. P-56, issued September 17, 1941	2222	1255
5—Preference Rating Order No. 56-a, dated December 31, 1941	2227	1260
6—Amendment to Order P-56, dated March 2, 1942	2234	1268
7—Amendment No. 2 to Preference Rating Order P-56 as amended March 2, 1942	2242	1278
10—Minutes of SPAB meeting, November 18, 1941, Status of Gold-Mining	2243	1278
12—Statement on Priorities for Gold Mining Machinery dated December 17, 1941 with letter of transmittal dated December 19, 1941, Milo Perkins to Donald M. Nelson	2250	1288
13—Report on Gold Mine Order L-208 Its Effect and Accomplishments, by Edward H. Rott, May 24, 1943	2254	1292
16—Memorandum from Wilbur A. Nelson to H. O. King dated August 14, 1942	2288	1311
17—Memorandum from H. O. King to Wilbur A. Nelson, dated September 1, 1942	2290	1312
21—Memorandum from M. Creditor to Donald M. Nelson, dated September 15, 1942	2291	1313
22—Minutes of meeting on Interdepartmental Committee on Non-Ferrous Metals, September 8, 1942	2293	1315
23—Memorandum from W. L. Batt for Mr. Nelson, not dated	2298	1319
24—Memorandum from Wilbur A. Nelson to W. L. Batt, dated October 3, 1942	2299	1319
25—Letter from Robert P. Patterson to William L. Batt, dated October 2, 1942	2301	1321
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38—Memorandum from Edward H. Rott to A. S. Knoizen, dated April 17, 1943	2310	1331
43—Memorandum from M. Creditor to Donald M. Nelson, dated June 7, 1943	2313	13..
45—Memorandum from Donald M. Nelson dated August 26, 1942 with attached letter from Senator McCarran to Donald Nelson dated August 26, 1942	2314	1335
46—Memorandum from Edward H. Rott to A. S. Knoizen; dated May 6, 1943	2317	1338
47—Memorandum from Edward H. Rott to A. S. Knoizen, dated April 17, 1943	2321	134[illegible]
48—Memorandum from Gilbert J. Brown to Hugh C. Porter, dated September 7, 1943	2325	1345
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51—Memorandum from A. S. Knoizen to Howard I. Young, dated October 30, 1943	2330	1351
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53—Memorandum from A. S. Knoizen to William L. Batt, dated March 30, 1943	2337	1359
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58—Preference Rating Order No. P-22, effective September 9, 1941	2343	1364
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72—Memorandum from Wilbur A. Nelson to A. I. Henderson, dated March 16, 1942	2389	1436
74—Recommendation for amendment of P-56, dated May 15, 1942	2392	1438
75—Memorandum from H. O. King to A. I. Henderson, dated July 3, 1942	2393	1439
76—Document entitled "Committee Program for Increasing Production in the Copper Mining Industry," dated July 8, 1942	2394	1440
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79—Minutes of the War Production Board meeting of September 1, 1942	2402	1448
82—Minutes of Interdepartmental Committee on Non-Ferrous Metals meeting, September 15, 1942	2406	1455
83—Memorandum from J. M. Scribner to Dr. M. H. Stow, dated September 17, 1942	2412	1459
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127—Letter from Brehon Somervell to Chan Gurney, dated October 11, 1942	2452	1510
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129—Minutes of Interdepartmental Committee on Non-Ferrous Metals, dated August 25, 1942	2454	1512
132—Telegram from Robert P. Patterson to Edward H. Clark, dated October 10, 1942	2459	1516
133—Notice to Employees of Homestake, signed by Guy N. Bjorge, dated October 15, 1942	2461	1517
162—Letter from Robert P. Patterson to H. O. King, dated June 13, 1943	2462	1518
164—Minutes of Order Clearance Committee Meeting, dated May 4, 1945	2464	1520
175—Report to accompany Senate Bill 45 of the 81st Congress—Senate Report No. 79, Calendar No. 65, entitled, "Relief of the Owners and Operators of Certain Gold Mines, etc.	2467	1524
177—Senate Subcommittee Preliminary report of the Subcommittee on Mining and Minerals Industry (Excerpts)	2473	1535
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34—Memorandum from Richard A. Lester to General Frank J. McSherry, dated July 4, 1942, Critical Shortage of Labor in Non-ferrous Metal Mining, etc.	2507	1579
35—Memorandum from Richard A. Lester to Brigadier General Frank J. McSherry, dated August 25, 1942, "Workers in the Homestake Mining Company."	2509	1582

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43—Memorandum from R. J. Lund to A. I. Henderson, dated September 9, 1942, "Gold Mining Order."	2517	1589
46—Memorandum from J. M. Scribner to Donald M. Nelson, dated September 11, 1942, "Gold Order," and attachment	2522	1594
48—Summary of Proposed Gold Curtailment Order with Agreed date of September, 1942	2526	1598
49—Memorandum from Edward H. Rott to Edward T. Dickinson, Jr., dated April 24, 1943	2527	1599
50—W.P.B. Document 228, Gold Mining Order L-208, Executive Secretary's Note, dated June 15, 1943	2530	1601
51—Minutes of War Production Board meeting of June 15, 1943 (Excerpt)	2533a	1605
52—Memorandum from Harvey A. Anderson to Dr. Marcellus H. Stow, dated September 16, 1942	2535	1608
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IN THE UNITED STATES COURT OF CLAIMS

EXCERPTS FROM COMMISSIONERS REPORT—Filed May 30, 1954

No. 49468

CENTRAL EUREKA MINING COMPANY (a Corporation)

v.

THE UNITED STATES

No. 49486

ORO FINO CONSOLIDATED MINES, INC.

v.

THE UNITED STATES

No. 49693

ALASKA-PACIFIC CONSOLIDATED MINING COMPANY

v.

THE UNITED STATES

No. 50182

IDAHO MARYLAND MINES CORPORATION

v.

THE UNITED STATES

No. 50195

HOMESTAKE MINING COMPANY

v.

THE UNITED STATES

No. 50214

(1) BALD MOUNTAIN MINING COMPANY, (3) ALABAMA-CALIFORNIA GOLD MINES COMPANY, (5) CONSOLIDATED CHOLLAR GOULD & SAVAGE MINING COMPANY, (7) ERMONT MINES, INC.

v.

THE UNITED STATES

[fol. 128] REPORT OF COMMISSIONER

To the Honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

Pursuant to the orders of reference in the above-entitled cases, the undersigned Commissioner makes the following report of his findings of fact on all of the above-named cases which, by agreement among counsel at pretrial, have been consolidated for trial on the issue of liability only:

[fols. 129-137] 4. In the decisions by OPM and WPB to issue a "P", "M", or "L" order there was involved the consideration of a complexity of economic and production factors, but in general the principal purposes served by issuance of such orders were the conserving of essential materials, the conserving of the equipment used by non-essential industries, and the maximum utilization of available manpower. In different orders, a different purpose would be paramount.

[fol. 138] 18. By July 1942, there were indications that the production of nonferrous metals in the United States, particularly copper, would not be adequate to meet current and anticipated demands. This condition was due to very greatly increased wartime requirements and to a growing shortage of miners. Experienced copper miners were leaving the mines in large numbers, among other reasons because of the higher wages offered by the aircraft and shipbuilding plants and withdrawals due to Selective Service. Production was also hampered by low morale of the miners, their tendency to work a short week, and the lack of any organized program of recruitment of workers for this industry. An informal committee organized by officials of the War Department to develop a program for increasing production in the copper mining industry, submitted a re-

port on July 8, 1942. In that report it outlined the problem in the following terms:

* * * * * * *

> Since February of this year, the amount of copper allocated to mills to fill the orders of the Army and Navy has steadily fallen below the amount required for these orders; increasing from a net shortage of 9,000 tons in March to a net shortage of 23,000 tons in June.
>
> [fol. 139] The success of our armament program, consequently, is basically dependent on our ability to increase the production of basic raw materials such as copper and other nonferrous metals.
>
> The basic factors preventing or seriously hampering the desired increase in output in the copper mining industry are out-migration of the present labor force to other war industries because of more attractive wages and working conditions, excessive labor turnover within the industry, low morale of workers, the tendency of miners to work a short week, the effects of Selective Service withdrawals, and the lack of an organized program of recruitment of workers for this industry. In some important district[s] of Utah, Idaho, and Montana, the replacement of miners has been virtually impossible. In Arizona, Montana, and Utah, production schedules have already been retarded as a result of labor stringency.

* * * * * * *

Labor scouts employed by the aircraft and shipbuilding plants were working through the mountain states offering high wages and inducing men to leave the mines. The situation had become serious and WPB officials, aware of the foregoing facts, anticipated that it would become more serious in future months as a result of the continually increasing out-migration of copper miners from the mines. [fols. 140-152] 20. While this committee was studying the problem, the Labor Production Division of WPB began to give consideration to the shortage of miners in the nonferrous mining industry. The primary function of this Division was to develop programs for the best utilization

of labor in various industries. On July 4, 1942, the Acting Chief of the Priorities Branch of this Division sent a memorandum to the Director of Operations of the War Manpower Commission. In this memorandum he analyzed the May reports of the United States Employment Service. After pointing out the acute labor shortage in the nonferrous mining industry, he pointed out that in 1941 the 15 largest producers of gold in seven Western States had had 6,700 employees, that their gold mines were frequently located close to other nonferrous mining enterprises, all of which were experiencing labor shortages, and that some of the gold mines were owned by companies which operated nearby copper and zinc mines. He concluded as follows:

> Steps should be taken to remedy the critical labor situation in nonferrous metal mining, including arrangements for the transfer of miners from gold and silver mining to copper, lead, zinc, tungsten, chrome, and molybdenum mining. This can be done through curtailment of gold and silver production, but it would be necessary to make sure that the workers released went into nonferrous metal mining and did not go into war plants in the vicinity or on the West Coast. It has been customary for metal miners in the mountain states to move considerable distances with the opening and closing of mines and ordinary turnover.

[fols. 153-155] 29. The minutes of the interdepartmental Committee on Non-Ferrous Metals for September 15, 1942, provide in part as follows:

* * * * * * *

> Dr. M. Stow presented a report on the proposed order to curtail gold mining operations. He distributed a copy of the proposed order which, he said, had been brought up for consideration before the Clearance Committee.
>
> Dr. Stow explained that the persons responsible for drafting the order favored the method of curtailing gold mines by denying them serial numbers under P-56, rather than the type of blanket order which would shut down any gold mine whose gold ore production was above a stipulated proportion of its total produc-

tion by dollar value. Under the former type of order the gold mines would be closed by being denied serial numbers under P-56, as a result of which they would be unable to obtain either supplies or equipment and would be prohibited from using their present supplies and equipment.

* * * * * * *

The meeting was attended by representatives of the various minerals branches, the Mining Branch, the Labor Production Division, and the Legal Division of the War Production Board, as well as representatives of the War Manpower Commission, the Office of Price Administration, and the War Department. Dr. Wilbur Nelson presided at the meeting. Dr. Stow was immediately subordinate to Dr. Wilbur Nelson in the Mining Branch.

[fol. 156] 35. On September 29 Mr. Batt directed that a group of officials of representative gold mines be invited to a meeting in Washington on October 1, 1942. Five officials of gold mines representing about 75 percent of the tonnage of ore hoisted or treated attended, including officials of two of the companies which are plaintiffs in this suit. Several Members of Congress from gold-producing States were also present, as were representatives of the Army and the War Manpower Commission, as well as numerous representatives of WPB. Arguments were again presented as to the hardships that would be imposed upon the local communities, and even upon the States, if the gold mines were closed. There was also some discussion as to the extent to which gold miners would actually go to the other nonferrous mines.

[fols. 157-158] The latter part of the meeting was devoted to an analysis by the representatives of the gold mines present of available employment statistics, in an attempt to determine the number of miners and muckers who might be released by an order closing the gold mines, as distinguished from the total number of employees who would be released. It was the consensus of their opinion that the gold mines which would be affected by the order employed 3,270 workers, of whom 750 were engaged in dredging and 896 in hard-rock mining. They further believed that about 300 men in the latter category would have to be kept in the mines for maintenance purposes.

[fol. 159] 40. At the meeting of the War Production Board referred to in the preceding finding, the following were present:

Board Members, Alternate and Staff:

Mr. Donald M. Nelson, Chairman.

Vice President Henry A. Wallace, Chairman, Board of Economic Warfare.

Mr. Robert P. Patterson, Under Secretary of War, acting for Mr. Henry L. Stimson, Secretary of War.

Vice Adm. S. M. Robinson, Chief of the Office of Procurement and Material, Navy Department, acting for Mr. Frank Knox, Secretary of the Navy.

Mr. Jesse H. Jones, Secretary of Commerce.

Lt. Gen. William S. Knudsen, Director of Production, War Department.

Mr. Isador Lubin, acting for Mr. Harry L. Hopkins, Special Assistant to the President supervising the Defense Aid Program.

[fol. 160] Mr. Leon Henderson, Administrator, Office of Price Administration.

Mr. John Lord O'Brian, General Counsel, War Production Board.

Mr. W. L. Batt, Vice Chairman, War Production Board.

Mr. Ferdinand Eberstadt, Vice Chairman, War Production Board.

Mr. Milton Katz, Solicitor, War Production Board, acting for Mr. J. S. Knowlson, Vice Chairman, War Production Board.

Mr. Charles E. Wilson, Vice Chairman, War Production Board.

Mr. Ernest Kanzler, Director General for Operations, War Production Board.

Mr. G. Lyle Belsley, Executive Secretary War Production Board.

By Invitation:

Lt. Gen. Brehon B. Somervell, Commanding General, Services of Supply, War Department.

Rear Adm. H. L. Vickery, Vice Chairman, U. S. Maritime Commission.

Brig. Gen. Oliver P. Echols, Assistant for Procure-

ment Services, Office of Chief of Air Corps, War Department.

Mr. Will Clayton, Assistant Secretary of Commerce.

Mr. Paul V. McNutt, Chairman, War Manpower Commission.

Lt. William A. Weber, Assistant to the Vice Chairman, U. S. Maritime Commission.

Mr. Wayne Coy, Assistant Director, Bureau of the Budget.

Mr. Donald R. Belcher, Assistant Chief in Charge of Planning and Statistics, Navy Department.

Mr. A. I. Henderson, Deputy Director General for Industry Operations, War Production Board.

Mr. Robert R. Nathan, Chairman, Planning Committee, War Production Board.

Mr. Simon Kuznets, Chief, Program Analysis and Research Section, Planning Committee, War Production Board.

Mr. Wilbur Nelson, Administrator, Mining Branch, War Production Board.

Mr. Stacy May, Statistics Division, War Production Board.

Mr. Joseph L. Weiner, Deputy Director, Office of Civilian Supply, War Production Board.

Mr. Thomas C. Blaisdell, Jr., Member, Planning Committee, War Production Board.

[fols. 161-163] Mr. Fred Searls, Jr., Member, Planning Committee, War Production Board.

Mr. Frederick Roe, Assistant Executive Secretary, War Production Board.

It is again noted that the power and authority of the War Production Board was, by Executive Order 9024, vested in the Chairman, acting with the advice and assistance of the members of the Board.

[fols. 164-173] 44. The dominant consideration by Chairman Donald Nelson of WPB in the issuance of Limitation Order L-208 was the releasing of mine labor from the gold mines for employment in mines that were producing other metals, such as copper, which were in short supply and urgently needed in the war program. Another consideration in the issuance of the order was as stated in the preamble that the fulfillment of requirements for the defense

of the United States had created a shortage in the supply of critical materials which had been used in the maintenance and operation of gold mines.

Both objectives were in some measure accomplished with the closing of the plaintiffs' gold mines pursuant to the order.

45. Although the evidence is not satisfactory as to the authority of Ernest Kanzler, Director General for Operations, WPB, on October 8, 1942, to actually issue the order, since the parties agree that the order was issued, it is presumed that he was duly authorized by Chairman Donald Nelson to issue the order.

[fol. 174] FINDINGS RELATING TO PLAINTIFF IDAHO MARYLAND MINES CORPORATION

[fol. 175] 83. In May, 1944, the Policy Analysis and Records Branch of WPB submitted a report concerning Limitation Order L-208 providing in part as follows:

> It is generally agreed by the WPB divisions concerned with mining activities that a very small percentage of the released gold mine workers actually were employed by other mines. A majority of them probably went into work of greater value to the war effort than gold mining, such as lumbering, agriculture, construction, shipbuilding, aircraft manufacture;[96] but the fact remains that the primary justification for closing the gold mines was to get labor for the production of the strategic metals. Wilbur Nelson, Arthur S. Knoizen, present Director of the Mining Division, and F. H. Hayes, Chief of the Primary Production Branch

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[96] A partial analysis based on the records of the Social Security Board indicates that the released gold mine workers went into a wide variety of occupations, including in addition to those mentioned in the text, coal mining, steel working, communications, transportation, and many others; they scattered in short, through a fair cross-section of American industry. Letter, John J. Corson, Director, Bureau of Old Age and Survivors Insurance, Social Security Board, to Stacy May, October 22, 1943.

[fols. 176-177] of the Copper Division, concur in the statement that the number of gold mine workers who went into other mines and remained there for a year or more was not over 100.[97]

84. Idaho Maryland had 212 employees on its payroll as of October 8, 1942. Of that number, 115 were underground workers. There were 81 employees who had terminated their employment with Idaho Maryland after October 8, 1942, who were thereafter reemployed by that firm, which obtained a record of the employees' intervening employment in most but not all instances. Of the 69 as to which the firm had a record of intervening employment, 6 were employed in other mining activities during some or all of the time they were out of the company's employ, 8 were in military service, 4 were employed in the Miners' Foundry, Nevada City, California, 6 worked with the railroads, 4 were employed in shipyards, and the remained as to which there was information were engaged in other types of employment.

[fols. 178-184] FINDINGS RELATING TO PLAINTIFF ALASKA-PACIFIC CONSOLIDATED MINING COMPANY

[fols. 185-188] 109. Although Order L-208 was revoked by the WPB on June 30, 1945, Alaska-Pacific did not resume operations until sometime in 1949.

[fols. 189-190] FINDINGS RELATING TO PLAINTIFF ERMONT MINES, INC.

132. There is no evidence that Ermont's mine was in operation on October 8, 1942, or that it closed as a result of Limitation Order L-208 issued by the War Production Board on that date. There is no evidence as to the number of employees in this mine at any date, as to the amount of any inventory of equipment and operating supplies which

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[97] Wilbur Nelson and Arthur S. Knoizen, in interviews with the writer, March 7, 1944; F. H. Hayes, in an interview with writer, March 4, 1944.

it may have had, or as to the length of time that it could have continued operating its mine without priorities assistance.

Respectfully submitted.

William E. Day, Commissioner

[fols. 191-194] ARGUMENT AND SUBMISSION OF CASES—JAN. 12-13, 1955

On January 12, 1955 argument on the merits was begun by Mr. Edward W. Bourne for plaintiff Homestake Mining Company. Argued on the merits by Phillip Barnett for plaintiff Central Eureka Mining Company, by Mr. George Herrington for Plaintiff Idaho Maryland Mines Corp., and by Mr. O. R. Maguire, Jr., for planitiff Alaska-Pacific Consolidated Mining Company. Argument on the merits was begun by Mr. John Ward Cutler for plaintiffs Oro Fino Consolidated Mines, Inc. and Bald Mountain Mining Co., et al. Argument on the merits was begun by Mr. Kendall M. Barnes for the defendant.

On January 13, 1955, argument on the merits was concluded and the cases submitted on the merits by Mr. Kendall M. Barnes for the defendant, by Mr. Edward W. Bourne for the consolidated plaintiffs and by Mr. John Ward Cutler for plaintiff's Oro Fino Consolidated Mines, Inc., and Bald Mountain Mining Co., et al.

[fol. 195] IN THE UNITED STATES COURT OF CLAIMS

No. 49468

CENTRAL EUREKA MINING COMPANY (a Corporation)

v.

THE UNITED STATES

No. 49486

ORO FINO CONSOLIDATED MINES, INC.

v.

THE UNITED STATES

No. 49693

ALASKA-PACIFIC CONSOLIDATED MINING COMPANY

v.

THE UNITED STATES

No. 50182

IDAHO MARYLAND MINES CORPORATION

v.

THE UNITED STATES

No. 50195

HOMESTAKE MINING COMPANY

v.

THE UNITED STATES

No. 50214

(1) BALD MOUNTAIN MINING COMPANY, (3) ALABAMA CALIFORNIA GOLD MINES COMPANY, (5) CONSOLIDATED CHOLLAR GOULD & SAVAGE MINING COMPANY, (7) ERMONT MINES, INC.

v.

THE UNITED STATES

Opinion—Feb. 20, 1956

[fol. 196] *Mr. Phillip Barnett* for Plaintiff Central Eureka Mining Company. *Messrs. Ralph D. Pittman* and *Rodney H. Robertson* were on the brief.

Mr. John Ward Cutler for Plaintiffs Oro Fino Consolidated Mines, Inc., Bald Monntain Mining Company, Consolidated Mining Company. *Messrs. Hogan & Hartson* and Ermont Mines, Inc.

Mr. O. R. McGuire, Jr., for Plaintiff Alaska-Pacific Consolidated Mining Company. *Messrs. Hogan* x *Hartson* and *V. A. Montgomery* were on the brief.

Mr. George Herrington for Plaintiff Idaho Maryland Mines Corporation. *Messrs. Orrick, Dahlquist, Herrington & Sutcliffe* were on the briefs.

Mr. Edward W. Bourne for Plaintiff Homestake Mining Company. *Messrs. James D. Ewing, Eugene Z. Du Bose, Edward E. Rigney, J. Kenneth Campbell* and *James W. Misslbeck* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant. *Mr. Thomas H. McGrail* was on the brief.

LITTLETON, *Judge*, delivered the opinion of the court:

The plaintiffs were, at the times herein mentioned, the owners and operators of gold mines. On October 8, 1942, the War Production Board issued Limitation Order L-208 requiring certain so-called non-essential mines to close down and cease all mining operations, or any other operations in and about the mines, except to the minimum amount necessary to maintain the mines safe and accessible. Violations of the order were punishable by fine and imprison-

ment. By its terms, the order suspended for the life of the order the right of plaintiffs to mine and sell gold.

It is plaintiffs' contention that this action by the Government amounted in law to a taking, for a public purpose, of their right to make profitable use of their mining properties for which just compensation is due them under the Fifth Amendment to the Constitution. In the alternative, the plaintiffs contend that by virtue of the jurisdiction conferred on this court by the special jurisdictional act of July 14, 1952, 66 Stat. 605, they are entitled to recover for the closing of their mines the amount of losses incurred as a [fol. 197] result of Order L-208. It is plaintiffs' position that in the absence of the special jurisdictional act, this court would not have jurisdiction to render judgment in favor of a gold mine owner for losses incurred unless they could establish a compensable taking, but that the act conferred on this court jurisdiction to render judgment for such losses where they resulted from the issuance of L-208.

Following denial by this court of the Government's motion to dismiss the petition in the case of the *Idaho Maryland Mines Corp.* v. *United States* [1952] 122 C. Cls. 670, the instant cases were consolidated for trial before a commissioner of the court on the question of the Government's liability, the question of just compensation or the amount of damages being reserved for further proceedings.

By the time L-298 was issued by the War Production Board, on October 8, 1942, the President had delegated to that Board all allocation, priorities and requisitioning powers granted to him by Congress,[1] except the power to

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[1] The Act of June 28, 1940, 54 Stat. 676, as amended by the Act of May 31, 1941, 55 Stat. 236, as further amended by Title III of the Second War Powers Act of March 27, 1942, 56 Stat. 177, gave to the President priorities and allocation powers and the authority to delegate such powers. Section 9 of the Selective Training and Service Act of September 16, 1940, 54 Stat. 885, 892, gave the President the power to place mandatory orders for products or materials required for the national defense, and provided for the payment of just compensation for such products, or as rental for any facilities or plants used by the United States. The Act of October 10, 1940, 54 Stat. 1090 authorized the

requisition real property. In general, the purposes to be [fol. 198] accomplished through the exercise of those powers were to increase production of raw materials and finished products needed for the national defense through the mobilization of the material resources and the industrial facilities of the nation. The Board's power to regulate the production and supply of materials, equipment and facilities necessary for the national defense was broad and was, in general, accomplished by the use of various orders, the most common of which were the "P" or priorities orders, the "M" or materials orders, and the "L" or limitation orders. "P" orders were usually addressed to buyers of materials, etc. and authorized them to attach to

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President to take over for use or operation any military or naval equipment, etc., held for export purposes but whose exportation had been denied by law, and provided for payment of just compensation. The Act of October 16, 1941, 55 Stat. 742, authorized the President to requisition all other military or naval equipment not held for export. This act was amended in Title VI of the Act of March 27, 1942, *supra*, to eliminate the requirement that only equipment and machinery not in actual use by the owner could be requisitioned. Section 120 of the National Defense Act of 1916, 39 Stat. 213, authorized the President to place mandatory orders for the production of materials required for defense and for the seizure of plants refusing to cooperate. All of these acts provided for the payment of just compensation for any interest taken. The President delegated all the above authorities to the War Production Board or its predecessors in a series of Executive Orders as follows: Executive Order 8572, October 21, 1940, as amended by Executive Order 8612, December 15, 1940 (the Priorities Board); Executive Order 8629, January 7, 1941 (Office of Production Management); Executive Order 8875, August 28, 1941 (OPM and SPAB); Executive Order 8891, September 4, 1941; Executive Order 8942, November 19, 1941; Executive Order 9024, January 16, 1942 (WPB); Executive Order 9040, January 24, 1942; Executive Order 9125, April 7, 1942; Executive Order 9138, April 17, 1942; by Executive Order 9139, April 18, 1942, the President established the War Manpower Commission and transferred to it the labor supply functions of WPB's Labor Division.

their purchase orders a symbol entitling them over other users to a certain preference in delivery. "M" or material orders were allocation orders addressed to the manufacturers or distributors of materials. These orders were used to limit and define the use or the distribution of the particular material which was the subject of the order. "M" orders might also prohibit producers or distributors of certain materials or products from selling them to any buyer unless that buyer had a certain preference rating. "L" or limitation orders, were also related to the Board's allocation functions and were issued to curtail or prohibit the manufacture of end products which required the use of specified critical materials.

The mining industry, along with other industries, was subject to regulation of its acquisition and use of materials, supplies and equipment needed in the defense effort. A general repair order known as P-22 was issued on September 9, 1941, which authorized a variety of industries, including the mining industry, to use only the lowest preference rating, i. e., A-10, to acquire the materials needed for the repair of their mining property and equipment. On September 17, 1941, Preference Rating Order P-56 granted an A-8 preference rating to so-called recognized mining enterprises to acquire materials needed by them for operating supplies and for the maintenance of the mines' property and equipment. This order represented the first special treatment accorded to gold mines as distinguished from other types of mines, in that placer gold mines were expressly excluded from any benefits under the order. Lode gold mines were permitted the use of the A-8 rating because it was recognized that denying them repair and [fol. 199] maintenance supplies would cause depreciation of their installed equipment and structures, and because many lode mines produced metals other than gold which were useful to the defense effort.

As the critical materials supply situation became more acute, the Office of Production Management [2] found it necessary to take action that would insure a sufficient amount of

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[2] At this time the Office of Production Management was still in existence. It was not succeeded by WPB until January 1942.

new and repair parts for the mines producing critical raw materials, and in order to do this it eventually became necessary to deny to mines whose production was predominantly gold the right to purchase any new machinery for use in that production, and to limit such gold mines to the lowest preference rating for the acquisition of maintenance, repair and operating supplies. Accordingly, on December 18, 1941, Preference Rating Order P-100 was issued granting the mines an A-10 or the lowest possible preference rating. On March 2, 1942, Preference Rating Order P-56 was amended to revoke the serial numbers of all gold mines whose total dollar production was more than 30 percent gold. Without a serial number, a gold mine could not acquire any materials needed for operating supplies, or supplies for the maintenance of their property and equipment. Over two hundred gold mines, including those of most of the plaintiffs herein, never again received serial numbers under Order P-56 and thus, by March 1942, a series of progressively more stringent regulations had virtually eliminated any opportunity for the gold mines to acquire critical materials and supplies needed for the national defense.

No agency of the Government was ever granted any real power to control civilian manpower during the war. However, the War Production Board found it necessary to take into consideration manpower problems obviously inherent in the overall problem of increasing the production of vital raw materials and finished products necessary for defense. Shortly after the establishment of WPB's predecessor agency, the Office of Production Management, an operating division known as the Labor Division was established in OPM to study and keep abreast of the labor requirements for national defense and to advise and collaborate with the [fol. 200] other divisions of OPM on all matters affecting labor.[3] In the summer of 1942, the Labor Division of what was now WPB, became concerned with the seriously increasing shortage of hardrock or underground miners in the vital nonferrous metal mines, particularly in the copper mines. This concern was shared by the recently

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[3] OPM Regulation 5, March 18, 1941, 6 F. R. 1598, 32 CFR 2875—1941 Supp.

established War Manpower Commission and by the War Department which had become alarmed by the growing shortage in the output of copper. Upon investigation, these groups found that the exodus from the strategic metal mines was the result of the higher wages and better working conditions available to the miners in the aircraft and shipbuilding industries and on the armed services building construction projects frequently being carried on in the vicinity of the copper mines. It was also determined that a large number of experienced miners were being drafted into the armed services and Selective Service was adverse to granting deferments to such workers. Despite the urgings of mine employers and the government agencies involved to miners to stay on the job, the strategic metal miners continued to leave the mines for the more attractive job opportunities offered by other defense industries. Production was also hampered by the generally low morale of the miners, the short workweek in the mines, and the lack of any effective means of recruiting workers for work in the strategic metal mines.

During this same period the gold mines were losing experienced miners by virtue of the same circumstances, except that working conditions in many of the gold mines were good, many of the miners owned their own homes, and gold mining was often a family tradition from which they would not readily depart.

Based on 1940 and 1941 statistics furnished by the Bureau of Mines, the War Department, the War Manpower Commission and the War Production Board's Labor Division determined that if the gold mines could in some way be closed down, several thousand hardrock miners would immediately become available for work in the nonferrous metal mines, although no one was quite sure how they could be induced to go to work in such mines since no one had authority to require them to do so. A survey by WPB's [fol. 201] Mining Division revealed that the labor figures arrived at by the Labor Division were unduly optimistic and that the probable number of hardrock miners employed in gold mines was much smaller than the estimate based on the 1940 and 1941 figures; that after taking into consideration the number of hardrock miners who would be necessary to maintain the closed mines in safe condition,

and the number who were elderly men and home owners and thus unlikely to leave their homes unless forced to do so, a relatively small number of experienced miners would be thrown on the labor market for any purpose. The conclusions of the Mining Division were reinforced by data supplied by representatives of the larger gold mines who came to Washington to confer with officials of WPB and the Army, and also by Congressional Representatives of the mining States. Everyone involved in the ensuing controversy was aware that there was no power in any arm of the Government to force gold miners to work in the nonferrous metal mines, and no way to deny to gold miners opportunities to work in the same war industries or on the same armed services' construction projects that had been luring the nonferrous metal miners away from their jobs in the mines. Selective Service could not bring itself to grant deferments to miners. The Army indicated that it might furlough some four thousand soldiers who had mining experience, and condition their furloughs on their staying on the jobs in the nonferrous metal mines. But the Army was reluctant to grant those furloughs while the gold mines were still operating. Army officials were furnished with facts and figures showing that few hardrock miners would be released by the closing of the gold mines and that there was no way of compelling those miners to work in the copper mines and little likelihood that they would do so. Despite this, officials of the Army continued to bring great pressure to bear on the War Production Board to close down the gold mines, indicating that otherwise WPB would not being doing its part to increase production in the nonferrous metal mines. The Army's objection to the continued operation of gold mines appears to have been largely political rather than practical. Its reluctance to furlough trained soldiers was understandable, but the fact remains that it was the only governmental agency which had [fol. 202] sufficient control over manpower to compel persons under its jurisdiction to work in the nonferrous metal mines and continue to do so.

Over the vigorous objection of informed persons in and out of the War Production Board, the Board on October 8, 1942, issued L-208 which ordered the complete shutdown within 60 days of all the country's gold mines which did not

produce sufficient sfategic metals to warrant their holding serial numbers.

Within a relatively short time it became apparent that the closing of the gold mines was doing little to relieve the shortage of hardrock miners in the strategic metal mines. In fact, the record indicates that no more than 100 gold miners went into other mines and remained there for a year or more. Despite numerous appeals and a desire on the part of WPB officials to modify the order to permit the gold mines to operate at least on a break-even basis, the order was continued in effect and unchanged until the summer of 1945.

The record establishes that no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines. Although WPB had full power to requisition any large inventories of supplies, materials, and equipment owned by the gold mines, or to authorize more essential users of such materials to place mandatory orders with the gold mines, no such power was ever exercised. In L-208 WPB did not even attempt to assure that those critical materials, equipment and facilities would be held for possible future requisition or order, but left the owners free to sell them to anyone they pleased, whether the prospective purchaser was engaged in essential defense work or not.

The record establishes that the purpose and intent of WPB in issuing L-208 was to deprive the gold mine owners and operators of the right to use their properties in the only way they could be beneficially used, i. e., to mine and sell gold for a profit, and that this was done in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines. The record fails to establish that the prohibition of gold mining was reason-[fol. 203] ably calculated to or in fact did increase the country's war efficiency.

The following contentions were made in the Homestake brief and were adopted in general by all the other plaintiffs. After discussing those contentions and disposing of them,

we shall take up separately the applicability of the conclusions reached to each of the plaintiffs.

Plaintiffs contend that L-208, while in form a regulation restricting their acquisition and use of critical materials needed for defense, was in substance a requisition or taking, for the life of the order, of plaintiffs' right to make profitable use of their gold mining properties for which taking the Government is liable to pay just compensation under the Fifth Amendment to the Constitution. Plaintiffs also contend that if the court should decide that L-208 was actually a regulation in substance as well as in form, it was arbitrary in that it went far beyond what was required by the exigencies of the war situation existing at the time of its issuance, bore no reasonable relation to its ostensible purpose of conserving critical materials needed in the defense effort, and in fact and law amounted to a taking of valuable property rights of plaintiffs for which just compensation should be paid.

The Government contends that regardless of how much damage plaintiffs may have suffered by virtue of their compliance with the provisions of L-208, the order was a proper exercise of the statutory regulatory powers over critical materials by the War Production Board; that it was issued to prohibit plaintiffs' use of those materials in a manner detrimental to the public safety in wartime; that the Government made no use of plaintiffs' property nor did the order represent any positive invasion of any of plaintiffs' property rights, and that no direct benefits accrued to the Government from the imposition of the order except the negative benefit arising from the prohibitions placed on plaintiffs' use of their property. Defendant urges that under these circumstances, plaintiffs' losses are no more compensable than were the losses suffered by the St. Regis Paper Company from the imposition on it of War Production Board General Preference Order M-251 (*St. Regis Paper Co.* v. *United States*, 110 C. Cls. 271; cert. den. 335 U.S. 815), or the losses [fol. 204] suffered by landlords who complied with wartime rent control regulations (*Bowles* v. *Willingham*, 321 U. S. 503, *Block* v. *Hirsh*, 256 U. S. 135, *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170). Defendant also contends that if WPB acted arbitrarily and without good cause in issuing L-208, then the order was unauthorized and illegal

and the Government is not liable to pay just compensation for losses occasioned by the unauthorified act of its agents, citing *Hooe* v. *United States*, 218 U. S. 322 and *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330. Defendant suggests that in this latter circumstance, plaintiffs should have refused to obey the order (*Morrisdale Coal Co.* v. *United States*, 259 U. S. 188), or they should have brought injunction proceedings against the officials of WPB to prevent enforcement of the order.

Our first problem is to determine the precise nature of the action taken by the War Production Board in its issuance of L-208, i. e., whether that action amounted to a regulation or a taking of plaintiffs' property rights. Next it must be determined whether WPB had the power to do what it in fact did, and finally whether the Government is liable for the injuries caused plaintiffs by the exercise of that power, even though the power was exercised arbitrarily.

The property which plaintiffs contend has been taken from them, and which defendant urges was merely limited in its usefulness to plaintiffs as a consequence of a valid regulation of scarce materials, was plaintiffs' right to make profitable use of their gold mining properties. As pointed out by Mr. Justice Roberts in *United States* v. *General Motors Corporation*, 323 U. S. 373, while "property" as that term is used in the Fifth Amendment certainly means the physical thing with respect to which the citizen exercises rights recognized by law, it also means the group of rights inhering in the citizen's relation to the physical thing, as the rights to exclusively possess, use and dispose of the physical thing. In this sense, the right of a gold mine owner to extract gold from his mine and to sell it for a profit, is a property right protected by the Constitution. *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393.

In order to determine whether that property right was "regulated" or "taken," or was merely injured as a conse- [fol. 205] quence of a regulation or of a taking of some other property or property right of plaintiffs, we turn to the limitation order itself and to the facts and circumstances of record surrounding its issuance.

The order was issued on October 8, 1942, by the War Production Board which had succeeded to all the powers and functions of the old Office of Production Management

and the Supply Priorities and Allocations Board. The preamble to L-208 reads as follows:

> The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.

The statutory authority cited at the conclusion of the order was section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended,[4] which granted to the President the power to establish priorities and to allocate materials. The President's allocation powers were expressed in the following language (56 Stat. 178), which it will be noted, closely resembles the above quoted language in the preamble of L-208:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such materials or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

As further authority for its issuance, the order cited Executive Order 9024 (January 16, 1942), abolishing SPAB and establishing the War Production Board, Executive Order 9040 (January 24, 1942), abolishing the Office of Production Management and transferring to WPB all of its duties and powers along with those of the old SPAB, and providing that WPB should perform the functions and exercise the authority vested in the President by section 120 of the [fol. 206] National Defense Act of 1916 (39 Stat. 312). Section 120 of the last mentioned act provided that the President in time of war might, through the head of any

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[4] Act of May 31, 1941 (Pub. Law 89), 55 Stat. 236; Act of March 27, 1942 (Pub. Law 507), 56 Stat. 177.

Government department or agency, place mandatory orders with individuals, firms, associations, etc., for products produced by them; that if there was a refusal to make or sell at a reasonable cost any product required in response to such mandatory orders, the President, through the head of any department, might take immediate possession of the plant. The section provided for the payment of compensation for any product or material acquired by mandatory orders, or as rental for the use of the manufacturing plant. Executive Order 9125, April 7, 1942, also cited in L-208, contained the President's delegation of his allocation and priority authority to WPB pursuant to Title III of the Second War Powers Act of 1942, 56 Stat. 176.

Order L-208 provided that for the purposes of the order all gold placer or lode mines located in the United States or its territories or posessions which did not hold serial numbers under Preference Rating Order P-56 were deemed "nonessential mines".[5] The order then required such nonessential gold mines to do the following: (1) to close down as soon as possible after issuance of the order; (2) to cease acquiring, consuming or using any material, facility or equipment for the purpose of breaking any *new* ore or for the purpose of carrying on any development work; (3) on or after 60 days from the issuance of the order, to cease acquiring, consuming or using any material, facility or equipment to remove *any* ore or waste from the mine, above or below ground, or to conduct any other operation in or about the mine except to the minimum amount necessary to maintain the buildings, machinery and equipment in repair, and the mine's access and development workings safe and accessible; (4) to refrain from using any preference rating to acquire any material or equipment for consumption or use in the operation, maintenance or repair of the mines covered by the order, except with the permission of the Director General for Operations. The order provided that the Director General for Operations, WPB, might assign [fol. 207] preference ratings only for obtaining the mini-

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[5] This provision had the effect of including in the operation of the order all mines whose gold production in dollar value exceeded 30 percent of its total production.

mum amount of material needed to maintain the nonessential gold mines in safe condition during the closedown. Violations of the provisions of the order were made a crime punishable by fine or imprisonment. The order provided that persons affected by the order might appeal to the Board by letter and that the Director General for Operations might thereupon take such action as he might deem appropriate.

The preamble to the order, the authority cited at the end thereof, and the prohibition placed upon the acquisition of critical materials, indicate that the order was merely intended to allocate *away from* the so-called nonessential gold mines materials, equipment and facilities which were in short supply and needed for defense. A study of the balance of the order, particularly in the light of certain facts of record, persuades us that the order was not intended to be an allocation order. Insofar as the order prohibited the acquisition of materials, equipment and facilities, certain existing orders, P-56 and P-100, already prevented the acquisition by the gold mines of any such materials except, in the case of P-100, where gold mines did have the lowest priority rating in existence for repair parts, and that could have been revoked. The record establishes that gold mines, particularly the Homestake mine, had on hand in October 1942 large amounts of materials, equipment and facilities needed in the mining of gold and that Homestake, and some of the others whose circumstances we shall discuss separately, could have continued operations with such inventories for a considerable period after October 8, 1942. L-208 did not in fact "allocate" any of such materials, equipment or facilities away from the mines but, on the contrary, left the mine owners and operators free to dispose of them in any manner they saw fit, by delivering or selling them to nonessential users or by keeping them in the mines. What the order did do, and do directly, was to prohibit the continued operation of the gold mines.

A comparison of L-208 with General Preference Order M-251 which was involved in the *St. Regis* case, *supra*, may aid in evaluating the Government's contention that the two orders were alike in their purpose, operation and effect, and [fol. 208] that the loss of the gold mine owners' right to make profitable use of their mining properties was merely

a consequential injury resulting from a valid allocation of critical materials away from the mines in the same way that the injury to the paper company's right to do business was the consquence of a valid allocation of pulpwood away from the company.

The preamble to the St. Regis Order, M-25, was in all material respects identical with the preamble of the gold order, L-208.[6] The order was issued on October 19, 1942, ten days after the issuance of the gold order, and the authority cited for its issuance was identical with that cited in the gold order.

Order M-251 provided that in areas declared by WPB's Director General for Operations to be shortage areas, the Director General could allocate the available supply of pulpwood held or accumulated in that area away from and to specific persons; that he could direct the holders of pulpwood in the area to maintain their accumulations of pulpwood *available for disposition* by the Director General who might direct the delivery of specific quantities of such accumulated pulpwood to specific persons. The Director General was authorized to direct that no one in the area might acquire, consume, process or deliver any pulpwood of the types defined, and which were held or accumulated in the area, *except as the Director General might order*. The Director General was also authorized to require the manufacture of particular types of woodpulp or other wood products by manufacturers. On October 23, 1942, this order was applied specifically to the St. Regis Paper Company and that company was forbidden to acquire, consume, process

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[6] General Preference Order M-251 contained the following preamble:

"The fulfillment of requirements for the defense of the United States has created in certain areas and is expected to create in other areas a shortage in the supply for defense, for export and for private account, of wood for pulp and lumber, and has created a shortage in the supply for defense, for export and for private account of various materials and facilities required for the production of pulpwood; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense."

or deliver any pulpwood, except on authorization or by direction of the Director General for Operations of WPB. Immediately upon issuance of the order to St. Regis, that company was directed by the Director General to deliver during the month of November its entire inventory and supply of pulpwood to specified persons "at regularly es- [fol. 209] tablished prices and terms", subject to OPA regulations. St. Regis was permitted to continue processing and manufacturing its customary products from pulpwood during the balance of October. Although the order did not direct plaintiff to close its factory and plaintiff was left free to make any use of its factory it could, its inability to secure pulpwood resulted in the closing of the mill, plaintiff having decided that it was not feasible to convert its facilities to some other type of manufacturing that would not require the use of pulpwood.

In its suit in this court, the St. Regis Paper Company contended that M-251 amounted to a temporary taking of its paper factory and of its right to do business. Although it was not made an issue in the case, M-251 probably did amount to a taking of plaintiff's inventory of pulpwood (cf. *Edward P. Stahel & Co., Inc., et al.* v. *United States*, 111 C. Cls. 682 cert. den. 336 U. S. 951), but plaintiff did not sue for the taking of its pulpwood, probably because shortly after the order was issued plaintiff received what it considered to be just compensation on the mandatory sales to the Government's designees pursuant to M-251. The court held that M-251 did not require the closing of plaintiff's plant nor did it interfere with plaintiff's use of the plant; that on the contrary, the order represented a valid exercise of WPB's admitted power to allocate a scarce material such as pulpwood, and that any injury to plaintiff's profitable use of its plant, or any loss in value of its plant, were merely consequential and therefore did not amount to a taking and were not compensable. The terms of the order itself certainly bore out the court's conclusion since the order merely represented an attempt by the Government to secure all the available supply of pulpwood in the area by freezing the supplies on hand with the owners in the area and immediately placing mandatory orders directing delivery to specified users elsewhere, and by prohibiting the users in the area in question from acquiring any more pulpwood.

Like M-251, the gold order prohibited the acquisition, consumption or use of certain personal property used in the mining of gold. L-208 did not, however, require the gold mine owners to hold for the use or disposition of the Government their inventories and supplies of the personal [fol. 210] property covered by the order but left the owners free to use that personal property in any way they wished except in the mining of gold. The plaintiffs might have sold their inventories of machinery, supplies and equipment to any user whether or not that user was conducting a business which was essential to the defense effort. The record establishes that the Government did not intend to, nor did it ever, requisition any of this personal property or direct the mine owners to sell it to anyone else. From the language of the order itself and from the circumstances surrounding its promulgation, it is apparent that its only purpose was to deprive the gold mine owners and operators of their right to make use of their mining properties.

Since the subject matter of L-208 was the gold mine owners' right to make use of their gold mines and was not the materials equipment and facilities they had on hand and in which the Government apparently had little interest, the next question is whether L-208 amounted to a "regulation" of that property right or to a "taking."

"Regulation" implies a degree of control according to certain prescribed rules, usually in the form of restrictions imposed on a person's otherwise free use of the subject matter of the regulation. Where the restrictions imposed are temporary and narrow, and where the persons on whose property the restrictions are imposed are assured an opportunity to receive "reasonable" compensation as determined by an impartial arbiter, the courts have held that enforcement of such regulations has not deprived the owner of the regulated property of due process, nor has it resulted in the "taking" of a property right in the constitutional sense. Typical of this type of regulation are the rent control regulations referred to above, regulations issued under the renegotiation statute (*Lichter* v. *United States*, 334 U. S. 742) limiting the right to make excessive profits on war contracts, and restrictions imposed in mortgage moratorium legislation (*Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398). On the other hand, where the re-

strictions imposed by the so-called regulations are so broad that the owner of the property regulated is deprived of most or all of his interest in the property, for all practical purposes there has been a taking of that property. *Louis-*[fol. 211] *ville Bank* v. *Radford*, 295 U.S. 555.[7]

The case of *Edward P. Stahel & Co., et al.* v. *United States*, referred to earlier herein, has much in common with the issues raised in the instant controversy as well as with those involved in the earlier case of *St. Regis Paper Co.* v. *United States, supra.* In the *Stahel* case, as in the others, plaintiffs alleged that an order of the Office of Production Management (predecessor agency to the War Production Board) though in form a regulation, operated in such a manner as to take valuable property rights of plaintiffs without payment of just compensation. The order in question was General Preference Order M-22 issued on October 16, 1941. M-22 prohibited the owners of raw silk, including the plaintiffs, from selling or delivering their silk to any user but the Government or persons designated by the Government, and further provided that any orders placed with such owners by the Government or its designees had

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[7] *The Home Building & Loan Association* case, *supra*, involved the constitutionality of a Minnesota statute which, in time of economic depression sought to relieve the plight of needy mortgagors by providing for a possible extension of the redemption period of their mortgaged property. Citing the many safeguards contained in the statute to protect the rights of the mortgagee and the fact that the mortgagee would ultimately receive all that he was entitled to under the mortgage, the Court upheld the statute as a *limited* and *temporary* restriction on the mortgagee's right to enforce his contract, such restriction being justified by the great public calamity, i. e., the depression. This case was relied on by the mortgagor, Radford, in *Louisville Bank* v. *Radford, supra*, to uphold the constitutionality of the Frazier-Lemke Act of 1934, which also sought to relieve the plight of needy mortgagors during the depression. The Supreme Court held that the restrictions imposed by the federal act were neither limited nor temporary and that they amounted to a taking of valuable property rights of the mortgagees without any compensation whatsoever.

to be accepted and filled. The order did not prohibit the acquisition of raw silk by the plaintiffs. Some two months after the issuance of M-22, the Government and its designees began placing mandatory orders with plaintiffs for the silk which was paid for, upon delivery, at the OPA price. Plaintiffs sued for additional compensation for the silk, alleging that the "taking" had occurred on the issuance of General Preference Order M-22 on October 16, 1941, and that, accordingly, they were entitled to recover an additional amount to compensate them for delay in payment, plus amounts expended for storage and handling of the silk after October 16, 1941, until the silk was finally delivered [fol. 212] to and paid for by the Government or its designees. The Government contended that M-22 was merely a regulation which placed certain limitations or restrictions upon plaintiffs' right to sell their silk and that these limitations were imposed in the proper exercise of the sovereign's lawful power to allocate scarce materials in wartime *away from* nonessential to essential users, and that while the restrictions imposed in the interest of the defense effort may have decreased the value of the silk to the plaintiffs, the silk was not taken on October 16, 1941, citing *Omnia Commercial Company, Inc.* v. *United States*, 261 U. S. 502, *Bowles* v. *Willingham*, 321, U. S. 503.[8] The Government pointed out that on October 16, 1941, when the

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[8] In the *Omnia* case the Government had requisitioned the entire output of steel by the Allegheny Steel Company and had directed the company not to comply in that year with any contract calling for steel. The Omnia Commercial Company had a contract with the Allegheny company entitling Omnia to Allegheny's steel at a price well under the market. Omnia sued the United States alleging that the Government had "taken" its right to have its contract with Allegheny performed. The court held that the contract had not been taken but only its performance frustrated and that Omnia's loss of the expected profit was a consequential loss resulting from lawful governmental action of requisitioning Allegheny's steel. In the *Bowles* v. *Willingham* case the Supreme Court held that rent control imposed only temporary and narrow restrictions on an owner's use of his property.

order was issued, the Government did not take any positive action regarding plaintiffs' property which, on the contrary, was left in the possession and control of the plaintiffs subject only to the negative power of the Government evidenced by the restriction that it might not be sold or delivered to anyone but the Government or its designees. The court held that the restrictions imposed by M-22 on plaintiffs' use of its silk were so broad that, for all practical purposes, plaintiffs were deprived of their silk; that although the silk did remain in the actual possession of the plaintiffs after October 16, 1941, it was held not for their own use but for the use of the Government whether the Government ever exercised its right under the order to demand delivery of the silk or not.[9] The court noted that the Government had the statutory power to requisition plaintiffs' silk and pay just compensation therefor on October 16, 1941, and held that the Government's choice of a gen- [fol. 213] eral preference regulation as a means of acquiring the use of plaintiffs' property in preference to a formal requisition did not depriv the operation of M-22 of its character of a taking, or lessen plaintiffs' constitutional right to just compensation. Plaintiffs' recovery included an additional amount to compensate them for delay in payment, plus amounts expended by them in handling and storing the silk after October 17, 1941.

It seems to us that the restrictions placed by L-208 on the right of gold mine owners to mine and sell gold were neither conditional nor limited and were as complete as were the restrictions placed on plaintiffs' silk in the *Stahel* case. In neither the *Stahel* case nor the instant case did the Government, through the orders issued, attempt to vest in itself title to the subject matter of the orders, or to assert any proprietary rights in the subject matter. In both cases the orders merely sought to impose certain negative restrictions on the otherwise free use of their property by

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[9] In its motion for a new trial which was denied, the Government pointed out that under the court's decision a holder of silk on October 16, 1941, who had never received a mandatory order for any of its silk, would still be entitled to the same compensation as the holder who sold all of his silk on mandatory orders.

the owners. If plaintiffs' silk was taken by M-22 because that order served to deprive plaintiffs of all beneficial use of their silk, regardless of the fact that physical invasion of the property right was merely threatened in the order and might never have taken place, it would seem to follow that L-208 was equally a taking of the right of the gold miners to make profitable use of their mining properties by mining and selling gold.[10] It also appears that the loss of the gold mine owners of their right to mine gold was the direct result of L-208 and was not a consequential loss in the sense that it was the result of the exercise of defendant's power to allocate scarce materials, or to take such materials, as plaintiffs' loss in the *St. Regis* case, [fol. 214] *supra*, because, as we have seen, L-208 neither allocated nor took plaintiffs' inventory and supply of critical materials, equipment and facilities.

To allocate means to distribute or assign. Allocation is the act of distributing or of putting one thing to another. Insofar as L-208 prohibited the *acquisition* by gold mine owners of materials, equipment and machinery, the order was allocating the available supply of those items *away*

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[10] It is not contended that their right to mine and sell gold was acquired by defendant in the sense that the Government actually took possession of the mines and carried on the business for its own benefit. It is contended, however, that the Government deprived plaintiffs of their right to make profitable use of their mining properties for the period during which the order was in effect and that this deprivation amounted to a taking. That Government action short of acquisition of title or short of physical occupancy may constitute a "taking" in the constitutional sense has been upheld by the Supreme Court. *United States* v. *General Motors, supra; United States* v. *Welch*, 217 U.S. 333; *Richards* v. *Washington Terminal Co.*, 233 U.S. 546. As Justice Roberts pointed out in the *General Motors* decision, it is the "deprivation of the former owner rather than the accretion of a right or interest to the sovereign" which constitutes the taking, and if the effects of the Government's actions are so complete as to deprive the owner of all or most of his interest in his property, that property has been "taken."

from the gold mines so that there might be more to distribute or allocate to mining enterprises considered to be more essential to the war effort. Insofar as L-208 prohibited the mine owners from using any of the materials, supplies, equipment, machinery and facilities owned by them and on hand, that prohibition allocated nothing, i. e., it distributed nothing because the order contained nothing which required the gold mine owners to sell those items to the more essential users. Furthermore, because the order merely deprived the owners of the machinery, materials, supplies, etc., on hand, of the use thereof for one single purpose, i. e., for the continued mining of gold and left the owners free to otherwise dispose of those items as they pleased, that prohibition did not amount to a "taking" of the materials, equipment, machinery, etc., owned by the gold mine owners and operators. The fact that occasional voluntary sales of idle gold mining-machinery were made to some more essential mines does not give to that part of L-208 prohibiting the owners from using those items to mine gold the character of an allocation order; it merely emphasizes the fact that those items were not "taken." But the petitioners herein are not suing for the taking of their machinery, facilities and supplies on hand.

We turn next to a consideration of whether L-208 was in fact a limitation order. Limitation orders were used to supplement priority orders which were not always effective to keep nonessential manufacturers of nonessential products from acquiring critical materials. Such nonessential manufacturers, even with the lowest priority rating, might be able to pick up from time to time a significant amount of critical materials which at a later time might be needed by essential manufacturers. To remedy this situation, limitation orders were directed to the manufacturers of *specified end products* which were considered nonessential in [fol. 215] war time, such as office machinery, furniture, bicycles, stoves and passenger automobiles, and they prohibited the manufacture of such end products into the manufacture of which went critical materials.

No critical materials went into the end product of a gold mine, i. e., refined gold. The gold mining industry used critical materials only for the maintenance, repair and operation of the mines. If it had been the sole purpose

of WPB to prevent gold mines from *acquiring* critical materials to a greater extent than they were already prevented by P-56, under which they could acquire nothing because their serial numbers had been revoked, and under P-100 under which they could acquire only limited amounts with their lowest (A-10) priority rating, that part of L-208 which absolutely prevented the acquisition of those materials to operate the mines, effectively did that.

It has been suggested by defendant that a further purpose of a limitation order was to prevent the consumption of critical materials already on hand and owned by a nonessential industry in order to "conserve" such critical materials. The question immediately arises in connection with L-208: In what significant way did L-208 *conserve* such critical materials, i. e., the equipment and machinery and supplies of the gold mines? Presumably something is "conserved" for the purpose of putting it to some more important use, otherwise what is the object of "conservation"? A material may be in short supply but if it is not needed by anyone, it seems hardly a proper object of conservation, and if it is kept idle or saved up, it would appear to be merely hoarded rather than conserved. Also, if something is scarce and is urgently needed by others, it cannot be said to be conserved unless the so-called conservation measure makes some effective provision for getting that scarce and needed material into the hands of essential users. The provision may appear in the same measure or in a supplemental measure. This was not done in L-208 and it was this omission which robs the order of the character of a *bona fide* limitation order.

[fol. 216] L-208 was labeled a "Limitation Order", and up to a point it followed the pattern of true limitation orders. But a limitation order has a specific purpose: it is issued to conserve critical materials so that those materials may be used by essential war industries. It is not issued to insure that those critical materials will deteriorate through disuse or be preserved for future by the nonessential owners thereof. L-208 made specific provision for the gold mine operators to preserve their own critical machinery and equipment so that they, i. e., the nonessential owners, would have that equipment and machinery in good condition for use in gold mining when the limitation order was finally lifted.

Paragraph (b) (3) of L-208 provided that no gold mine operator might acquire, consume or use any critical material, facility or equipment *except to the minimum amount necessary to maintain the gold mine's buildings, machinery and equipment in repair and its access and development workings safe and accessible.* Paragraph (c) of the order authorized the Director General for Operations of WPB to assign such preference ratings as might be required to gold mine operators to enable them to obtain the minimum amount of critical materials necessary to maintain their nonessential mines on the basis set forth in subparagraph (b) (3), i. e., to keep their machinery and equipment in repair, *inter alia.*

The above makes it quite clear that the "conservation" brought about by L-208 with respect to the mining machinery and equipment owned by the mine operators was not the usual conservation purpose of a limitation order of WPB, i. e., conservation so that the equipment, machinery and materials owned by a manufacturer of nonessential products might be converted to the manufacture of essential end products either by the owner or by some manufacturer of an essential end products. Any actual conservation intended and brought about by that part of L-208 which prohibited the use of the gold mine owners' equipment and machinery for the mining of gold was for the purpose of conserving that equipment and machinery for future use by the nonessential gold mines in the production of nonessential gold.

In summary, it appears to uset that only to the extent that L-208 prohibited the *acquisition of new materials and equip-*
[fol. 217] *ment* was that order either a limitation or an allocation order. The balance of the order, having to do with the prohibition of the consumption and use of materials, equipment and machinery owned by the mines and on hand, in the operation of the gold mines, was not intended to and could not, under the very terms of the order itself, accomplish any of the purposes of allocation or limitation orders. Since that prohibition on use of materials and equipment on hand was neither a limitation nor an allocation order, the destruction of the right to mine and sell gold was not consequential to a limitation or allocation order.

L-208 was aimed, in all its provisions, directly at the beneficial use of the mining properties of the gold mine owners, and the only intention reasonably inferrible from the language of the order itself and the circumstances surrounding its issuance was an intent to temporarily deprive them of that property right. By the issuance of Order L-208 the defendant prohibited the carrying on of otherwise lawful mining operations and thereby placed a definite servitude on plaintiffs' profitable use of their mines which resulted in a temporary taking of that property right. See *Peabody* v. *United States*, 231 U. S. 530; *Matthews* v. *United States*, 87 C. Cls. 662, 720.

We come next to the question whether the War Production Board had the necessary authority to issue an order which would have the effect of depriving plaintiffs of their right to make profitable use of their mining properties. The Government contends that if, as argued by plaintiffs, WPB acted "arbitrarily" in issuing L-208, it acted without authority and the Government is not liable to pay just compensation for property destroyed by the unauthorized act of its agents.

While it is true, in general, as urged by defendant, that the Government is not liable for damages occasioned by the unauthorized acts of its agents, the problem of determining whether or not a particular act was "authorized" is not always a simple one.

If the statute under which the Government agent is acting specifically forbids the particular act complained of, that action is clearly unauthorized and the Government will [fol. 218] not be liable for damages resulting from that action. *Hooe* v. *United States*,[11] *supra*.

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[11] In the *Hooe* case a federal statute provided that in renting space for Government use, Government officials might not obligate the Government for the future payment of money in an amount in excess of the appropriation. A Government official rented from plaintiff a part of his building at a rental in the full statutory amount, but occupied additional space in the building for which plaintiff was not paid. Plaintiff sued for the additional rent either on the ground of an implied contract or as just compensation for private property taken for public use. It was held

If an agent of the Government acts without any statutory authority, that action is unauthorized and the Government will not be liable for damages resulting from that action. In such a case the injured person's remedy would be by injunction against the individual government official acting without authority. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343. U. S. 579. In that case the President issued an order directing the Secretary of Commerce to take and operate most of the Nation's steel mills. Although there were in existence at that time two statutes authorizing the President to take both personal and real property under certain conditions, the Supreme Court held, and the Government admitted, that those conditions were not met. Furthermore the Court noted that the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment but that Congress had refused to adopt that method of settling labor disputes when it was considering amendments to the Taft-Hartley Act in 1947. The Court further held that not only was there no statutory authority for the seizure or taking of the steel mills, but also there was no constitutional authority for such a taking in that the President had no such inherent power. In the instant case Congress had by legislative enactment given the President authority to take for title or for use both real or personal property or interests therein, and those statutes did not impose "cumbersome, involved, and time-consuming" conditions referred to by the Supreme Court in connection with the statutes referred to in the *Youngstown* case. On the contrary, the conditions imposed by the wartime statutes were simple, and involved (1) that the taking be [fol. 219] *deemed* by the President or his designee to be necessary for the prosecution of the war and (2) that just compensation be paid the owner of the property interest taken. It is true that the wartime statutes under which the President and WPB operated did not specifically authorize the closing of any business as a means of taking

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that the Government was not liable on either theory since the officer acted without lawful authority when he did anything which tended to commit the Government to pay more rent than the statutory maximum and that in so doing he was not representing the United States.

over that business. But the closing amounted to a taking and the President and WPB were authorized to take private property when, *in their opinion*, such taking would be in the interests of national defense. We have here then, merely the use by WPB of an unorthodox and perhaps *unauthorized means* of accomplishing an *authorized end* or result, i. e., a taking. And if a taking is authorized by Congress, it is compensable under the Constitution despite the means used to accomplish it, as we shall discuss more fully hereinafter.

Where the agent's actions are not prohibited by statute and where they are within the general scope of his authority, although under general law they may be tortious, the modern trend is to hold such actions to be the acts of the sovereign. This subject was discussed at some length in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, in which the Court held that the District Court did not have jurisdiction to grant an injunction preventing officials of the War Assets Administration from selling coal to anyone other than the petitioner on the ground that the suit was actually one for specific relief against the Government which had not consented to be so sued. The petition in that case alleged that the War Assets Administration had sold certain surplus coal to the petitioner; that the Administrator for that agency had then refused to deliver the coal to petitioner and had entered into a new contract to sell the coal to others; that the petitioner's contract with the Government was an immediate contract of sale under which title to the coal had passed to the petitioner; that, accordingly, retention of the coal by the Administrator, after demand, was a conversion of petitioner's property and the Administrator's actions illegal so that the relief prayed for was not against the Government but against the Administrator individually to enjoin his threatened tortious action. The Supreme Court held that the Administrator had statutory [fol. 220] authority to make decisions concerning the meaning and effect of the contracts he entered into on behalf of the Government, and that such authority included the authority to make incorrect as well as correct decisions, whether of law or of fact; that any action taken pursuant to an incorrect decision was not, *ipso facto*, an unauthorized or illegal act, but might well be the act of the sovereign even

where the act involved the wrongful withholding of property belonging to the petitioner, i.e., a conversion. The Supreme Court then held that the action of an officer of the sovereign, "be it holding, taking or otherwise, legally affecting the plaintiff's property," could only be regarded so illegal as to permit suit for specific relief against the officer as an individual where that action was clearly outside the officer's statutory powers or where, though within those powers, the powers themselves were constitutionally void. The Supreme Court stated at page 695:

> Thre is, therefore, nothing in the law of agency which lends support to the contention that an officer's tortious action is *ipso facto* beyond his delegated powers. Nor, we think, is there anything in the doctrine of sovereign immunity which requires us to adopt such a view as regards Government agencies.

The Supreme Court concluded that since the Administrator's tortious actions were taken pursuant to erroneous decisions (of law) which he was authorized to make, he was acting for and as the representative of the Government and not in his individual capacity. The injunction was denied because it would have required specific relief against the Government itself. The Supreme Court suggested that the petitioner's remedy was in the Court of Claims for damages for breach of contract or for just compensation for the taking of the petitioner's coal.

Where a Government agent exercises a statutory power in a manner not provided for in the statute, the courts have held that his action was not "unauthorized" if the result of the action was one contemplated by the statute. In *Hurley v. Kincaid,* 285 U. S. 95, petitioner had obtained an injunction in the District Court restraining certain Government officials from proceeding further with the construction of a flood control project then being carried out under the Federal Flood Control Act. It was clear that the continued [fol. 221] construction would necessarily destroy portions of plaintiff's property. The lower court granted the injunction on the ground that the Government officials were acting "illegally" and therefore in their individual capacity in threatening to proceed with the project without first acquiring by formal eminent domain proceedings, as they

were specifically required to do by the Flood Control Act, the necessary flowage rights over petitioner's land. The Supreme Court reversed the action of the lower court granting the injunction, on the ground that the acts complained of were the acts of the sovereign and not the individual acts of the officials; that the Flood Control Act authorized the taking of petitioner's land or of an easement therein; that the only "illegality" involved was the failure of the Government officials to compensate petitioner for the land taken and that such a circumstance afforded no basis for an injunction where, as in that case, compensation might be procured by the petitioner in an action at law in the Court of Claims. The Supreme Court held that the Fifth Amendment assured plaintiff of just compensation but that (p. 104, footnote 3) it did not entitle him to be paid the compensation in advance of the taking:

> Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury.

Although the Supreme Court did not characterize as "arbitrary" the action of the Government officials in refusing to institute condemnation proceedings as provided for in the Flood Control Act, it would seem that such action was arbitrary in the same manner that a willful breach of a Government contract by a contracting officer is arbitrary. In neither case, however, are such arbitrary actions "unauthorized" in that they were forbidden by statute or were clearly outside the scope of the powers delegated by statute.

A regulation may be so arbitrary in its application to the particular subject matter and under the circumstances that it actually results in the regulatory body exercising powers not conferred on it by statute. This was the case in *Berwind-*
[fol. 223] *White Coal-Mining Co.* v. *United States*, 9 F. 2d 429. Plaintiffs therein were owners of coal mines and private coal cars. They sought to enjoin the enforcement of an order of the Interstate Commerce Commission relating to the distribution among bituminous coal mines of coal

cars during times of car shortages. Enforcement of the order would have prevented the plaintiffs from using their private coal cars. The court observed that the rights of private car use and ownership are recognized by Congress, and that Congress had not delegated to the Commission any power over private car owners or over the soft coal industry. The court held that in issuing the order in question the Commission, through what purported to be an exercise of its regulatory power over carriers, actually abolished the use of private coal cars to a substantial extent and thus deprived the private car owners of the full enjoyment of their rights to operate their mines and supply themselves with coal from other mines. The order of the Commission was held to be unjust and unreasonable and to amount to an unlawfully arbitrary exercise of power which had the effect of regulating that which the Commission had no power to regulate.

It would seem to follow from the above, that the "arbitrary" action of a Government official is not necessarily "unauthorized" and "illegal" if the action represents an exercise of powers delegated to the official by the sovereign.

In the instant case the record establishes that as an order allocating critical materials away from a nonessential user, LL-208 was arbitrary and unreasonable. The amount of such materials which were thereby prevented from being delivered to the gold mines was not significantly greater than was already prohibited by existing priority orders, and a simple revocation of those orders insofar as they applied to the gold mines, would have cut off all such deliveries. L-208 did not require the owners of the critical materials to hold the materials they had on hand for the use of the Government or some essential user to be designated by the Government, nor did it require that the owners deliver the materials to such essential users, but rather left them free to dispose of the critical materials in any way or to anyone they pleased. The only use which the gold mine owners were forbidden to make of the critical materials, equipment and supplies which they owned and had on hand, was in the [fol. 223] operation of their gold mining properties. Despite its preamble and the authority cited for its issuance, the language of the order itself and the circumstances surrounding its issuance indicate that neither its purpose nor

its effect was to conserve or allocate critical materials, equipment and facilities needed for defense, but was rather to deprive the gold mine owners of their right to make profitable use of their gold mines. Viewed as a taking of that property right, the order was equally arbitrary since the record discloses that those officials responsible for its promulgation either knew or should have known that the only reason for the order, i.e., relieving the manpower shortage in the nonferrous metal mines, would not be accomplished thereby. However, we think that the only "illegality" involved in WPB's arbitrary action was its failure to pay just compensation for the property right of which plaintiffs were deprived, because we believe that WPB had the necessary statutory authority to take this property. By October 1942, Congress had conferred upon the President authority to requisition, place mandatory orders for, or take for title or for use, any real or personal property or interests therein which he deemed necessary to successfully prosecute the war. These statutes left the determination of war necessity to the absolute discretion of the President, but they required the payment of just compensation for any property taken or used. Congress also authorized the President to take possession of factories or other business establishments and to operate them if it was deemed by him to be in the interests of the national defense to do so. All these powers were delegated to the War Production Board except the President's power to condemn real property. Although none of the statutes contained specific language authorizing the requisition of a business in order to keep that business from operating at all, if the Government felt that the idleness of a business would be of benefit to the defense effort but did not believe the business sufficiently evil or dangerous in wartime to justify its closing,[12] we suppose its powers of requisitioning were broad enough to permit such action, subject, however, to the obligation to pay just compensation [fol. 224] to the owner. Neither party has suggested that the Government lacked such power.

Defendant also urges that if, as plaintiffs contend, the only purpose of the order was to divert manpower from the gold mines to the nonferrous metal mines, then the action

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[12] *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146.

taken by WPB in issuing the order was unauthorized because the War Production Board had no authority to issue orders affecting manpower.

From our study of the statutes, executive orders and regulations relating to WPB, we think that WPB was authorized to take into consideration the manpower implications of any order it might issue. The relationships between manpower and the consumption of scarce materials, and between manpower and increased production of vital end products, are of too obvious significance in the whole war production situation to suppose that they were not the legitimate concern of the War Production Board. The establishment of the Labor Division early in the life of the Office of Production Management and the presence on the War Production Board itself and on the War Manpower Commission of the Director of the Labor Division, are ample evidence of this concern. While Congress never enacted legislation which gave the Government the power to order a civilian worker to leave one job and go to another, or to order an employer to discharge an employee in order that the employee might be hired by someone else, it was no objection to an order of the Government, otherwise valid, that one of the results of its enforcement would be a better utilization of available manpower in the interests of the national defense. That the main objective of the gold limitation order may have been to bring about a shift in the employment of underground gold miners from the gold mines to the nonferrous metal mines is, we think, immaterial on the issue of the order's validity, since the order did not in any of its provisions attempt to exercise authority with respect to manpower and provided no possible basis for any attempted enforcement of the latent manpower purpose.

The only circumstance under which the Government may escape the obligation to pay for property which is destroyed or taken by the authorized action of its agents, is where, in time of war, that property is inherently dangerous, or is be-[fol. 225] ing used in such a manner as to clearly endanger the public safety. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *United States* v. *Caltex*, 344 U. S. 149. Gold mines which did not possess a serial number under WPB Order P-56 because they did not produce significant amounts of critical metals in addition to gold, were determined by

WPB to be "nonessential," but we know of no precedent which would justify our holding that a nonessential industry or business was, *ipso facto*, one endangering the public safety in time of war. That such an industry could be regulated, and strictly regulated in wartime, is unquestioned, and resulting losses are not compensable if the action taken is truly regulatory in nature. But the power to regulate a nonessential but nondangerous industry in wartime is not the power to destroy, and limitation is not the equivalent of confiscation. *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307, 331. As the Supreme Court said in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

That the taking of the gold mine owners' right to make use of their mining properties was not in fact necessary to the successful prosecution of the war, and that the officials responsible for the issuance of L-208 either knew or should have known this fact, does not, we think, relieve the Government of its obligation to pay just compensation for the destruction of this right. The statutes and executive orders granting to the Government authority to take property which would aid in the prosecution of the war left to the discretion of those officials to whom the authority was delegated the determination of "war necessity." No tests or procedures were prescribed in connection with the making of that determination and no criteria furnished. That the determination was without foundation would be no defense in a prosecution by the Government of the owner for refusal to give up his property on the Government's demand for it accompanied by a tender of just compensation. Similarly, we think the same lack of wisdom in determining that the Government actually needed certain property which it took [fol. 226] or destroyed would be no defense to the Government in a suit by the owner for just compensation.

That the Government did not make any physical use of the gold mines does not deprive its action of its character of a taking. The Supreme Court has held that *destruction* of private property for a *public purpose* is the equivalent of a *taking* of private property for a *public use*. *United States* v. *Welch*, 217 U. S. 333; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1.

In concluding that L-208 amounted to a temporary taking of plaintiffs' profitable use of their mining properties for which just compensation should be paid, we have had the following considerations in mind. If L-208 had merely denied plaintiffs the right to acquire any materials, facilities or equipment needed to operate a gold mine and, as a result thereof, plaintiffs had ultimately found it necessary to cease operations because of lack of needed materials, new or repair parts, their losses would have been consequential to the exercise by WPB of its lawful regulatory power of allocation in connection with scarce materials and therefore would not have amounted to a taking. If WPB had had the power to allocate civilian manpower from and to industries, and, as a result of its allocation, plaintiffs' mines had been forced to close down, there would similarly have been no taking. If L-208 had not only denied the gold mines the right to acquire materials, equipment and facilities but had ordered the mine owners to cease using what they had on hand, to hold them for the possible use of the Government, and not to dispose of them to anyone but the Government or its designees, such an order would have amounted to a taking by the Government of those materials, facilities and equipment, whether the Government or its designees ever actually took physical possession of them or not, and the loss of the gold mine owners' ability to carry on their business would have been consequential to the taking of the materials, equipment and facilities and would not have been compensable under the Fifth Amendment.

L-208 did not do any of the above things except to deny the gold mine owners and operators the right to acquire additional materials, facilities and equipment. However, the [fol. 227] loss of plaintiffs' right to make profitable use of their mining properties was not, in many cases, the result of that denial. The record establishes that a number of the plaintiffs herein could have operated for a time at least with what they had on hand and without acquiring any additional materials, facilities and equipment which were under Government restriction. How long they could have operated is of importance on the question of damages rather than of liability. But L-208 did not stop with a mere denial of the right to acquire materials, equipment and facilities. The real substance and intent of the order was embodied in the prohibition directed at the continued op-

eration of the gold mines. The so-called limitation on the gold mine owners' use of the equipment and supplies and facilities which they owned was not intended to make those items available to the Government or to the war effort but was expressly included in the order to insure that they would not be used in the mining of gold, and was part and parcel of the express order to cease doing business.

We conclude that L-208 by prohibiting the carrying on of otherwise lawful mining operations placed a servitude on plaintiffs' profitable or beneficial use of their mines and thus amounted to a temporary taking of that property right in the case of those mine owners and operators who were forced to close their mines by virtue of their compliance with those provisions of L-208 which prohibited them from using their materials, facilities and equipment to mine gold and which ordered them to close down their mines. Such mine owners and operators are entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution.

Homestake Mining Company

The Homestake Mining Company is a California corporation. Homestake is and was in 1942 the owner of patented mining claims covering more than 5,000 acres of mining properties containing gold-bearing ores of great value located in the Black Hills area of South Dakota near the city of Lead. For some 65 years prior to October 8, 1942, Homestake had been engaged in the business of mining, processing and selling gold, and in 1942 it was the [fol. 228] largest gold producer in the United States.

The mine was located in an isolated area and was therefore required to observe a policy of self sufficiency. From its early days it maintained larger inventories of supplies and equipment than was customary in most mining enterprises. It owned extensive timberlands which provided lumber needed for the mine. It had developed a coal mine, and it produced all of its own electric power. Prior to the issuance of L-208, Homestake had completed two deep mine shafts and had equipped them with modern hoists. It had also erected a new lumber mill. Its steam power plant was relatively new and its ore processing mills were in excellent operating condition.

The mine maintained its own foundry and machine shops to fabricate and repair a variety of mining and processing equipment. Homestake's inventory of supplies and materials, which it could not make for itself, was sufficient in October 1942, to permit the company to operate its mine during the entire period of the closure. Dynamite, which the company would have had to obtain within a few months, was readily available without restriction.

The working and living conditions at Homestake in 1942 were superior to those of any of the nonferrous metal mines to which the Government hoped to transfer the Homestake miners. Homestake had lost some of its manpower in October 1942, but had it been permitted to continue operations it could have maintained normal production levels by using mining techniques requiring less labor and by increasing its workday from seven to eight hours.

In October 1942, the Homestake mine constituted the largest single source of potential nonferrous metal mining labor, with a total payroll of approximately 1,800 workers of all kinds. Following the closing order, Homestake released 473 men of whom 183 were classified as miners, 39 of whom had had less than six months' experience. The nearest nonferrous metal mines were about 500 miles from the Homestake mine—Anaconda copper mine at Butte, Montana, and the Climax molybdenum mine at Climax, Colorado. Representatives of the United States Employment Service attempted to induce released Homestake workers to accept employment at those nonferrous metal mines. Fifty-[fol. 229] one Homestake employees accepted employment at Climax, 41 staying less than 6 months and only 6 remaining as long as a year. One hundred seventy-eight Homestake employees went to Anaconda and more than 100 left before the end of a year. Between October 8, 1942 and November 12, 1942, the United States Employment Service placed 207 Homestake employees of all kinds in other mining districts. A number of these employees, however, returned to Lead shortly after November 12, 1942.

Prior to October 8, 1942, employement at Homestake had not suffered as had employment in the nonferrous mines and, although some employees had left the mines, most of the old employees stayed on. The reasons for the greater stability of employment in this mine, which constituted the

largest single source of experienced miners, were probably the good living conditions, the free medical and hospital service, group insurance, pensions, recreational and other facilities provided for Homestake employees by the company. These conditions were unusual in the mining industry and had no counterpart in the nonferrous metal mines.

After the issuance of L-208, Homestake was permitted to hoist and process ore already broken until the latter part of May 1943. After June 1, 1943, the mine was closed for all except maintenance purposes until July 1, 1945, when the mine was reopened.

Without acquiring new machinery, parts, supplies or other materials, and with a greatly reduced labor force, Homestake could have operated profitably during the entire period of closure.

Although Homestake had a large inventory of supplies and materials, and large amounts of machinery and equipment in good condition, neither WPB nor any other Government agency sought to requisition, purchase or compel the transfer thereof to the Government or to a war industry.

The properties of Homestake were useful for no other purpose than the production of gold and were adaptable to no other use than the conduct of a gold mining business. The closing of the mine had far-reaching and drastic repercussions in the city of Lead and in the surrounding communities. The population of Lead declined sharply. More than 750 homes and apartments were left vacant and 36 [fol. 230] business establishments which had served the communities were closed. About ten percent of the State's annual revenue derived from Homestake was lost to the State.

We conclude that L-208 amounted to a temporary taking of the profitable use of the Homestake mining properties for which Homestake is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

Idaho Maryland Mines Corporation

Idaho Maryland Mines Corporation, a Nevada Corporation, owned in fee certain gold mining properties known as the Idaho Maryland Mines, consisting of approximately

8,000 acres of gold-bearing lands situated in the Grass Valley Mining District in the County of Nevada, State of California, together with all the necessary mining plant and equipment located on those lands.

On October 8, 1942, Idaho Maryland had extensive equipment and facilities for the operation of its mining enterprise, including machine shops, electric shops, welding shops, blacksmith shop, carpenter shop, cyanidation plant and smelting plant, a sawmill and other mills, all the usual automotive and other equipment. It also had on hand a large inventory of supplies and materials necessary for operating the mine, including pipe and rail, steel, drill steel, tires, tubes, repair parts for milling machinery, valves, pipe fittings, mercury, etc. The mine was a fully developed one comprising extended drifts, cross-cuts raises and winzes, fully equipped with modern mechanical equipment. The mine had its own timber supply and its own sawmill. Its electric power was furnished by the Pacific Gas and Electric Company and there was no shortage of electric power at the mine nor was it curtailed during the shutdown period.

Prior to the issuance of L-208, the mine had lost considerable manpower. Its payroll was reduced from 800 employees to 212 employees [13] between December 1941 and [fol. 231] October 8, 1942. Alterations in mining methods enabled the mine to continue a profitable operation with the smaller force of workers.

With a greatly reduced labor force and without acquiring any critical material, supplies, equipment or facilities subject to Government control, Idaho Maryland could have operated its mining properties on a profitable basis during the entire period of L-208.

The properties of Idaho Maryland were useful for no other purpose than the production of gold. Its various machine shops were not capable of being utilized in the mass production of any item.

The closing of the mine caused considerable community dislocation and individual hardship in Grass Valley, Cali-

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[13] The average age of the 212 employees was 47.7 years. Forty-three of the underground workers were 50 years of age or over.

fornia, which was wholly dependent upon the operation of the gold mine for its continued prosperity. Since 1848, the principal occupation of the inhabitants of the communities of Grass Valley and Nevada City had been gold mining.

On May 3, 1944, Idaho Maryland was permitted by WPB to resume operations on a limited basis to be carried out with a force not to exceed 200 men who were required to be over 40 years of age and not employed by other industries. Production was limited to 7,800 tons of ore per month, but because of the length of time it took to prepare for production and to open up the necessary ground workings after extensive damage caused by the shutdown, Idaho Maryland was not able to produce 7,800 tons a month in 1944. Permission to hire additional labor was denied by WPB on November 24, 1944.

The closing of Idaho Maryland was brought about by reason of compliance with the provisions of L-208 which ordered that the mine be closed and that the owners not use materials, supplies, machinery and facilities on hand to operate the mine. We conclude that L-208 amounted to a temporary taking of the profitable use of the Idaho Maryland mining properties for which Idaho Maryland is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

[fol. 232] Central Eureka Mining Company

Central Eureka Mining Company, a California corporation, owned approximately 641 acres of gold-bearing land located at Sutter Creek, Amador County, California. On October 8, 1942, the mine had been producing gold for about 80 years. It then employed 117 men of whom 73 were classified as underground workers. The average age of these employees was 41.74 years. Most of them were married and had children and a number owned their own homes in the vicinity of the mine. Following the closing of the mine, the company was permitted to retain 42 men for maintenance purposes.

Central Eureka's equipment included machine shops, electrical shops, blacksmith shop, carpenter shop, an assay office, a complete mill from primary crush to cyanidation,

and its own source of timber. It had all the automotive and other necessary equipment required to carry on its mining operations and the servicing of the underground workings. On October 8, 1942, the company was operating profitably and could have continued to so operate throughout the entire period of the L-208 closure without acquiring any critical materials, machinery or equipment and with a reduced force of labor. The properties of the company were useful for no other purpose than the production of gold, and were adaptable to no other use than the conduct of a gold mining business.

Following the issuance of L-208, Central Eureka attempted to operate a copper mining project at Battle Mountain, Nevada, but abandoned the work in the summer of 1943. Central Eureka leased some mining equipment to individuals engaged in tungsten mining. It does not appear that any of the company's equipment or materials were ever requisitioned by the Government or acquired on mandatory orders by the Government's designees.

The closing of Central Eureka mine was brought about by compliance with the provisions of L-208 which ordered the mine to close and to cease using its materials, supplies, machinery and equipment to operate the mine. We conclude that L-208 amounted to a temporary taking of the profitable use of the mining properties of Central Eureka for which Central Eureka is entitled to be paid just compensation within the meaning of the Fifth Amendment to [fol. 233] the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

Oro Fino Consolidated Mines, Inc.

On October 8, 1942, certain gold mining properties located in Ophir Mining District, Placer County, California, were operated by J. C. KempvanEe under lease, dated September 5, 1935, from Hazel P. Gridley. Subsequent to receipt of L-208 from WPB, the lessee was permitted by WPB to continue the removal and milling of broken ore until January 15, 1943. Thereafter, operations at the mine were discontinued and the mine closed down.

As of October 8, 1942, there were approximately 11 employees in the mine as contrasted with about 40 in normal times. The mine was equipped with the necessary machin-

ery and equipment on October 8, 1942, but how long the mine could have continued in operation without acquiring additional materials, supplies or equipment, is not established by the record. The mine could be used for no other purpose than the production of gold, and its closing in early 1943 was due to compliance with those provisions in L-208 which ordered the mine to be closed and prohibited the operator from using materials, equipment and facilities on hand to operate the mine.

Defendant raises a special defense in this case. Defendant urges that plaintiff, Oro Fino Consolidated Mines, Inc., is not the real party in interest and that the claim, if any, with respect to the closing of the mine, resides in J. C. KempvanEe because the assignment of the lease by KempvanEe to the corporation did not include this claim. Plaintiff argues that the language of the assignment is sufficiently broad to cover the claim of KempvanEe against the United States.

The assignment, dated February 2, 1950, states that the lessee, KempvanEe

> "does hereby sell, assign, transfer and grant unto Oro Fino Consolidated Mines, Inc., a corporation, all right, title and interest in and to that certain mining agreement and the real property therein described and all rights arising by virtue of said agreement, dated [fol. 234] September 5, 1935, by and between Hazel P. Gridley, a widow, designated as lessor and J. C. KempvanEe, designated as lessee, * * *."

At the time of the alleged taking, KempvanEe was the owner of the lease covering the mining properties and the damage, if any, was to KempvanEe. It appears that in 1948 the financial backer of KempvanEe died and he turned for financial assistance to another individual who suggested that the mining operation be incorporated. As a result, the plaintiff corporation was organized on January 4, 1950, and on February 2, 1950, KempvanEe assigned his rights in the lease to the corporation.

We think it immaterial whether or not the somewhat ambiguous assignment conveyed to plaintiff the original lessee's right to receive just compensation or not since, if it did, the anti-assignment statute, 31 U. S. C. 203, bars plain-

tiff's recovery. *United States* v. *Shannon*, 342 U. S. 288; *Potts* v. *United States*, 130 C. Cls. 88. In the *Shannon* case, the Shannons had purchased from the Boshamers a tract of land part of which had previously been leased by the Boshamers to the United States. Buildings on the land had been damaged by soldiers of the United States, and the contract of sale to the Shannons provided that the sellers, the Boshamers, released to the purchasers any claim, reparation, or other cause of action against the United States Government for any damage caused the property. The Boshamers were themselves unwilling to institute a claim against the United States. The Supreme Court held that the assignment of the claim fell clearly within the ban of the Anti-Assignment Act as a voluntary assignment, as distinguished from an assignment by operation of law. In the *Potts* case, *supra*, Potts held an oil and gas lease on land inundated by Lake Texoma with the building of Denison Dam. Drilling operations by Potts were damaged by the rising water in 1945. In 1950 Potts assigned the lease to Godfrey and O'Hearn. All three persons sued the United States for a taking. The Court of Claims denied the claims of Godfrey and O'Hearn, holding that whatever claim Potts may have had against the Government, he could not validly assign it to anyone.

If the assignment in evidence in this case did not convey to this plaintiff the claim of KempvanEe against the United [fol. 235] States, plaintiff is obviously not the real party in interest. If the assignment did convey the claim, recovery is barred by the anti-assignment statute. Accordingly, the petition of Oro Fino Consolidated Mines, Inc., is dismissed.

Alaska-Pacific Consolidated Mining Company

Alaska-Pacific Consolidated Mining Company is a State of Washington corporation owning and operating mining properties located in the Willow Creek (Wasilla) Mining District in the Territory of Alaska. The properties consisted of an underground or lode mine with about 5 miles of underground workings and with two entries. The mine is in an isolated area and except for timber, all supplies, including foodstuffs, were imported from the States by ship, rail and truck. Because of its isolation, the mine custom-

arily carried a substantial inventory of parts, equipment and supplies and at the time the mine was closed by virtue of L-208, Alaska-Pacific had an inventory of parts, equipment and supplies sufficient to permit continued operations for at least one and one-half years. A company village was maintained at the mine, consisting of the mine and mill buildings, various warehouses, shops, dormitories, a school and an office building, a store, messhall and various recreational facilities.

The normal crew at the mine was about 125 men. On October 8, 1942, the mine had a crew of 101 men. The only other mines in Alaska at that time, aside from gold mines, were two coal mines. Only three of Alaska-Pacific's employees had any coal mining experience. There appears to have been an aversion, at least on the part of Alaskan gold miners, to working in coal mines, partly because of the hazards involved and partly because the equipment and machinery were different. Although the record does not establish the exact number of gold miners who transferred to the two coal mines, there were at least four and possibly a few more.

Alaska-Pacific was able to produce a small amount of concentrate essential to the smelting of copper and a certain amount of tungsten. WPB was inclined to permit the mine to continue operating for the production of tungsten and, in response to a series of appeals, the mine was permitted to continue operations until August 8, 1943, on which date WPB [fol. 236] required the mine to close down. Subsequent to the closure of the mine, Alaska-Pacific sold most of the perishable items in its inventory to such agencies as the Alaska Road Commission and the Alaska Railroad, and stored at the mine the other items.

The closing of the Alaska-Pacific mine was brought about by reason of compliance with the provisions of L-208 which ordered that the mine be closed and that the owners not use the materials, supplies, equipment and facilities on hand to operate the mine. We conclude that L-208 amounted to a temporary taking of the right of Alaska-Pacific to make profitable use of its mining properties, for which it is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

Bald Mountain Mining Company

Bald Mountain Mining Company is a South Dakota corporation owning certain gold-bearing lands in Lawrence County, South Dakota. On October 8, 1942, Bald Mountain was engaged in mining gold on those properties. Pursuant to appeals to WPB, Bald Mountain was permitted to continue gold mining operations until August 8, 1943.

On October 8, 1942, Bald Mountain employed approximately 150 men. How many of these men were hardrock miners or where they went after the mine closed in August 1943, the record does not disclose.

It appears that the mine closed in August 1943, because of L-208. The mine was reopened shortly after revocation of L-208 in the summer of 1945. The record does not disclose the nature or size of the mine's inventory of mining equipment, materials and supplies on hand when the mine finally closed, or how long the mine could have continued to operate without acquiring new materials, etc.

We conclude that L-208 amounted to a temporary taking of the right of Bald Mountain to make profitable use of its mining properties for which it is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages. [fol. 237] In that connection, however, consideration should be given to the probable length of time Bald Mountain could have operated its mine without acquiring additional materials, facilities or equipment for which priorities were requred during the period L-208 was in effect and while the mine was closed.

Alabama-California Gold Mines Company

Alabama-California Gold Mines Company, a State of Washington corporation, owned certain gold-bearing lands located in the State of California. On August 8, 1942, Alabama-California closed its gold mine and ceased all operations because of its inability to secure sufficient manpower or materials. Inasmuch as the mine of Alabama-California was not closed by virtue of compliance with the provisions of L-208, there has been no taking of its right to make profitable use of its mining properties and the petition will therefore be dismissed.

Consolidated Chollar Gould & Savage Mining Company

Consolidated Chollar Gould & Savage Mining Company, a California corporation, owned certain gold-bearing lands in Story County, Nevada. Its method of operation on October 8, 1942, was an open-pit one. It had explored the location and size of the veins of gold and silver through an underground shaft, but finding the cost of mining through that shaft to be excessive, it had stripped off the rock above the veins containing precious metal, and was recovering ore by use of power shovels. Some time prior to the issuance of L-208 officials of the mine had determined that because of the shortage of rubber essential to the trucking of waste from the stripping operations, the development of new ore would no longer be practicable. The mine's management had also been making preparations to conduct operations which would consist of rehandling previously mined and processed ore, and machinery was installed for this purpose. On October 30, 1942, the company requested of WPB permission to conduct operations which would consist of the rehandling of previously mined and processed ore (tailings). It represented that such operations would require a crew [fol. 238] of only six men who would be available from the local community and were of such an advanced age that they were precluded from employment in copper mines or defense plants. It also stated that the planned operations would require no steel consumption and that the supplies on hand and available from mines already closed down would enable the operations to be carried to completion. WPB permitted such operations to be carried on first to February 26, 1943, and then to June 30, 1943.

The above-described rehandling operations proved to be financially impractical and on April 28, 1943, Consolidated Chollar requested permission of WPB to resume its normal open-pit operations. It stated that it expected equipment to be available as a result of the completion of defense projects in the area, and that it would require no more than 20 men from the locality whose average age was over 50 years. Consolidated stated that steel consumption would be low and that it had the necessary steel on hand to operate for at least six months. Consolidated had been granted a serial number for use in its permitted rehandling operations, but on June 19, 1943, WPB refused to transfer the application of

that number to the resumption of open-pit operations. Consolidated then advised WPB that there were 15 men not suitable for work in war industries available in the locality and that there were sufficient operating supplies and fabricated repair parts on hand, with the exception of sodium cyanide, for the conduct of open-pit operations for six months. It stated that if such operations were authorized, priority assistance for supplies and equipment would not be required for six monts except in the event of unexpected equipment breakdown.

On August 28, 1943, WPB issued Serial No. 36-26-T under Preference Rating Order P-56 which had the result of removing this plaintiff from the restrictions of L-208, and permitted the mine to conduct open-pit operations. It was also authorized by the serial number to the use of a priority rating for obtaining maintenance, repair and operating supplies. The rating was extended through the first and second quarters of 1944.

In December 1943, Consolidated Chollar advised WPB that during the previous ninety days' operations under its [fol. 239] serial number it had been unable to bring its operations up to capacity because of the inefficiency of available labor and the lack of adequate equipment in the form of power shovels and trucks but that it hoped this condition would improve in time. It stated that with 23 men it had been producing an average of 320 tons per day, compared with 400 tons per day in 1942, with approximately the same number of men.

The record does not disclose how long Consolidated Chollar continued open-pit operations under its serial number or its reasons for discontinuing its operations if, in fact, it did discontinue them.

The record discloses that after the war Consolidated found it necessary to first remove overburden from above the ore vein because no ore was clear for breaking. The reason for this was that during the effective period of L-208, Consolidated Chollar had been able to process all the ore which it had stripped of overburden prior to the close of 1942.

From the above, it appears that open-pit mining operations of Consolidated, in which it was engaged in October 1942, were not discontinued as a result of the issuance of L-208 except for the period from sometime in November

1942 to August 28, 1943, and during that period Consolidated was permitted to carry on the rehandling of previously mined and processed ore in accordance with plans it had made early in 1942. We conclude that while Consolidated's operations were curtailed by WPB, they were never required to close down as provided in L-208, nor were they ever made to comply with that part of the order which prohibited the use of materials, equipment and facilities owned by them for any purpose having to do with the operation of the mine. The right of Consolidated Chollar to make profitable use of its mining properties was regulated but it was not taken or destroyed for any period and this plaintiff is accordingly not entitled to recover. The petition of Consolidated Chollar Gould & Savage Mining Company will therefore be dismissed.

Ermont Mines, Inc.

Ermont Mines, Inc., an Oregon corporation, owned a compact block and contiguous quartz lode mining claim, desig- [fol. 240] nated by numbers 1 through 34 inclusive, and located in the County of Beaverhead, State of Montana.

At the time of the issuance of L-208 in October 1942, Ermont was working claims numbered 1 (with drifts on claims numbered 2, 3 and 4); 2 (working over into claim number 6), 7, 9, 19, 20, 23, 24, 28 and 32. After receiving the WPB order to close down pursuant to L-208, Ermont continued taking out ore already mined, ran it through the mill and refinery, and shipped it to the mint. Sometime in November, the mine and buildings were closed and a watchman was employed to look after the property.

On October 8, 1942, Ermont employed a crew of men adequate to work the above claims. The men had homes in the vicinity of the mine. The mine had sufficient supplies, machinery and equipment in good working order which would have enabled the mine to continue operations for at least a year from October 8, 1942, if the mine had not been closed down pursuant to L-208. Mining operations were resumed at Ermont at sometime subsequent to the revocation of L-208.

We conclude that L-208 amounted to a temporary taking (for at least one year) of the right of Ermont to make profitable use of its mining properties for which Ermont Mines,

Inc., is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

In summary, the following plaintiffs have established their right to recover just compensation for a temporary taking of their right to make profitable use of their gold mining properties and their cases will be remanded to a commissioner of the court for trial tn the question of damages: Homestake Mining Company; Idaho Maryland Mines Corporation; Central Eureka Mining Company; Alaska-Pacific Consolidated Mining Company; Bald Mountain Mining Company, and Ermont Mines, Inc. In view of our decision in these cases it is unnecessary to discuss the various contentions relative to the special jurisdictional act of July 14, 1952, 66 Stat. 605.

The petitions of Alabama-California Gold Mines Co., and Consolidated Chollar Gould & Savage Mining Company will [fol. 241] be dismissed, inasmuch as it does not appear that they were closed down as a result of compliance with the provisions of L-208, which circumstance also removes them from any possible coverage by the special jurisdictional act.

The petition of Oro Fino Consolidated Mines, Inc., will be dismissed for the reasons set forth hereinbefore. It is so ordered.

MADDEN, *Judge*, and WHITAKER, *Judge*, concur.

JONES, *Chief Judge, dissenting:*

I concede that that part of order L-208 which directed certain mines to be closed down was invalid. The statute did not authorize such action. Paragraph (b) (1) of that order undertook to do that and was therefore issued without authority. However, paragraphs (b) (2) and (3) of the same order, which forbade the use of critical materials in nonessential industry, were valid exercises of the President's power under the allocation statute and they would have produced the closing down of the mines whether or not paragraph (b)) (1) had been included.[1] I would hold that paragraph (b) (1) of order L-208 should therefore be con-

[1] The full text of L-208 is set out in finding 43.

strued as mere surplusage and not an exercise of the President's powers of eminent domain. Since the valid portions of the order would have produced the closing of the mines, the added part of the order becomes immaterial.

During the war limitation orders were issued to curtail or prohibit the use of critical materials in the manufacture of nonessential products. L-208 (b) in its second and third paragraphs did just that. The majority concedes that such mines as did not have critical materials on hand are not entitled to recover for the reason that the gold mining process did consume critical materials and that regulations (other than L-208) depriving the operators of the effective right to acquire such materials were valid under the statute.

It follows that L-208, in so far as it prohibited the acquisition of critical materials, was valid. In so far as this order or other priority or allocation orders, either working together or separately, forbade the use of critical materials on hand for nonessential purposes, they were also valid wartime regulations. *St. Regis Paper Co.* v. *United States*, 110 C. Cls. 271; cert. den., 335 U.S. 815. I do not think it [fol. 242] matters whether the acquisition or use of critical materials was prohibited by L-208 or by it in conjunction with other priority or allocation orders.

The majority concludes that those operators who had critical materials on hand are entitled to recover for the time tha tthese materials would have allowed them to continue operation. In this respect the court seems to rely mostly on its conclusion that in so far as L-208 prohibited the use of critical materials on hand, it was arbitrary. The court bases this conclusion in turn primarily on the fact that the Government took no affirmative steps to allocate the materials "away from" the gold mine operators into more essential uses.

We do not think this was necessary under the circumstances. If indeed these materials were critical, then it is natural to expect that, under the operation of supply and demand, such materials would find their way into essential uses. In fact it would have been wholly impracticable in a great national emergency for any agency of government to allocate and assign every bolt, nut, and piece of critical materials. Thus, for example, even those who were engaged

in essential wartime industry were often merely given priority orders which were little more than hunting licenses and those industries had the task of locating and securing the critical materials. The fact that our nation, unprepared though it was, was able to produce wartime materials on a vast scale is a magnificent tribute to our free economy.

It was reasonable to suppose that the gold mine operators would attempt to reduce their capital investment in materials which they had no authority to use. This did in fact happen in the case of the Central Eureka Mining Company which leased some of its equipment to persons engaged in tungsten mining. Thus, while it may be true that there were other motives and purposes in issuing L-208 than the allocation of critical materials, I do not think that in so far as L-208 was intended to allocate critical materials it was arbitrary. There can be no question that some strategic materials could be expected to be saved by the dual prohibition of forbidding the gold mines to acquire new strategic materials and preventing the use of the ma- [fol. 243] terials and equipment they had on hand.

It cannot be said that L-208 and concurrent orders in their prohibition of the use of strategic materials on hand had no reasonable relation to the execution of the lawful purpose of allocating strategic materials. *Jones* v. *City of Portland*, 245 U.S. 217, 224. That this may have been done more effectively by other means does not matter.

The President had neither the constitutional power nor the statutory authority to close the mines directly. It is probable that as a legal matter the enforcement of that part of the order which directed the closing of the mines could have been enjoined. However, in wartime that is not a very practical remedy because it puts any individual or company in the position of hindering the war effort. In any event the Supreme Court has ruled that the defendant cannot be held for damages flowing from an unauthorized act of its officials. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384. Besides, if that portion had been enjoined, the valid portions of the order, as well as concurrent orders freezing the uses of critical materials, would have remained in effect. These would have compelled the closing of the mines, and the injunction would have been useless.

There is no doubt that plaintiffs were damaged by the necessity of closing the mines. War produces many hardships. It entails many sacrifices. When ceiling are placed on the prices of the products of farm and factory, when wages are frozen and when young men are taken and sent to face hardships and even death on distant battlefields at a small rate of pay in the fixing of which they have had no part, when prices generally are fixed, when all the interests of the nation are fused in the common purpose—losses are inevitable. No nation could justify such action in normal times. It would be next to impossible to measure and pay all the losses involved in an all-out war.

If the Congress should see fit to acknowledge liability to these owners on the ground that their losses were unusual, the court should willingly undertake to determine the amount, but unless this is done I do not think the court should select these losses to be compensated.

[fol. 244] — LARAMORE, *Judge*, dissenting:

The majority opinion points out that L-208 was not an allocation order, as it purported to be, but rather was clearly an order closing gold mines deemed nonessential to the war effort; *i.e.*, those mines whose gold production in dollar value exceeded 30 percent of their total production.

There was no authority vested in the President to directly close a business. The President could regulate the gold mines, allocate materials away from them, or requisition their materials, or even the business itself, if he determined their need essential for defense, and that such need was immediate and would not admit delay or resort to any other source of supply, and all other means of obtaining the use of such property for defense had been exhausted. See Act of October 16, 1941, 55 Stat. 742. Instead of determining that these gold mines were needed for defense, the President determined that they were nonessential and that the national defense would be better served by their closing.

The majority considers the closing under such circumstances to be a taking of plaintiffs' right to do business and compensable under the Fifth Amendment. I believe that the President lack the constitutional power and statutory authority to close these mines and, therefore, the unauthorized closing could and should have been enjoined. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579.

Inasmuch as the President lacked authority to close these mines, and such closing has not been ratified by Congress, the unauthorized closing is not compensable under the Fifth Amendment. *Hooe* v. *United States*, 218 U.S. 322; *United States* v. *North American Transportation & Trading Company*, 253 U.S. 330; *United States* v. *Goltra*, 312 U.S. 203.

Findings of Fact

The court, having considered the evidence, the briefs and argument of counsel, and the report of Commissioner William E. Day, makes the following findings of fact:

[fol. 245] 1. On January 7, 1941, the President of the United States established the Office of Production Management, hereinafter referred to as OPM, and delegated to it the powers and duties described in Executive Order 8629 (6 Fed. Reg. 191) and Executive Order 8942.[1] On August 28, 1941, the President by Executive Order 8875 established the Supply, Priorities and Allocations Board, hereinafter referred to as SPAB, and directed it to determine general policies for OPM.

2. By Executive Orders issued January 16 and January 24, 1942,[2] the President established the War Production Board, hereinafter referred to as WPB, and vested in the Chairman of that Board, acting with the advice and assistance of the members of the Board, the functions and powers formerly vested in OPM and SPAB. The Chairman of WPB was authorized by the Executive Order of January

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[1] In Executive Order 8629, the President delegated his priorities power under section 2(a) of the Act of June 28, 1940, 54 Stat. 676, and his power of requisitioning under section 9 of the Act of September 16, 1940, 54 Stat. 885, 892, including the power to take possession of plants. Further requisitioning power conferred on the President by the Act of October 10, 1940, 54 Stat. 1090, and the Act of October 16, 1941, 55 Stat. 742, were delegated to OPM by Executive Order 8942, Nov. 19, 1941.

[2] Executive Order 9024, January 16, 1942; Executive Order 9040, January 24, 1942. The latter order delegated to WPB the President's power under section 120 of the National Defense Act of 1916, 39 Stat. 213, to place mandatory orders and to take possession of plants.

16, 1942, to exercise the power, authority and discretion conferred upon him through such officials or agencies as he might determine.

3. The function of WPB and its predecessor agencies was to exercise general direction over the war procurement and production program, to regulate the production and supply of materials and equipment necessary for the national defense, and after the declaration of war for the prosecution thereof, and to determine when and what manner priorities should be accorded to deliveries of such material and equipment. These agencies fulfilled this function by the issuance of various orders, the most common of which were designated as "P" orders (priorities), "M" orders (materials), and "L" orders (limitation).

The "P" orders were generally addressed to buyers of materials and authorized them to attach to their purchase orders a letter or symbol entitling them to preference in [fol. 246] delivery. Once having been granted, this preference could usually be applied on a repetitive basis.

The "M" orders were usually directed to the manufacturers or distributors of materials and were aimed at controlling either the use or the distribution of particular materials. These orders frequently prohibited producers from selling to any buyer unless the buyer had some preference rating.

The "L" orders were usually issued to prohibit or curtail the manufacture of end products containing critical materials, continued production of which would have necessarily consumed such critical materials. Sometimes an additional purpose of such "L" orders was to accomplish the conversion of scarce manufacturing facilities to war production.

"L" orders were issued prohibiting or limiting the production of end products such as office machinery, furniture, bicycles, stoves, refrigerators, laundry equipment, automobiles, and other products. In most instances a prohibition against the production of a product resulted in the facilities being transferred to war production. Thus, the automobile industry's facilities were largely converted to war purposes although some of the facilities may have become inoperative because of a lack of adaptability to other purposes or to war production.

Issuances of "L" orders sometimes released manpower employed in the production of the prohibited end products. Working with the particular industry branch involved in the "L" order, the Labor Production Branch[3] of WPB, assisted in making arrangements whereby the application of the "L" order to the industry would be most effective in terms of the utilization of the services of the manpower so released.

Where an area was threatened with serious economic dislocation by reason of the threatened closing down of a primary industry resulting from an "L" order because substitute materials were not available to produce that in-
[fol. 247] dustry's product, either the area or the industry could be certified as "distressed" by WPB. Such a certification entitled the firms in the area to special treatment in the awarding of war orders, i.e., the orders did not have to go to the lowest bidders, and financial assistance could be given to enable the plants to convert. The entire washing machine industry was so certified.

The preference ratings assigned under the "P" orders originally ranged from A-1 to A-10, with the highest rating, A-1, being further subdivided. There was no control over the number of buyers who might be given a particular rating, and a buyer having one of the lower preference ratings might and often did find it impossible to purchase any material because the holders of the higher ratings had exhausted the available supply.

4. In the decisions by OPM and WPB to issue a "P", "M", or "L" order, a number of considerations might be

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[3] On March 18, 1941, OPM issued Regulation 5 (6 F. R. 1598, 32 CFR 2875—1941 Supp.), establishing a new operating division known as the "Labor Division". The functions and duties of this division were (1) to ascertain labor requirements for national defense; (2) to develop programs and coordinate efforts for assuring an adequate and trained labor supply for defense purposes; (3) to advise regarding problems and standards of work and employment in defense industries; (4) to assist in the prevention and adjustment of labor controversies which might retard the defense program; (5) to advise and collaborate with other divisions of OPM on all matters affecting labor.

involved such as the conserving of essential materials, supplies and equipment for use in essential war industries, the increasing of production of strategic raw materials or essential end products, and the maximum utilization of available manpower. In the earlier months of the war some areas of the country were still suffering from large scale unemployment.

5. On July 29, 1941, OPM issued Preference Rating Order P-23 in order to facilitate the acquisition of materials by producers of machinery and equipment used in the mining, beneficiation and preparation of coal and metallic ores. Said order authorized such producers to use a preference rating of A-3 for the acquisition of such materials.

6. On September 9, 1941, OPM issued Preference Rating Order P-22, known as the General Repair Order. It authorized a broad variety of industries, including mines and quarries generally, to use an A-10 rating for the acquisition of material needed for the repair of their property or equipment.

7. On September 17, 1941, OPM issued Preference Rating Order P-56 and amended it on September 22, 1941. Said order, as amended, authorized recognized mining enterprises to use a preference rating of A-8 for the acquisition of materials needed for operating supplies and for the main- [fol. 248] tenance of the property and equipment of such mines. Under the terms of said order OPM was to issue so-called mine serial numbers to all mines certified by an appropriate agency of a State, Territory or possession as constituting a recognized mining enterprise.

Placer gold mines but not lode gold mines were expressly excluded from the benefits of Order P-56. Placer mining is the derivation of gold from streamborne materials in contrast with lode mining which is the underground working of auriferous quartz veins in hard rock.

The reason for the distinction between lode and placer mines in the assignment of preference ratings under Order P-56 was set forth in a report entitled "Status of Gold Mining" submitted to SPAB on November 18, 1941, by its Executive Director, Donald Nelson. The report read in part as follows:

> * * * Most lode mines are underground, and consequently subject to the hazards of rapid depreciation if

they are shut down. Flooding by water is the chief hazard. Though not all lode-mining is deep enough to suffer seriously if a shutdown occurs, continuity of operation is clearly desirable to prevent depreciation of installed equipment and structures. On the other hand, placer operations can be discontinued (and often are, seasonally) without injury to equipment. * * *

Another reason for this distinction was stated in November 1941 by Dr. Wilbur Nelson, who was then Priorities Specialist and Administrator of Order P-56 and who later became the Chief of the Mining Branch of WPB, to be "that we felt that we must start restricting mining activities where they were not essential to the production of materials needed in a defense effort." This referred to the fact that placer mines produced only gold, while many lode mines produced other metals.

8. In the memorandum submitted to SPAB on November 18, 1941, Mr. Donald Nelson had reviewed the problems relating to furnishing materials both to gold mines in the United States and to gold mines in foreign countries, and had said, in part:

> 1. A general announcement of policy toward gold-mining is needed. Otherwise, specific *administrative* actions will be questioned by the mines as unfairly dis- [fol. 249] criminatory. This is particularly necessary if the purchase of new machinery for gold production is to be virtually prohibited after November 30. A necessary preliminary to such a declaration would be a request to the Treasury for an immediate formal opinion on the significance of new gold production to monetary policy. It is to be emphasized that from a consumption of scarce materials standpoint, this whole issue is a minor one. Only about $7,000,000 of equipment, not including a lesser amount for repairs and maintenance, is involved annually at a maximum. Such importance as the issue possesses is largely political. It is political from two opposing standpoints—that of popular reaction to the continuation of an industry widely regarded as unnecessary (to the point of jocularity), and contrariwise, that of the regional interests delineated in the report.

2. The continuation of the right of lode gold mines to use the A-8 rating under Order P-56 could be made entirely discretionary with the Director of Priorities. The guiding principle might be established by SPAB of requiring their purchases to be held to the bare minimum necessary to prevent disastrous shut-downs. SPAB might also wish to establish a separate test of eligibility in terms of the amount of other more useful metals that are produced jointly with gold. For example, if the selling value of the essential metals is 25 percent and that of gold produced 75 percent, the mine might be permitted to buy machinery and supplies on the same basis as other essential metal producers. Or the minimum ratio might be set at 40 percent in the value of other metals, and 60 percent gold. The intent would be to avoid any discouragement to production of the essential metals.

3. An alternative, and more drastic policy would be to eliminate all domestic gold mines, whether lode or placer, from Order P-56 and also from the general repair Order, P-22. Gold mine operators would thus be forced to buy repairs and supplies without A-ratings, but could apply for special help on Form PD-1. It is quite possible that only very gradual declines in output and employment would result, because of managerial ingenuity. Here again, exceptions could be made for mines producing other metals.

4. In lieu of any blanket privileges to foreign mine operators, all foreign mine needs could be reviewed continuously with the Economic Defense Board, so that considerations of inter-American and British American policy could be consistently applied to decisions authorizing or forbidding shipments of gold-mining machinery and repair parts. No serial numbers au- [fol. 250] thorizing several purchases would be issued, but applications for individual shipments would be entertained. Here again, the specific quantities of burdened material (which are not large) are not the issue, but the political considerations involved and the question of treating nonessential industries consistently are paramount. In the special case of Canada, the Joint Economic Committees could secure all relevant statistical data.

5. Some special basis of treatment might be worked out for Alaska, where gold mining assumes the proportions of a majority industry. To cut off suddenly all shipments of new equipment needed for replacement, and to make it unduly difficult to secure supplies, might have several effects upon employment in Alaska, and upon the revenues of the Territory. The Labor Division might be asked for a formal opinion on the probable impact upon employment in the Territory of the restrictions suggested in this report. The Territorial Government could also be asked for a formal report on the importance of gold mining, with all relevant statistical data.

On November 24, 1941, a meeting concerned with priorities and export licenses for gold-mining machinery was called by A. A. Berle, Jr., Assistant Secretary of State. It was attended by representatives of the Treasury Department, the Federal Reserve Board and OPM, as well as the State Department. The consensus of opinion at such meeting was reported that:

> * * * preference ratings for gold mining equipment should be granted only after careful scrutiny with a view to maintaining, at the very most, existing rates of output and to refusing equipment for any expansion of output; subject to exceptions in cases where extraordinary hardship might result—as in the case of isolated communities having no alternative forms of employment—preference ratings for exports of gold mining equipment should be made to depend on a showing that the maintenance of the present level of gold production is necessary (a) to supply dollars for an otherwise deficit dollar position in the balance of payments of the country (or in the case or South Africa, for the dollar position of the sterling area), or (b) for special political reasons; whenever the current gold mining is maintained mainly to prevent a dollar deficit and especially where the labor could be used for more direct contribution to defense production, this Government should endeavor to find other means of [fol. 251] meeting this deficit such as lend-lease activities, purchase of gold "in the ground" for postwar

delivery, and the like. To give effect to the foregoing conclusions, no general priority ratings for gold mining equipment, including repair and replacement parts, should be granted but individual consideration should be given to each application on its merits unless adequate periodic compliance investigations can be made (particularly in Canada) as is done in the United States.

On December 2, 1941, SPAB, having before it the report of the November 24 meeting quoted above, directed Donald Nelson to obtain the official opinions of the State Department, Treasury Department, Federal Reserve Board and the Board of Economic Warfare on "supplying gold mining equipment abroad and on other possibilities of providing dollars to offset probable dollar deficit positions."

9. Donald Nelson complied with the directions of SPAB, and secured the official comments of these departments and agencies. The Secretary of the Treasury stated in part as follows:

> * * * Domestic gold production in wartime serves no military purpose, but does consume labor and materials that have usefulness in military production, particularly in the mining of scarce metals. We do not believe, therefore, that domestic gold mines should receive any preference rating for machinery unless the gold is produced with a substantial amount of much needed by-product metals or ores, or unless it is produced in a mine so peculiarly situated that serious and sustained unemployment of men not eligible for defense jobs would result from its shutdown.

The Secretary of State confined his reply to the subject of supplying gold-mining equipment abroad, and said in part:

> It is the Department's opinion that preference ratings for gold mining equipment should be granted only after careful scrutiny with a view to maintaining, at the very most, existing rates of output, and to refusing equipment for any expansion of output. * * *

The Chairman of the Board of Governors of the Federal Reserve System stated in part that:

> Priority measures tending to reduce new gold production under present circumstances are, in my judgment, highly desirable. The United States stock of [fol. 252] gold is already redundant. Its dollar value is more than five times as great as in the 1920's. From the standpoint of credit control in this country further additions to gold stock are not only unnecessary; they are harmful. By swelling excess bank reserves, they add to inflationary dangers and make the maintenance of a stable and productive economy more difficult. From the standpoint of war output of the allied countries, the materials, machinery, and labor devoted to gold production are largely wasted.
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> Since new gold output is largely unnecessary and diverts materials, machinery, and labor from production of war supplies, I strongly favor curtailing it so far as is practicable through the priorities system. I would suggest that no machinery be allowed to foreign mines for the expansion of gold output; and that machinery and supplies for the maintenance and repair of gold mines should be restricted to the minimum consonant with the principles adopted by the Supply Priorities and Allocation Board for other nondefense industries.

Milo Perkins, Executive Director of the Board of Economic Warfare, after discussing the question of supplying mining equipment to foreign gold mines, proceeded to outline a policy with an ultimate objective of eliminating the domestic gold-mining industry in the postwar era. In this connection he stated:

> The system of priorities on gold mining equipment was devised as part of the general effort to economize on scarce facilities and thereby to maximize the joint war effort of the nations fighting for the democratic cause. But in dealing solely with the question of gold mining equipment there is a danger of losing an opportunity both to solve the longer-term aspects of the

gold problem and to maximize the joint war effort. Such an opportunity exists now. The United States can and should use the power that it derives from being practically the sole buyer of the yellow metal in order to initiate a program of a gradual reduction in gold production. Such a program would contribute to a maximization of the joint war effort and, at the same time, would facilitate a solution of the postwar gold problem.

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It is essential therefore, that a reduction in gold mining should be envisaged for the postwar period. It is, however, obviously impossible to effect a cessation of gold production overnight because of the enor- [fol. 253] mous dislocation it would involve in the national economies of the more important gold producing countries. The purchase of gold in the ground leaves the problem unsolved, and merely adds to the difficulties of the immediate postwar period. A program of gradual reduction and final cessation of all new gold production spread over a period of fifte-n to twenty years is the only satisfactory solution to the general gold problem. This is the moment to institute such a program. Further, the United States possesses the necessary powers to initiate such a program. Being practically the only buyer of the yellow metal, the United States is in a position to demand that its future purchases will be on an increasingly restricted scale. * * *

On December 23, 1941, Donald Nelson sent his summary of the foregoing letters to SPAB in the following terms:

As directed by the Board at its December 2d meeting I have obtained the official opinions of the State Department, Treasury Department, Federal Reserve Board and Board of Economic Warfare on supplying gold-mining equipment abroad and on other possibilities of providing dollars to offset probable dollar deficit psitions.

The following is a summary of these opinions:

1. In a war economy labor, materials, and machinery applied to gold production are largely wasted.

Moreover, dollars made available through Lend-Lease, R. F. C. and stabilization loans, etc., have made new gold unnecessary as a provider of dollar exchange. Therefore:

(a) Nothing should be allowed for expansion, although minimum amounts for maintenance and repair should to some extent be provided.

(b) Only high-grade ores or those yielding high percentages of other minerals useful in the war effort should be mined.

(c) Labor, materials and machinery should be converted to more vital production except where extreme political or economic hardship would result.

2. In-the-ground purchase of gold is neither necessary nor desirable. It is an experiment which raises serious complications and not only fails to solve the present problem but also presents a new one for the postwar period.

3. Agreements should be entered into with gold producing countries, to the end that they do not divert labor, materials and machinery from more essential uses to gold production.

[fol. 254] On the same day SPAB adopted the spirit of these recommendations. It stated:

It was the judgment of the Board that in view of the military program only limited priorities and export licenses should be granted to the gold mining industry,

and it was agreed

that in granting priorities and export licenses for gold mining machinery, materials should not be allowed for expansion of production although minimum amounts for maintenance and repair may be provided.

10. On December 18, 1941, OPM issued a new General Repair Order, Preference Rating Order P-100, to replace Order P-22, which was revoked on the same day. The stated purpose of Order P-100 was to effectuate the policy of SPAB in maintaining governmental, charitable and in-

dustrial property located in the United States, its territories and possessions, upon an adequate operating basis, without expansion or improvement of facilities except where duly authorized or approved. Industries coming within the terms of Order P-100 were entitled to an A-10 Preference Rating (the lowest rating used) for their maintenance, repair and operating supplies.

P-100 represented a continuation of SPAB's policy of granting some preference rating for maintenance, repair and operating supplies to industries in general without regard to essentiality in the war program, and this policy prevailed throughout the war. This policy was designed to avoid unnecessary dislocations in the civilian economy. The percentages of critical materials such as steel, aluminum and copper used in all industries for maintenance, repair and operating supplies ranged from one-half of one percent to three percent of the total amounts available for the entire economy.

11. On December 31, 1941, OPM issued Preference Rating Order P-56-a to supersede P-23, which had expired on that date. Order P-56-a continued to authorize the manufacturers of mining machinery to use a preference rating of A-3 to acquire material entering into the production of machinery and equipment ordinarily used in the mining industry, including the gold-mining industry.

[fol. 255] 12. By a letter dated February 18, 1942, John P. Gregg, Assistant Chief of the Bureau of Priorities, WPB, proposed to C. H. Matthiessen, Jr., Chief of that Bureau, that gold and silver mines be closed forthwith in order to conserve materials. The letter stated in pertinent part:

> 4. The Committee is of the view that the restrictions with respect to materials to be used in the mining of gold and silver are not sufficiently restrictive and that a limitation order should be drafted forthwith to stop production of gold and silver in the United States, appropriate consideration being given to the continuance of such production in Canada, Mexico, South Africa, and other areas now permitted to obtain materials and equipment from this country under Lend-Lease or direct purchase.

13. Said proposal of February 18, 1942, to close the gold and silver mines as a means of conserving materials was rejected. Instead, on March 2, 1942, WPB amended Preference Rating Order P-56 so as to deprive gold and silver mines of all priority ratings formerly available to them under that order. This was accomplished by revoking the so-called mine serial numbers of all mines the production of which in dollar value consisted of more than 30 percent of gold and/or silver.

14. Although the amended Order P-56 required the revocation of the mine serial numbers held by gold mines coming within the foregoing 30 percent exclusion clause, in actual practice WPB restored such numbers to mines whose production included significant quantities of materials important to national defense. However, over 200 gold mines, including those of the plaintiffs herein, never again received serial numbers under Order P-56.

15. The amended Order P-56 was the subject of vigorous objections in the mining districts, and public meetings were held in Reno, Nevada, and Denver, Colorado, to protest the amendment. These meetings were attended by the Governors of five states, several United States Senators and Representatives, mine operators, Wilbur Nelson as Chief of the Mining Branch of WPB, and other interested parties.

16. In addition to the aforementioned meetings the 30 percent exclusion clause was the subject of extensive hearings before a special Senate Committee (U.S. Senate, 74 [fol. 256] Cong., 2d Sess., Subcommittee of the Special Committee on the Investigation of Silver, *Hearings*, May 5, 6, 8, and 28, 1942).

17. WPB on May 15, 1942, amended Order P-56 so as to eliminate the 30 percent exclusion clause. However, the amendment effected no practical change, since no person could use the ratings assigned by Order P-56 unless a serial number was granted by WPB. After March 2, 1942, serial numbers were never restored to gold and silver mines producing no substantial quantities of critical materials.

The gold mines excluded by the above amendments to Order P-56 were reduced to the same priority position as that of the least essential industries in the United States, i.e., they were entitled only to an A-10 preference rating for

the acquisition of maintenance, repair and operating supplies under Order P-100. They were excluded from obtaining any critical materials which might have been needed by any of the nonferrous metal mines or by any other industry deemed by WPB to be more essential. While it was possible for gold mines excluded from any benefits under P-56 to apply for equipment under the general repair order P-100, the demand for desired equipment was so far above available supply that the possibility of the gold mines obtaining any was remote. Thus, by March 2, 1942, a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment.

18. By July of 1942, the Labor Division of the War Production Board, and officials of the War Department and the War Manpower Commission, were all becoming concerned with the fact that the production of nonferrous metals in the United States, particularly copper, would not be adequate to meet current and anticipated demands. Investigation revealed that this condition was due not only to the increased wartime demands, but to an alarming shortage of miners in the nonferrous metal mines. The agencies concerned were agreed that the success of the country's armament program was basically dependent on increased production of basic raw materials such as copper and other nonferrous metals.

The reasons for the poor production of nonferrous metals were found to be (1) the out-migration of workers in the nonferrous mines to other war industries offering [fol. 257] higher wages and better working conditions, (2) drafting of the workers for the armed services by Selective Service, (3) excessive labor turnover within the industry, (4) low morale of the workers, (5) the short workweek in the mines, and (6) the lack of an organized and effective program of recruitment of workers for this industry.

Labor scouts employed by the aircraft and shipbuilding plants were working through the mountain states offering high wages and were inducing men to leave the mines. Armed services construction projects in the vicinity of the

mines offered higher wages and were recruiting miners for work on such projects.

19. An informal committee organized by officials of the War Department to study the copper shortage situation submitted a report on July 8, 1942, recommending a program for dealing with the problem. For the War Manpower Commission it recommended a program for the recruitment of mine labor, involving among other things the expansion of the offices and personnel of the United States Employment Service in the mining areas, and including "a program for the orderly transfer of workers in gold mines and other nonessential industries to the nonferrous mines," as well as assistance in securing Selective Service deferments for mining occupations. For the WPB, the report recommended a Labor-Management Production Drive Committee to secure increased production through improved morale and greater efficiency; the report then recommended that:

> 2. Production of gold, with the exception of required amounts of essential silicious gold ores, should be curtailed by an order of the War Production Board to free labor which is urgently needed in the nonferrous mines which are essential to the war effort. * * * *

For the War Labor Board the recommendation was that in the cases then pending before it, involving about half of the copper-mining industry, it give careful consideration to the wage differential problem. The recommendations for the Army and Navy were the establishment of morale building programs for the miners and the exertion of influence on their contractors to prevent further recruitment from the nonferrous mines.

[fol. 258] 20. The Labor Production Division [4] of WPB was also studying ways to relieve the shortage of underground workers in the nonferrous metal mining industry. On July 4, 1942, the Acting Chief of the Priorities Branch of the Labor Production Division sent a memorandum to the Director of Operations of the War Manpower Com-

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[4] See footnote 3, supra, for the functions and duties of this division.

mission who was also in charge of the Labor Supply[5] functions of WMC at that time. The memorandum pointed out the acute labor shortage in the nonferrous metal mining industry and observed that the 15 largest producers of gold in seven Western States had some 6,700 employees; that the gold mines of these producers were sometimes located in the vicinity of nonferrous metal mines and that in some cases one company would own both a gold mine and a nonferrous metal mine in an area. The statistics upon which the above figures were based were as of 1941, and were later found not to represent the situation in the summer of 1942, because the gold mines, as well as the nonferrous metal mines, had been losing workers to the war industries and the draft. The 6,700 figure employed in the memorandum represented employees of all kinds, including clerical employees, and no figure was given of the number of hardrock miners which were the type of employee needed in the nonferrous metal mines. In speaking of the "15 largest producers of gold in seven Western States", the memorandum did not point out that several of such gold producers also produced nonferrous metals in substantial quantities and therefore would not be classified as gold mines for the purpose of any anticipated action.

The above memorandum described the large turnover in employment in the copper mines and the steady decline in over-all employment; it noted that most of the men leaving the copper mines were going into war plants or were being drafted into the armed services, and that the companies were requesting permission to hire Japanese and Mexican labor in their operations. The memorandum concluded as follows:

> Steps should be taken to remedy the critical labor situation in nonferrous metal mining, including arrangements for the transfer of miners from gold and [fol. 259] silver mining to copper, lead, zinc, tungsten, chrome, and molybdenum mining. This can be done through curtailment of gold and silver production, but it would be necessary to make sure that the workers

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[5] When the War Manpower Commission was organized under Executive Order 9139, April 18, 1942, WPB's labor supply functions were transferred to WMC.

released went into nonferrous metal mining and did not go into war plants in the vicinity or on the West Coast. It has been customary for metal miners in the mountain states to move considerable distances with the opening and closing of mines and ordinary turnover.

21. On July 9, 1942, the General Counsel of the War Manpower Commission sent to a member of his staff a memorandum concerning the possibility of transferring gold miners to work in the nonferrous metal mines. The memorandum stated:

> At a meeting of the War Manpower Commission yesterday, the following problem was referred to this office.
>
> General McSherry [Director of Operations of WMC] wishes to secure the release of men employed in the gold mining industry for transfer to the copper mining industry. Concededly the War Manpower Commission cannot accomplish this result directly. May the result be accomplished (1) by the War Production Board refusing to the gold mine operators critical materials used in their operations thus compelling the closing of the mines; (2) may the Chairman of the War Manpower Commission direct the War Production Board to take that action?
>
> The specific situation suggested is simply illustrative of the general problem in this field.

22. The proposal for closing the gold mines in order to divert their miners to nonferrous metal mines was gaining momentum in August 1942, and accordingly, Wilbur Nelson, Chief of the Mining Branch, WPB, who was not in sympathy with the method of the proposed plan, expressed opposition to it on August 14, 1942, in a memorandum to H. O. King, Chief of the Copper Branch, WPB, reading in pertinent part as follows:

> The Mining Branch views with serious alarm the dissipating of the only appreciable reserve of highly competent mining labor through the hasty closing of the gold mines in the United States.

The gold and silver miners constitute the last reservoir of the skilled mining labor. We must, therefore, [fol. 260] be certain that that labor is directed toward the most critical points before permitting it to be disbursed. [Sic.]

The present critical situation developed when copper, lead, zinc, mercury and other miners left their jobs and went to the West Coast on shipbuilding and on aircraft jobs, and into the mountain areas in new war industries work.

If we close down the gold mines while these same opportunities are available for work at substantially high rates of pay in other war industries, the miners will not move to a copper, lead, or zinc mine but will do just as their predecessors have done, move on to other more fruitful jobs on the coast.

Logic dictates this, for when a copper miner at Butte is willing to leave his home and go to the coast, I am sure that a gold miner, living in the excellent living conditions at Lead, is not going to leave his family and stop at Butte if he could go to the west coast.

. . . . . .

23. Late in August 1942, Guy N. Bjorge, General Manager of plaintiff Homestake Mining Company, the largest gold-mining company in the United States, learned that consideration was being given by the Government to a proposal to close domestic gold mines in order to divert their miners to the nonferrous metal mines. He therefore went to Washington and conferred with several officials of WPB, including Donald Nelson, Chairman, and Wilbur Nelson, Chief of the Mining Branch, as well as Brigadier General McSherry, Director of Operations of the War Manpower Commission, and Lieutenant General Somervell, commanding the Services of Supply, War Department. In the course of these conferences Mr. Bjorge furnished figures as to the small number of men who might be obtained for work in the copper mines by such order. He pointed out that many men had already left the Homestake Mine in 1942 for the same reasons that men had left the copper mines, mainly to accept employment at West Coast aircraft factories and

shipyards. Mr. Bjorge also pointed out that the miners remaining at Homestake were an older, more stable class of men, a large percentage of whom were home owners, and asserted his belief that it was improbable that they would leave their homes for the poor housing facilities and undesirable working conditions at the nonferrous metal mines. [fol. 261] 24. On August 26, 1942, United States Senator Pat McCarrran of Nevada wrote a letter to Donald Nelson, Chairman of WPB, setting forth various reasons why he believed the proposed closing of the gold mines would not accomplish its purpose of obtaining any considerable number of miners for the nonferrous metal mines. Senator McCarran wrote, *inter alia:*

* * * * * * * *

> In the first place, the transfer of necessary labor from closed gold and silver mines to mines producing copper, lead, zinc, etc., would be negligible, due to the fact that very few operations exist today where only gold and silver are mined, and in these districts (mainly, the Homestake Mining activity in South Dakota and the Mother Lode Mining district in California), the number of men who could be so transferred is small. Many of the usual workers have joined the armed forces; many are familiar only with the routines of this type of mining and cannot be successfully transplanted. Thus little good would result and great hardships would be inflicted upon affected families and communities.
>
> Secondly, there is no rule or procedure by which such workers could be legally forced to transfer to other mines. The labor that would be denied employment by reason of the shutting down of the mines producing gold and silver would most likely go to the places where they would receive higher wages than are paid in mines.

* * * * * * *

On September 1, 1942, Donald Nelson replied to Senator McCarran in pertinent part as follows:

* * * * * * *

A serious study has been and is being made of sources from which mine labor could be made available to the nonferrous metal mines. Naturally, our thoughts have included gold mines, but we have not at this time reached any conclusion thereon.

We quite agree that no legal power exists today by which workers may be forced to transfer to other mines. This accentuates the mine labor problem which faces us today.

Because of your experience in mining matters, and the factual evidence you secured in your recent hearings in the West, I am asking our people responsible for mine production to carefully consider your suggestions.

* * * * * * *

[fol. 262] 25. The minutes of the War Production Board for the meeting held September 1, 1942, provide in part as follows:

1. Labor Supply for Copper, Lead, and Zinc Industries

The Chairman stated that since the labor supply in the copper industry had reached a critical stage and already had resulted in a decline in the production of copper, he had asked the Labor Production Division and the Copper Branch to report to the Board on the Manpower problem in the nonferrous metals industries (Doc. 135).

Mr. King reported that 6,000 miners have been lost by the copper, lead, and zinc mines to other industries during the past several months and that the shortage of labor will become increasingly acute next year when new facilities will require 2,000 additional miners. Preliminary reports indicate a shortage of 2,100 workers in smelters and refineries. Mr. King pointed out that the loss of 5 or 6 thousand workers at the copper mines might so influence the subsequent fabricating processes that 100 thousand workers in war plants at the end product state would be affected. Although monthly production of copper increased steadily from early 1941 to a peak of 95,000 tons in May and June 1942, output in July dropped 5,000 tons

to 90,000. The copper outlook is even more critical than shown by the drop in production, since at many mines labor is being transferred from developmental and stripping operations, necessary to provide for future production, to current ore extraction. The position of the smelters and refineries is exemplified by a smelter at Tacoma where output of 2,000 tons of copper per month is being lost for lack of only 300 unskilled common laborers. Mr. King emphasized that production at the mines, smelters and refineries will continue to fall unless the exodus of labor is checked and the supply of workers augmented. Output of lead and zinc likewise declined in July, and the labor-production situation in these metals is similar to that in the copper industry.

Mr. Lund pointed out that there is general agreement that the higher wages paid to workers in competing occupations in other industries are the prime factor causing the out-migration of labor from the mines and mills. Average weekly earnings in April of 37.28 dollars for mine workers and 35.18 dollars for smelting and refining workers compared with an average of 53.30 dollars in shipbuilding and 45.94 dollars in aircraft, the principal competing industries. Corollary factors in the out-migration of workers have been [fol. 263] rumors of ceilings on wages and proposals to confine workers to their present jobs, the hazards of mining, and inadequate housing and transporation facilities.

Mr. Lund pointed out that the decision of the War Labor Board, expected within a month on 30 or 40 cases involving higher wages for copper miners, will have an extremely important bearing on the out-migration problem.

Mr. King reported that following a resolution of the War Production Board (See WPB Minutes, March 3, 1942, Item 7), labor-management committees were established in the metal mining areas and the importance of having mine workers stay at their jobs was publicized. On June 13, 1942 the Chairman of the War Production Board formally launched the War Production Drive in the nonferrous metals industries

by a radio address to the miners at Butte, Montana.

As further steps in halting out-migration, the Inter-Departmental Committee on Nonferrous Metals was established on August 11 and various letters and literature have been prepared for distribution to mine operators and labor unions; an order has been prepared to prohibit the use of materials in nonessential gold mines, which may free about 8,000 workers; plans to prevent employment of miners on Army and Navy construction projects are being considered; and training programs are being introduced into mining properties. To increase the efficiency of present working forces, mine equipment is being accorded high priority ratings, and labor is being trained and upgraded by improving working and living conditions, and by lowering age and other restrictions on hiring. Mr. Lund observed that in many cases labor standards have shown no change from those existing in normal times when a surplus of labor is available. He suggested that the pooled employment interviews which the War Manpower Commission is now conducting in some parts of the country should be pursued with increasing vigor.

Mr. Lubin inquired if the order to prohibit the use of materials in nonessential gold mines had actually been issued and, if not, what steps are being taken toward its issuance. Mr. King replied that a first problem is to define a nonessential gold mine since gold is frequently found in association with other metals and it is necessary to avoid denying materials to mines that produce important quantities of a critical metals jointly with gold. It is hoped that an appropriate definition can be developed very shortly and an order issued promptly thereafter.

* * * * * * *

[fol. 264] The Chairman remarked that since other uses have been cut to a minimum, the major use of copper is in munitions, especially small arms ammunition, and any reduction in the copper supply will be reflected in a reduced output of ammunition. He expressed the belief that the War Production Board

must take an active and leading role in assuring an adequate supply of copper and Mr. Lubin added the suggestion that the concern of the War Production Board in this problem is sufficiently great to establish its own employment offices, if this is necessary to obtain additional copper miners.

After further discussion it was agreed that:

> Inadequate production of copper, lead, and zinc will result inevitably in reduced output of munitions, including small arms ammunition needed by the fighting forces. The output of these metals is now being reduced by a shortage of manpower in mines, smelters and refineries.
>
> The War Production Board is charged with the primary responsibility for providing the maximum possible production of critical metals, but the solution of the problem of assuring a sufficient supply of labor involves the responsibilities of other agencies of the Government as well. The coordination of the efforts and activities of other agencies of the Government with those of the War Production Board is needed, therefore, to ensure an adequate supply of critical metals.
>
> The War Production Board urges all agencies involved to promote and support such actions as may be necessary to provide to nonferrous mines, smelters, and refineries a supply of labor adequate for the maximum possible output of such metals. It is especially important that the facilities of the United States Employment Service be expanded and strengthened to meet this particular need.

* * * * * * * *

The Chairman referred to above was Mr. Donald Nelson, Chairman of the War Production Board. The Mr. King referred to was Mr. H. O. King, Chief of the Copper Branch, Industry Operations, WPB. The Mr. Lund referred to was Mr. Wendell Lund, Director of the Labor Production Division, WPB. The Mr. Lubin referred to was Mr. Isadore Lubin, acting for Mr. Harry L. Hopkins, Special Assistant to the President.

[fol. 265] 26. On September 4, 1942, Mr. A. I. Henderson,

Deputy Director General for Industry Operations, WPB, directed that an order be drafted by the Miscellaneous Minerals Branch which would curtail the output of gold and which would not be related to Preference Rating Order P-56.

27. On September 9, 1942, Mr. R. J. Lund, Chief of the Misellaneous Minerals Branch, sent the following memorandum to Mr. A. I. Henderson:

> At a meeting held in your office on September 4, attended by Messrs. Dodge and Scribner of your staff, Mr. Parks of the Miscellaneous Minerals Branch, and Mr. Stow of the Mining Branch, you issued instructions that an order be drawn up either by the Miscellaneous Minerals Branch or the Mining Branch which would curtail the output of gold and which would not be connected with Order P-56. You indicated that this Branch should prepare the order but that the order could be administered by this Branch or the Mining Branch as later determined.
>
> It was understood that the purpose of the order was to make mining labor now producing gold available to copper and other strategic nonferrous metal mines. This end can be attained by WPB only through its authority to control materials.
>
> Attached is copy of the order[6] for your consideration. This order has not been circulated, except in discussions with the Mining Branch.
>
> The order is designed to close all mines producing gold to the extent of 50 percent or more of the value of the total output. In considering the order the following matters are pertinent:
>
> (1) Number of mines affected
>
> Based on 1940 production figures obtained from the Bureau of Mines, the latest they were able to supply, about 220 lode mines will be affected by the order. This figure is not exact, because production in the 1941 or 1942 base period specified in the order is not strictly comparable with the 1940 picture. Geographic distribution of these lode gold mines

[6] The copy of the order is not in evidence.

is as follows: California, 58; Colorado, 32; Montana, 30; Nevada, 27; Arizona, 18; Alaska, 12; Idaho, 12; Utah, 8; South Dakota, 6; with the remainder distributed among five other states.

Detailed data on placer operations affected by the order are not presently available, but the Bureau [fol. 266] of Mines reported that in 1940 a total of 3,107 placer mines produced gold and silver in the United tSates, and 1,069 in Alaska. Undoubtedly, sizable numbers of these produced such small quantities that they would be exempted by the order.

The Bureau of Mines reported that in 1940, there were 49 connected-bucket floating gold dredges operating in Alaska, 46 in California, 12 in Idaho, 7 in Montana, 6 in Oregon, 1 in Colorado, and 1 in Nevada. In addition there were large numbers of mechanized placer operations using drag line and power-shovel excavators, but no separate figures on these operations are available.

(2) Labor involved

Based on 1941 data, latest available from the Bureau of Mines, approximately 12,400 employees in lode gold mines will be thrown out of work by the order. Incomplete data indicate that about 70 percent of this labor is employed underground. Geographic distribution of this total labor was as follows: California, 3,394; South Dakota, 2,123; Colorado, 1,689; Alaska, 1,251; Arizona, 911; Montana, 602; Nevada, 601; Idaho, 590; Utah, 484; with the remainder distributed in a number of Western and Eastern states.

No detailed data are available showing number of employees in placer operations, except that the number would probably amount to at least several thousand in the United States and perhaps two thousand in Alaska.

(3) Estimated recapture of employees affected

Assurances were given by General McSheery at a meeting of the Interdepartmental Committee on Non-Ferrous Metals, September 8, that the U. S. Employment Service had adequate staff available to go immediately into the several hundred mining

camps which might be affected by the gold curtailment order and to recruit labor for transfer to copper mines and other nonferrous metal mines in dire need of such labor. At a previous meeting of this Committee, an estimate was made that about 25 percent of the mine labor might be recaptured for work in other mines.

(4) Other metals lost

Production of other metals in 1940 by mines affected is as follows: copper, 2,751,000 pounds; zinc, 92,000 pounds; lead, 12,047,000 pounds; silver, 4,947,000 ounces. Other metals such as antimony, [fol. 267] arsenic, tungsten, molybdenum and manganese are also produced in minor amounts by some of these mines.

(5) Fluxing ore problem

Some gold mines affected by the order produce large tonnages of siliceous ore required by smelters working primarily on other nonferrous metals, such as copper, lead and zinc. This flux is necessary to their operation, and gold values in the flux naturally make operations more economical than by adding barren siliceous material which may, or may not, be available at the smelter.

(6) Critical materials saved

Sizable amounts of critical materials will be saved in closing these gold mines. Estimates as to total current consumption of such materials are not available but the general order of magnitude of such consumption is indicated by the fact that in 1939 gold mines in the United States (excluding Alaska) spent about $17,000,000 on supplies and materials, $2,000,000 for fuel and about $5,000,000 for purchased electric energy.

(7) Effect on economy of states and communities

Shutting down the operations at mines affected by the order will result in loss of sizable tax revenues, in respect to state tax revenues alone, in some of the states involved. There has been insufficient time to obtain complete data on this point, but two examples are cited as follows: (a) In South Dakota, total state taxes collected in fiscal year 1941, exclu-

sive of motor fuel taxes, amounted to $11,700,000; taxes paid to the state by mines in South Dakota affected by this order amounted to $1,000,000, or about 9 percent of the total; (b) in Nevada total taxes collected in fiscal year 1941, excluding motor fuel taxes, amounted to $3,300,000, of which about $65,000, or 2 percent, was collected from mines affected by this order.

Losses in county and municipal taxes will be felt much more severely by the communities in the vicinity of the mines. In this respect, shutting down mining operations is not comparable with shutting down other industrial operations in communities where enterprise is diversified; in the West it is generally true that the mine is the sole major source of income for local communities. For example, it has been reported that the Homestake Mining Company pays 65 percent of the local community taxes [fol. 268] and 50 percent of the county taxes; that the wage earners and those servicing them pay the balance largely from the $4,500,000 in annual wages paid by the company. At least 19,000 people, the population of the county, are directly or indirectly dependent upon its operation.

For reasons stated in the last paragraph, hardships faced by old established mine employees will be severe. There is virtually no possibility of converting the facilities at the mines to war work.

(8) Probable loss of deep mining operations and dredging equipment

Although the order permits gold mining companies to maintain buildings, machinery and equipment in repair, and to keep access and development workings in a safe and accessible condition, it is probable that most of the deep mines situated in heavy, caving ground will be unable to take full advantage of these provisions in the order. As a result it is probable that many of these old, deep mines may never be reopened.

Costly dredging equipment forced to lie idle will be subject to more rapid depreciation than if it were maintained in operation.

The suggestion was made at a meeting this morning that the order should be tightened further by lowering the exemption from the 4,000-ton figure to 1,500 tons annually, or a monthly rate of 100 tons. Such a change would result in a large increase in the number of mines affected by the order, in the total labor involved, and in items 3 to 6, inclusive, discussed above. Tabulations covering these smaller operations are just now being made, so details in respect to these items cannot be presented herewith. The order will be modified to the lower exemption figure before clearance, if these studies indicate a considerable amount of labor involved.

A factor which would tend to lower the number of mines affected, labor involved and other items discussed above, is the fact that many of the gold mines affected by the order have already been forced to curtail or close operations through difficulties encountered in obtaining material and equipment, or through loss of labor to other industries. In one known instance, a recent fire destroyed the mill of a sizable mine so this operation is completely shut down and no labor available for recruitment.

There is, of course, an appeal provision in the order, through which, again, the number of mines, number of employees, other critical materials and fluxing ores af- [fol. 269] fected will be lowered from the estimates cited in items 1 to 5 above.

Concluding Statement

Administration of an order such as the above, entirely divorced from provisions of Order P-56, necessarily involves duplication of work, both here in Washington and in the companies affected by the order. Those gold mines producing needed metals and fluxing ores will have to submit an appeal under the provisions of the order before they can be exempt. There is no practicable way of defining, in an order, such mines that should be exempted. This appeal procedure duplicates, in large measure, the appeals that were already made under the administration of P-56, and it is likely that the repercussions throughout the min-

ing industry of such duplication of effort will be unwholesome.

Without using the mine serial numbers already established as a means for determining essential mining operations, there appears to be no alternative other than to use a percentage value basis in defining gold mines, and to provide for continued operation of essential ones through an appeal procedure.

Other pertinent considerations are presented in the attached memorandum to you from Dr. Wilbur Nelson, and I suggest that they be given careful attention.

The adverse repercussions mentioned above might be overcome in some measure by including an additional provision in the accompanying order which would automatically exempt those gold mines now having serial numbers until they are notified by the Director General for Operations that they are to cease operation. Each of these cases, in the meantime, should be fully reviewed and judged in the light of the more acute situation now prevailing.

I shall await your written instructions before proceeding further.

28. On September 11, 1942, Mr. J. M. Scribner, an assistant to Mr. A. I. Henderson, sent the following memorandum to Donald Nelson:

In accordance with instructions issued by Mr. A. I. Henderson, you will find attached a copy of the proposed curtailment order on gold. This order is in process of circulation in accordance with the procedure for order clearance and should be presented to the Clearance Committee for action about September 21.

Mr. Henderson requested that the order be prepared in a manner completely divorced from Order P-56. [fol. 270] However, in his absence, after a consultation with Mr. H. W. Dodge and Dr. Wilbur A. Nelson, and a meeting with Messrs. Fred M. Eaton, Richard Lester, and myself, it was determined to be most practical that the order not be divorced from P-56.

The effect of this order will be to close down all gold mines not having a mine serial number, within 30 days from issuance. It is the intention of the Mining Branch

to review all mine serial numbers assigned to mines producing 50% or more gold in dollar value and to withdraw such serial numbers unless the balance of the production represents critical materials urgently needed for the war effort in amounts sufficient to justify continuance of the operation.

In addition to the draft of the proposed order, there was also included an explanation of its effect in the following terms:

> The Order requires that all mines producing gold, except those having a serial number under P-56, cease operation and development within 30 days after the date of issuance of the Order. The Order makes provision for the minimum maintenance and repair necessary to maintain the mines plant in condition and for the granting of preference ratings to accomplish this after application made to the Director General for Operations.
>
> All gold mines which produce needed quantities of copper, lead, zinc, and other minerals, or of silicious fluxes, already hold serial numbers under Order P-56. Therefore, the mines closed down by this proposed order would be only those which have, after examination by the Mining Branch, already been determined to be nonessential to the war effort.
>
> The result of closing these nonessential mines will be to conserve all the material which they have been using for operational and development purposes. Heretofore they have merely been denied the right to use the high preference ratings granted by Order P-56, but have been able not only to obtain certain material under P-100, but also to use their own inventories.

29. The effect of the proposed limitation order was further summarized in the following terms at about the same time:

> A draft of a limitation order on materials and supplies for gold mining is being circulated within the War production Board. The order provides for complete shutdown of nonessential mines in the United States with the following exceptions:

(1) Mines producing less than 1,200 tons of ore per year will be permitted to continue operations at [fol. 271] their rate of operation in 1941 or early 1942. Such mines are usually individual or partnership enterprises worked by men who are not likely to be employed by others.

(2) A limited amount of supplies and equipment will be made available for the purpose of keeping the mines accessible and safe. This is intended to avoid flooding or otherwise damaging mines which would be in a position to produce after the emergency has passed.

A nonessential mine is defined as a mining enterprise in which gold is produced, unless the operator holds a serial number for such enterprise issued under Preference Rating Order P-56, as Amended. Since producers of siliceous fluxing ores and of complex ores containing substantial amounts of critical metals as well as gold have already been granted serial numbers, the order will not affect the production of essential metals.

The basic purpose of this curtailment of gold mining is, of course, to free manpower for the mining of essential minerals, particularly nonferrous metals such as copper, zinc and lead. Because many of the gold mines are located much closer to other mines producing such strategic metals as mercury, molybdenum, tungsten, vanadium, chromium, manganese, etc., it is expected that workers will also be made available to these industries.

The War Manpower Commission through the Employment Service is now taking steps to insure orderly recruiting of these gold miners and to provide for a minimum of delay in reemployment as well as to provide transportation expenses. It is expected that this procedure will make possible the maximum diversion of labor to essential mining industries where their skills can be used to best advantage.

Beside diverting manpower to essential industries, this order, when in effect, will also conserve some materials and supplies used in gold mining, such as mercury, drill steel, etc.

30. The minutes of the Interdepartmental Committee on Non-Ferrous Metals for September 15, 1942, provide in part as follows:

* * * * * * *

Dr. M. Stow presented a report on the proposed order to curtail gold mining operations. He distributed a copy of the proposed order which, he said, had been brought up for consideration before the Clearance Committee.

[fol. 272] Dr. Stow explained that the persons responsible for drafting the order favored the method of curtailing gold mines by denying them serial numbers under P-56, rather than the type of blanket order which would shut down any gold mine whose gold ore production was above a stipulated proportion of its total production by dollar value. Under the former type of order the gold mines would be closed by being denied serial numbers under P-56, as a result of which they would be unable to obtain either supplies or equipment and would be prohibited from using their present supplies and equipment.

Mr. Harbison [Army representative] expressed some concern over the delay in issuing the gold order. He outlined the steps that various agencies had taken to meet the manpower shortage in nonferrous metal mines, and pointed out that the transfer of gold miners to essential mining was being held up by lack of a gold curtailment order. He pointed out that the U.S. Employment Service had been unable to obtained any recruits at Rapid City, South Dakota, because the gold Mines had not been closed down, although Anaconda Copper Mining Company had agreed to pay transportation costs. He made it clear that the War Department was impatient at the delay.

Mr. Lester of the War Manpower Commission asked that his organization be kept informed of what mines would be affected by the directive, in order that representatives of the Employment Service might be on the spot beforehand.

In this connection, since the primary purpose of

the order was to free manpower rather than to curtail materials, Mr. Lipkowitz suggested that an advisory committee be established with representatives from Labor Production Division and War Manpower Commission.

The meeting was attended by representatives of the various minerals branches, the Mining Branch, the Labor Production Division, and the Legal Division of the War Production Board, as well as representatives of the War Manpower Commission, the Office of Price Administration, and the War Department. Dr. Wilbur Nelson presided at the meeting. Dr. Stow was immediately subordinate to Dr. Nelson in the Mining Branch.

31. The draft of the proposed limitation order for the goldmining industry was submitted to Morris Creditor, Special Assistant to Donald Nelson. On September 15, 1942, he sent the following comments upon it to Donald Nelson:

[fol. 273] I have reviewed the proposed limitation order for the gold mining industry and I wish to raise certain points as to the soundness of such an order.

You will recall that we received a letter from Senator Gurney on August 31 in which he set forth the harmful effects that such an order would have on the economy of the State of South Dakota. In your reply you stated in effect that we were confronted with the manpower problem and something had to be done to overcome the losses of production which are being experienced in the mining of copper and other strategic materials through the shortage of experienced miners.

In the preamble of the limitation order no mention is made of manpower requirements. It simply states that the order is made necessary because of the shortage in the supply of critical materials which are used in the maintenance and operations of gold mines.

It would seem to me that if the order is based on the premise of critical materials alone, the question might be raised as to why such an order would not apply to materials being sent by this country to other gold mines in Canada, South America, and South Africa.

If the main purpose of this order is to divert miners from the gold mining industry to copper and other mining industries, it seems to me that there is no assurance that this order would accomplish the desired results. As Gustav Peck pointed out to you in his memorandum of September 9, it would be too bad to close the Homestake Mine, for instance, without the assurance that most of the miners will continue to practice their trades in the copper mines.

Would it not be more practical to accomplish the purposes by a freeze order similar to that which is now in effect for workers in the copper mines and the lumber industry. This may be more drastic but, on the other hand, may give better assurance that the miners in the gold mines would eventually find their way into the copper mines. Consideration might also be given to the idea of having the Army give indefinite furloughs to Service men who in the past were engaged in the mining of nonferrous materials.

Even aside from the possible dissipation of these skilled miners into other occupations, there is a question whether the closing of all the gold mines will release any relatively large number of workers. As I understand it, in the case of Homestake Mine the proposed order would affect only about 450 miners. This is the largest gold mine and has from a third to a half of all the miners to be released. The Alaska-Juneau miners, incidentally, will be stuck in Alaska. Where [fol. 274] are they expected to go?

I am sure that a great deal of thought has been given to the proposed limitation order on gold mining, but unless there is a high degree of assurance that the main purposewill be accomplished; namely, the diversion of these miners to the nonferrous mines, I feel it is important to weigh the adverse effects it might have in other directions.

Actually, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, the preamble should give the real reason; which is to divert this labor to more necessary industries.

32. On September 17, 1942, Mr. J. M. Scribner, assistant to Mr. A. I. Henderson, sent the following memorandum to Dr. Stow of the Mining Branch:

> Acting in accordance with instructions received from Mr. Donald Nelson's office this morning, please be advised that the gold order is to be cleared with all of the branches involved as promptly as possible, but it is not to be presented to the Clearance Committee for clearance until further word is received from Mr. Nelson's office.
>
> The order is to be held in the branch in such shape that it may be presented to the Clearance Committee for action immediately upon advice from Mr. Nelson's office that it is to go through.

33. On September 25, 1942, representatives of the branches of WPB concerned with mineral production met and discussed the proposed gold limitation order which, by that time, had been designated L-208. A resolution was passed urging that representatives of the gold-mining companies be called to Washington to discuss the proposed gold order so that:

> A. Where possible, existing organizations may be utilized for important mining operations, or prospective operations, necessary in the war effort.
>
> B. Labor, and especially experienced miners, can be made available to the mining industry, rather than lost to vital metal production.

34. On September 25, 1942, William L. Batt, Vice Chairman of WPB, sent a memorandum to A. I. Henderson, Deputy Director General for Industry Operations, WPB, which stated, *inter alia:*

> [fol. 275] I have told the Chairman that my judgment is that the limitation order on gold mining should be released at the appropriate time, and he has agreed. It was the consensus of opinion that we should wait until the War Labor Board had acted on certain wage matters, and I shall expect to be advised when the situation is clear on this point.
>
> It seems to me imperative that we very carefully word our press release so that the predominant objec-

tive, namely of releasing less essential labor for more essential requirements, shall be clearly evident. And I particularly direct the attention of those who have to do with this matter at this point.

* * * * * * *

35. On September 30, 1942, a conference was held in Mr. Batt's office. Senator McCarran of Nevada and Senator Gurney of South Dakota, as well as Congressman Englebright of California, and Congressman Case of South Dakota, attended. Samuel Hill of the War Manpower Commission and members of the WPB staff, including Wilbur Nelson and Samuel Lipkowitz, also attended. The Members of Congress spoke of the hardships that would be imposed on the inhabitants of the gold mining communities and of the detrimental effects on the morale of such people if the mines should be closed down by the issuance of a WPB order. The WPB representatives, except Wilbur Nelson, countered with statements emphasizing the need for labor in copper mines. Some discussion arose as to the number of gold mine employees who would be released by such a closing order.

36. On September 29, 1942, at the direction of W. L. Batt, Wilbur A. Nelson telephoned the following representatives of the gold mining industry and requested them to attend a meeting in Washington: Guy N. Bjorge, General Manager of Homestake Mining Company, Errol MacBoyle of Idaho Maryland Mines Corporation, Merrill Shoup of Golden Cycle Corporation, Carroll Searles of Newmount Mining Corporation, and Thomas McCormack of the Natomas Company. The meeting took place on October 1st and lasted for approximately five hours.

Those in attendance at the meeting included W. L. Batt, Wilbur A. Nelson, Allen Buchanan and Samuel Lipkowitz of WPB's Labor Division, Messrs. Hill, Harbison, Ayer, [fol. 276] Hayes, Heikes and Hatch, General Lucius Clay representing the War Department Services of Supply, General Frank J. McSherry of the War Manpower Commission, Senator Chan Gurney and Representative Francis Case of South Dakota, Representative Harry Englebright of California, and the five aforementioned representatives of the gold mining industry.

At the opening of the meeting Mr. Batt stated that he had brought the gold mine operators to Washington to tell them that a decision had been made to close the gold mines in order to transfer the released labor to the copper mines. In justification of such an order, Mr. Lipkowitz of WPB's Labor Division stated that there were between 10,000 and 12,000 men who were then employed in the gold mines. The gold mine owners immediately protested that the figures stated were completely inaccurate; that the gold mines had already lost their most active men who had either gone to the shipyards and aircraft plants on the West Coast or had been drafted into the Armed forces; that the miners remaining in the gold mines were settled residents of their communities and that it was doubtful that they would move away to work in the copper mines if the gold mines were closed.

In response to General McSherry's statement that the need for underground workers in the copper mines was urgent, Mr. Bjorge of Homestake pointed out that it was unreasonable to hope that gold miners would accept the jobs which the nonferrous metal miners were already leaving for more desirable employment, and that it was more likely to expect that miners forced to leave Homestake would go to the same type of more desirable jobs to which the copper miners were going. He also pointed out the great hardships which the closing of the Homestake mine would inflict upon the local communities and upon the State of South Dakota. Similar arguments against a closing order were advanced by the other gold mine operators and by the Senators and Representatives in attendance. Messrs. Hatch, Heikes and Ayer, all of WPB, questioned the possible effectiveness of the proposed order. General Clay, representing the Army, spoke strongly in support of a closing order. Late in the meeting, Wilbur A. Nelson undertook to determine how many miners and muckers would actually be released by a closing order.

[fol. 277] 37. On October 3, 1942, Wilbur Nelson furnished Mr. Batt with figures which he had obtained directly from the gold mine operators. He reported that while there were 3,270 workers employed by gold mining companies at that time, only 896 of them were hardrock miners and muckers. He further reported that approximately 300 of these men would be needed to maintain the buildings, machinery and

equipment in repair, and the access and development workings safe and accessible as provided for under the proposed order. The WPB representatives, except Wilbur Nelson, dredges in the United States were put on a stand-by basis, it would make available only about 600 miners and muckers for other mining enterprises "provided they [could] all be induced to go into other mines."

38. On October 1, 1942, Mr. Batt sent the following memorandum to Donald Nelson, Chairman of the WPB:

> The more I study the gold mining situation, the more uncertain I am as to the form which a restriction of operations should take. Complete closing without exceptions will produce very serious economic dislocations, and the total possible gain in men is a small figure. If the question comes up in your press conference, I would suggest that you refer to the need for miners and the lack of need for gold, and say that the matter is being studied from all angles.

39. On October 2, 1942, Under Secretary of War Robert P. Patterson sent Mr. Batt the following letter:

> I hope that prompt and effective action will be taken with regard to gold mining. I need not call your attention to the urgent need for more miners in the production of copper and other nonferrous metals as you know the situation as well as I do. The longer the delay in shutting down gold mining, the further off will be the relief of the copper shortage. The matter has hung fire for some time, and I trust that there will be no further delay.
>
> If it is thought best to have the order approved by the War Department and the Navy Department, I will be glad to give the War Department's aproval, and I believe that Mr. Forrestal will do the same for the Navy.

[fol. 278] On October 5, 1942, Under Secretary of War Patterson and Under Secretary of the Navy Forrestal sent the following memorandum to Donald Nelson:

> The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.

There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production. These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.

The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step and others will not give complete relief if nothing is done to transfer gold miners to copper mining.

The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided.

41. The matter was presented to the War Production Board at its meeting on October 6, 1942. The minutes of that meeting, insofar as here material, and which accurately reflect what transpired, read as follows:

Mr. Batt reported that the matter of shutting down United States gold mines had been receiving detailed attention. On conferring with Brigadier General McSherry of the War Manpower Commission and representatives of the gold mining companies, it had been found that at present the gold mining industry employs 3,270 workers; 750 are engaged in dredging and only 896 are hard-rock miners. Loss of labor to the Services and to war industries, and higher costs have already sharply curtailed operations of all domestic mines except Homestake. Homestake's labor force has dropped from a peak of slightly over 2,000 workers to 1,876, including lumbermen and machine shop workers. If Homestake were shut down except for standby operations, all but 500 of these workers could be released for work elsewhere. Lead and Deadwood, South Dakota, with aggregate populations of 16,000 are totally dependent on the mine's operation.

Although it has recently emphasized other forms of production, the State Department, because of broad in- [fol. 279] terminal considerations, heretofore has urged

that gold mining in South Africa and Honduras be maintained. The South African economy and the stability of the present government are largely dependent on gold mining. The basic industries of Honduras are the cultivation of bananas, of which exportation to the United States has been reduced to 20 percent of normal, and gold mining. Mr. Leon Henderson reported that Canadian gold mining is being curtailed very sharply. The Vice President pointed out that questions pertaining to production of gold abroad should appropriately be discussed with the Board of Economic Warfare.

Mr. Batt stated that after investigation he recommends that: (1) All nonessential domestic mining of gold other than that incident to the mining of critical metals be stopped as soon as possible and not later than within 60 days; and (2) gold mines not producing critical metals be allowed to continue standby maintenance operations lest it be impossible to reopen them at the close of the war.

General Somervell stated that because of the critical shortage of copper, which is drastically curtailing ammunition production, the Army has taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines and that, under these conditions, failure to stop gold production immediately would be inexcusable.

After further discussion it was agreed that:

> An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within 60 days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition.

42. Those in attendance at the October 6, 1942, meeting of WPB to consider the gold closing order included Donald M. Nelson, W. J. Batt, A. I. Henderson, Wilbur A. Nelson, Under-Secretary of War Robert P. Patterson, Lieutenant General Brehon B. Somervell, and Paul V. McNutt, Chairman of the War Manpower Commission. The meeting was also attended by numerous other persons who were there for the purpose of considering the so-called feasibility program. The gold curtailment order was discussed for some

fifteen to thirty minutes and it was decided to issue the gold closing order immediately.

43. On October 8, 1942, the WPB issued Limitation Order L-208 directing that operations at gold mines not holding [fol. 280] serial numbers under Order P-56 be discontinued. Order L-208 read as follows:

> The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and or export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.
>
> *Section 3093.1—Limitation Order L-208*
>
> (a) *Definitions.* For purposes of this order, "nonessential mine" means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P-56.
>
> (*b*) *Restrictions upon production.*
>
> (1) On and after the issuance date of this order, each operator of a nonessential mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.
>
> (2) In no event on or after 7 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any development work or any new operations in or about such mine.
>
> (3) In no event on or after 60 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below ground,

or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair, and its access and development workings safe and accessible.

(4) The provisions of this order shall not apply to any lode mine which produced 1200 tons or less of commercial ore in the year 1941, provided the rate of production of such mine, after the issuance date of this order, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1000 cubic yards of material in the year 1941, provided that the rate of treatment of such placer mine, after [fol. 281] the issuance date of this order, shall not exceed 100 cubic yards per month.

(5) Nothing contained in this order shall limit or prohibit the use or operation of the mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a preference rating of A-1-k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P-56.

(c) *Restrictions on application of preference ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the Director General for Operations issued after application made to the Mining Branch, War Production Board.

(d) *Assignment of preference ratings.* The Director General for Operations, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in subparagraph (b)(3) above.

(e) *Records.* All person affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore.

(f) *Reports.* All persons affected by this order shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

(g) *Audit and inspection.* All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(h) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to:

War Production Board
Mining Branch
Washington, D. C. Ref: L-208

(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or fur- [fol. 282] nishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(j) *Appeal.* Any person affected by this order who considers that compliance therewith would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting forth the pertinent facts and the reason he considers he is entitled to relief. The Director General for Operations may thereupon take such action as he deems appropriate.

(k) *Applicability of Priorities Regulations.* This order and all transactoins affected thereby are subject to all applicable provisions of the Priorities Regulations of the War Production Board, as amended from time to time.

(P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 1, 7 F. R. 561; E. O. 9024, 7 F. R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R. 2719; sec 2 (a), Pub.

Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

Issued this 8th day of October, 1942.

Ernest Kanzler
Director General for Operations

44. Coincident with the issuance of L-208, the War Manpower Commission issued a directive relating to the employment of workers previously employed as production or maintenance workers in gold mines. This directive was issued on October 7, 1942, by Paul V. McNutt, Chairman, and stated in material part as follows:

I. On and after the date hereof no employer shall hire in, or hire for work in, Alaska or any State west of the Mississippi River, any person who on or after October 7, 1942, has ceased to be employed as a production or maintenance worker in connection with gold mining except upon referral of such worker to such employer by the United States Employment Service.

II. No person who on or after October 7, 1942, has ceased to be employed as a production or maintenance worker in connection with gold mining shall be referred by the United States Employment Service to any work in Alaska or a State west of the Mississippi River other [fol. 283] than work in essential nonferrous metal mining, milling, smelting, and refining activities unless such referral would be in the best interests of the war effort or unless the denial of such referral would entail an undue hardship upon the individual concerned, as determined in accordance with regulations and standards prescribed by the Chairman of the War Manpower Commission.

45. Immediately following the issuance of Order L-208 on October 8, 1942, a statement was issued by Paul V. McNutt, Chairman, War Manpower Commission, and Donald Nelson, Chairman, WPB, appealing to all workers in gold mines to transfer to nonferrous metal mines and not to other war industries.

46. The dominant consideration by Chairman Donald Nelson of WPB in the issuance of Limitation Order L-208 was

the releasing of mine labor from the gold mines for employment in mines that were producing other metals, such as copper, which were in short supply and urgently needed in the war program.

47. The closing of the gold mines did very little to relieve the manpower shortage in the nonferrous metal mines because (1) a relatively small number of the type of worker needed in those mines, i. e., hardrock miners, were released (finding 37); (2) a number of these men were required to remain in the gold mines to keep them in safe condition; (3) the older and more settled experienced miners remained in their home communities doing what they could to make a living or remaining idle; (4) most of the younger hardrock miners released sought employment in the better paying war industries, construction projects, or were drafted in the armed services. Approximately 100 hardrock miners are known to have gone to work in the nonferrous metal mines and to have remained there for a year.

48. Although the preamble to the order stated that it was issued to conserve critical materials, supplies and equipment needed for defense and in short supply, the only part of the order itself which attempted to effect such a conservation was that part which prohibited the gold mines from acquiring such materials, and that acquisition had already been effectively curtailed and in large part cut off by existing priority orders (finding 17). That part of the order which [fol. 284] prohibited the use by the gold mines of the supplies, materials and equipment and facilities they owned and had on hand did nothing to assure that those materials etc., would be available for use by more essential industries of by the Government. The order left the owners free to dispose of them as they pleased.

49. Prior to the issuance of L-208, and afterwards until the end of the war, critical materials, machinery and equipment subject to allocation and control by WPB were shipped in substantial quantities to foreign countries for use in their gold mining industry. These countries included South Africa, Canada, Honduras, Nicaragua and Columbia, in all of which gold mines continued to operate throughout the war.

50. On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of L-208 knew (1) that

existing priority orders insured that the gold mines would not receive any critical materials needed by more essential users; (2) that the closing of the gold mines would release only a small number of hardrock miners and helpers; (3) that no agency of the Government had the power to compel these men to accept employment in the nonferrous metal mines; (4) that in all likelihood unemployed gold miners would accept employment in shipbuilding, aircraft and construction industries rather than go to work in the nonferrous metal mines where wages were low and working and living conditions poor; (5) that L-208 was not in fact directed at the known reasons for the shortage of underground workers in the nonferrous metal mines, i. e., low wages, bad working and living conditions, and the refusal of Selective Service to defer miners; (6) that a substantial number of the employees of the gold mines were middle-aged men with families who owned their own homes and would not leave their communities if any alternative were possible; (7) that in many instances the communities in the vicinity of gold mines were entirely dependent upon the operation of the mines for their continued prosperity; (8) that the deeper mines were likely to deteriorate and become flooded if closed down, and that many operators would not be able to afford the cost of keeping their mines safe and accessible or their machinery, equipment and buildings in repair during a long period of unproductivity.

[fol. 285] 51. It is reasonable to conclude that in issuing L-208 WPB acted without any justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines.

52. On October 10, 1942, 21 United States Senators from 12 gold-producing Western States sent the following letter to the President of the United States:

> Some days ago the War Production Board announced a decision to close all gold mining operations in the United States. This order was made by the Board against the emphatic protest of those representing the largest mining operations engaged in the mining of gold from lode and placer operations.
>
> The largest mining operations affected by this order

are in the states of South Dakota, California, and Colorado.

The Homestake Mine in South Dakota has been operating for some sixty years and has supported a community immediately surrounding the operation of some sixteen or eighteen thousand souls.

The Mother Lode Mines in California extend along the western base of the Sierra-Nevada range of mountains for a distance of 150 miles or more. These mines have been depended upon by communities the total of which would approximate one hundred thousand souls.

The population dependent on the Cripple Creek Mines of Colorado has varied from time to time and is not definite at this moment. Suffice it to say that it would be in the neighborhood of five or six thousand souls.

The economy of communities and states in which these mining operations are located has depended largely upon these operations, in that all of these mines have contributed materially by way of taxation to the states, counties, and municipalities in which they are located.

The labor employed by these mining operations in the respective states has been to a very large extent contributed by the communities that surround the respective mine operations. Homes have grown up through the years in each of these communities, and sons followed their fathers into the mines.

The record made before the War Production Board discloses that in each of these mining communities the young men, that is, men under 50 or thereabouts, have already either gone into the military branches of the United States, or have gone into war activities where alluring wages attracted them. The record discloses that the men now engaged in mining operations in the [fol. 286] mines affected by the order are by and large about 50 years of age or over. The record before the War Production Board discloses that, the men now engaged in mining operations in these localities have, with but rare exception, been employed in the mines of the respective localities for many years.

It is stated that object of the order made by the

War Production Board closing down these gold mines is because of a shortage in the supply of critical materials for defense, and the making of the order is supported by the theory that the labor employed in these gold mines will go into mines of copper or lead or zinc.

We respectfully draw your attention, Mr. President, to the record as made before the War Production Board that if all of the gold mines affected by the order of the Board are put on a standby basis, that is, if they are permitted to retain only enough labor to keep the mines from becoming flooded and caved, there will be in all about 2,020 of all types put out of employment.

The record before the Board shows that there may be another 500 men put out of employment from other mines of smaller capacity, making a total of 2,520 men put out of employment from lode mines.

It is estimated that the number of men put out of employment from dredger operations will be about 750 men. The men engaged in dredger operations are as a rule much older than those engaged in lode mining, at the present time.

It is estimated that the total number of men put out of employment by the order of the War Production Board will be approximately 3,270. The record before the Board establishes that of this number about 900 are miners and muckers.

From this number, it is estimated that between 150 and 200 miners and muckers would be necessary to retain the gold mines and dredges in a stand-by condition; hence, not to exceed 750 men, accustomed to actual mining and generally termed "miners" and "muckers" would be available for employment in mines of copper, lead or zinc.

The record made before the War Production Board discloses that miners, who have been for a long time engaged in gold mining, do not go into the mining of other minerals, such as copper, lead and zinc. There are many reasons stated for this custom.

It is emphatically stated before the War Production Board that if this mine labor population is released [fol. 287] from employment in the gold mines in the respective states, only a negligible number, if any at

all, will seek employment or remain employed in mining operations of other metals.

The impairment of the morale of communities in the states affected by the order of the War Production Board; the far-reaching effect upon the economic structure of the communities; the irreparable destruction of private property that will be accomplished by the flooding and caving of gold mines; the discouragement and heartache that will come into thousands of homes, many of them the homes of boys now in the military service of this country, but whose parents and relatives remain in the communities affected by this order—all of these things will not be compensated by the negligible number, if any, of mine laborers who will go from the closed mines to communities far remote to engage in other mining activities.

We respectfully draw your attention to the fact that at this very time Great Britain is urging and aiding the production of more gold by the gold mining operators of South Africa.

We respectfully draw your attention to the fact that our neighbor ally in this war, the Dominion of Canada, is going forward and encouraging the production of gold in that country, and in a telephonic communication within the past few days with those in authority on the subject in Canada, the information was received that the Canadian government has no intention of closing down its gold mine operations.

We respectfully urge that no beneficial result inuring to the defense of the United States in its time of war will flow from the order made by the War Production Board closing the gold mines of this country. The record needs no emphasis that great and irreparable injury will result.

We respectfully bring this matter to your attention with the request that you stay the order made by the War Production Board affecting the gold mine operations of the United States, at least until the whole subject of marshalling of manpower and the allocation of labor may be considered, and the vital questions involved, concluded; thus that the gold ming industry of the United States may not be subjected to unwar-

ranted and unusual hardship and injury which may not eventually be considered necessary, and which may not be equitably borne by other industries.

[fol. 288] In May 1944, the Policy Analysis and Records Branch of the WPB submitted a report concerning Limitation Order L-208 providing in part as follows:

> It is generally agreed by the WPB divisions concerned with mining activities that a very small percentage of the released gold mine workers actually were employed by other mines. A majority of them probably went into work of greater value to the war effort than gold mining, such as lumbering, agriculture, construction, shipbuilding, aircraft manufacture;[96] but the fact remains that the primary justification for closing the gold mines was to get labor for the production of the strategic metals. Wilbur Nelson, Arthur S. Knoizen, present Director of the Mining Division, and F. H. Hayes, Chief of the Primary Production Branch of the Copper Division, concur in the statement that the number of gold mine workers who went into other mines and remained therefor a year or more was not over 100.[97]

Findings Relating to Plaintiff Homestake Mining Company

53. Homestake Mining Company (hereinafter referred to as Homestake) is and was at all times herein mentioned

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[96] A partial analysis based on the records of the Social Security Board, indicates that the released gold mine workers went into a wide variety of occupations, including in addition to those mentioned in the text, coal mining, steel working, communications, transportation, and many others; they scattered, in short, through a fair cross-section of American industry. Letter, John J. Corson, Director, Bureau of Old Age and Survivors Insurance, Social Security Board, to Stacy May, October 22, 1943.

[97] Wilbur Nelson and Arthur S. Knoizen, in interviews with the writer, March 7, 1944; F. H. Hayes, in an interview with writer, March 4, 1944.

a corporation organized and existing under the laws of the State of California.

54. Homestake is and was at all times herein mentioned the owner of patented mining claims covering more than 5,000 acres of mining properties containing gold-bearing ores of great value located in the Black Hills area of South Dakota, near the city of Lead, South Dakota.

55. On October 8, 1942, and for 65 years prior thereto, Homestake was and had been engaged in the business of mining, processing and selling gold, and in 1942 was the largest gold producer in the United States.

56. On October 15, 1942, Homestake notified its employees of the issuance of Order L-208 and informed them of the necessity of concluding its gold-mining operations pursuant [fol. 289] to the order. Homestake urged such employees as would be released to consider the opportunities for employment in the copper mines.

57. Pursuant to the terms of Order L-208 Homestake discontinued breaking new ore on October 15, 1942, and began to lay off miners on that date.

58. On or about October 17, 1942, Homestake appealed to WPB, requesting permission to continue mining operations on the ground that Order L-208 would work an exceptional and unreasonable hardship upon it. On November 25, 1942, WPB decided the appeal, granting Homestake only limited relief. The WPB advised Homestake of this decision in a letter dated November 25, 1942, which stated in part as follows:

> Permission granted to remove and mill broken ore from underground and refill the stopes with suitable material during a period of six months beginning December 8, 1942, provided that no more than 60 employees are at any time assigned to or used in such operations and provided further that workers shall not be assigned to such operations when the War Manpower Commission finds that they are needed in mining operations elsewhere. Permission is denied to break any new ore or to proceed with any development work or any new operations in or about the Homestake mines.

59. Homestake, with the aid of the limited additional personnel authorized by WPB, continued the hoisting and

processing of ore already broken from on or about October 15, 1942, until the latter part of May 1943. After June 1, 1943, the Homestake gold mine was closed down for all purposes, except necessary maintenance, until on or about July 1, 1945. It reopened on that date and has operated continuously since then.

60. On October 8, 1942, the life of operations of Homestake's gold mine based on ore bodies, indicated by reserves of ore in sight and ore that could be expected from development, was at least 20 years at the then current rate of mining.

61. Homestake, at the time of its founding in 1877, was located in an isolated part of the United States and as a result was required to maintain a policy of self-sufficiency. From its early days it established a program of maintaining larger inventories than customary in most mining en- [fol. 290] terprises. Prior to October 8, 1942, Homestake had acquired extensive timberlands which provided lumber for the mine, and continued this program up to the time of the issuance of Order L-208. Prior to October 8, 1942, Homestake also had developed a coal mine, and was producing its own electric power.

62. In October of 1942, Homestake had recently completed two deep mine shafts equipped with large modern hoists, and had erected a new lumber mill. Its steam power plant was relatively new and its ore processing mills were in excellent operating condition.

63. On October 8, 1942, Homestake maintained its own foundry and machine shops used in the fabrication and repair of a variety of mining and processing equipment. In addition, Homestake was capable of supplying all of its own needs with respect to mine timber, coal, and electric power.

64. The chief items of materials and supplies used by Homestake in its mining and milling operations consisted of pipe, rail, rock drills, parts for rock drills, drill steel hoisting ropes (wire), electrical wire, cyanide, lime, shoes and dies for stamp mills, balls and rods for grinding mills, liners for grinding mills, and cones and mantles for crushers. Items of necessary equipment included locomotives, mine cars and mechanical shovels.

Homestake's inventory of these and other necessary ma-

terials and supplies was sufficient to operate its mine during the entire period of the closure. This did not include items such as dynamite and explosives. Only a three-months' supply of dynamite was on hand on October 8, 1942, but it was readily available without restriction.

65. At no time did WPB requisition or order Homestake to surrender or transfer any of its supplies, equipment or machinery, nor did it make any inquiries regarding the amount, nature or availability of Homestake's supplies, equipment and machinery, although the Board was furnished with an inventory of supplies on hand and other information relating to equipment and machinery.

66. The working conditions at Homestake and the living conditions in the communities surrounding Homestake in 1942 were superior to those at the nonferrous metal mines to which the Government sought to transfer the Homestake [fol. 291] miners. Homestake employees enjoyed free medical and hospital services, group insurance, pensions, recreational facilities, and many of the older miners owned their own homes. In 1942, approximately 440 of Homestake's employees had seen more than 21 years of service with the mine, and some had been employed there for more than 40 years. For these reasons, Homestake had enjoyed greater employment stability than the nonferrous metal mines despite the lure of higher pay in the war industries.

67. In October 1942, Homestake had sufficient labor available to operate at full capacity. Even in the event of reduction of available manpower Homestake could have maintained normal production levels by using mining techniques requiring less labor and by increasing its workday from seven to eight hours.

68. The Homestake Mining Company released 437 men from its employment during the period from the issuance of L-208 on October 8, 1942, to a date shortly prior to November 12, 1942. Of these 437 employees, 391 came from the mine department, 21 from the metallurgical department, 21 from the mechanical department, and 4 from the carpenter department. Of the 391 employees from the mine department, 183 were classified as miners on Homestake's payroll. And of these 183 miners, 39 had less than six months' experience. Of the 437 released, 110 men did not register with the United States Employment Service. Of the re-

mainder, 207 of them were placed by the United States Employment Service in other mining work as of a date shortly prior to November 12, 1942.

Homestake reported to the U. S. Social Security Agency that it had in its employ during the third quarter of 1942 a total of 2,129 employees. In its report for the fourth quarter of 1942, the company reported that 921 of these employees received less wages than they had received in the preceding quarter, which indicates that these employees were separated from the company's employ before December 31, 1942. Of these 921, there were 401 also reported by another employer, although not previously so reported, which indicates that these employees transferred to such other employers after leaving the Homestake Mining Company. These figures did not include transfers after Decem- [fol. 292] ber 31, 1942, although Homestake continued limited operations through that date.

69. In October 1942, Homestake was the largest single source of potential nonferrous metal mining labor. Representatives of the United States Employment Service, immediately following the issuance of L-208, attempted to induce released workers to accept employment at the Anaconda copper mine at Butte, Montana, and the Climax Molybdenum mine at Climax, Colorado, both about 500 miles from the Homestake mine.

Fifty-one Homestake employees accepted employment at Climax. Forty-one stayed less than six months and only six employees remained as long as one year.

One hundred and seventy-eight Homestake employees accepted employment at Anaconda, and of these more than 100 left before the end of a year. A great many Homestake employees never transferred to nonferrous metal mines but remained at the mine doing maintenance work, remained idle at home, or went into other pursuits. As early as November 1942, some of the miners who had been assigned to jobs in other mining districts began returning to Lead.

70. The properties of Homestake were useful for no other purpose than the production of gold and were adaptable to no other use than the conduct of a gold mining business.

71. The closing of the Homestake mine pursuant to Order L-208 had far-reaching and drastic repercussions in the city of Lead and the surrounding communities. The population

declined sharply, more than 750 homes and apartments were left vacant and boarded up, and 36 business establishments which had served the communities were left vacant.

72. In the years immediately prior to the issuance of Order L-208, the State of South Dakota received about $1,000,000 per year, or approximately ten per cent of its annual revenues, from Homestake. The State was deprived of this source of revenue by the order closing the gold mines.

73. Without acquiring new machinery or repair parts, or supplies on which there were restrictions concerning acquisition, and with a reduced labor force, Homestake could have operated profitably during the period of closure.

74. By reason of the issuance of Order L-208 Homestake was deprived of the use and benefit of ownership of its gold [fol. 293] mining properties, to wit, the right to obtain gold from the ore bodies on its properties and to sell such gold.

75. No compensation has been paid to plaintiff Homestake by defendant for the closing of its mine as hereinbefore described.

FINDINGS RELATING TO PLAINTIFF CENTRAL EUREKA MINING COMPANY (A CORPORATION)

76. Central Eureka Mining Company (hereinafter referred to as Central Eureka) is a corporation organized and existing under the laws of the State of California, with its principal places of business located in Sutter Creek, Amador County, California, and in San Francisco, California.

77. On October 8, 1942, Central Eureka owned approximately 641 acres of gold-bearing land located at Sutter Creek, Amador County, California. On that date, the mine employed a total of 117 men, of whom 73 were classified as underground workers.

The average age of the total number of employees was 41.74 years; 74.36% of the employees were married and had an average of 2.64 dependents. These employees had resided in the community wherein the mine was located for an average of 4.26 years, and 31 of these employees owned their own homes in that community.

78. Immediately following the issuance of L-208 on

October 8, 1942, all but 64 men left the mine, that group having been retained by the company to maintain the mine until January 1943, when the National War Labor Board ordered that thereafter the company would not be authorized to employ more than 42 men in the maintenance of the mine. The record does not disclose how many of either the 64 or the 42 men were underground workers.

79. Prior to October 8, 1942, Central Eureka Mining Company was engaged in the successful operation and development of its gold mining property at a profit. In the five-year period immediately preceding the issuance of L-208, the company paid $355,414.04 in Federal and State taxes. During that same period of time the company paid to its shareholders dividends in the amount of $1,182,900.

[fol. 294] 80. On October 8, 1942, Central Eureka had an inventory of supplies on hand which would have enabled the mine to operate for a period of two or three years without replenishment.

81. Central Eureka's mining equipment included on October 8, 1942, machine shops, electrical shops, blacksmith shop, carpenter shop, an assay office, a complete mill from primary crush to cyanidation, its own source of timber, automotive and all other necessary equipment required to carry out mining and servicing of the underground workings and the extraction of gold from ore bodies.

82. During the period October 8, 1942 to June 30, 1945, while L-208 was in effect, Central Eureka, which had been producing gold for about 80 years, could have continued to operate its mine on a satisfactory basis with a reduced force of men. It had on hand sufficient inventory for that purpose and had approximately 100,000 tons of blocked out ore (exposed on four sides) in reserve and had additionally inferred ore and probable ore in reserve which would substantially increase the 100,000 ton figure.

83. The properties of Central Eureka Mining Company were useful for no other purpose except the production of gold, and were adaptable to no use other than the conduct of a gold mining business. The mine was closed by reason of compliance with L-208.

84. Within six weeks after the issuance of Order L-208,

Central Eureka applied for a serial number under P-56 for the operation of a copper-mining project at Battle Mountain, Nevada. Some mining equipment was transferred from its gold mine to this copper project. It was closed down by Central Eureka about the middle of 1943.

85. In addition, Central Eureka leased some mining equipment, including flotation machines and feeders, agitators, classifiers, sand pumps, filters and compressors, to individuals who were engaged in tungsten mining. This material would not have been so leased had it not been for the issuance of Order L-208.

86. On December 9, 1943, Central Eureka, by its general superintendent, wrote the following letter to the Mining Division of WPB:

> [fol. 295] As General Superintendent of the Central Eureka Mining Company, an Amador County, California gold producer closed under War Production Board Order L-208 and placed on a maintenance basis, I wish to call your attention to our position as well as similar gold operations.
>
> The cost of keeping our mine unwatered and of doing absolutely essential retimbering and repair work is becoming a great burden on this Company's treasury. If it became necessary to abandon the mine entirely and allow it to fill with water, I question seriously whether we or anyone else would be able to undertake a rehabilitation project at the present price of gold.
>
> It appears to me that the situation could be helped very much if we could have the sympathetic consideration of the people charged with the administration of Order L-208 in a relatively small departure from the provisions of the Order. Such departures might include (1) the hiring temporarily or permanently of a few additional men, either as replacements or to meet emergencies, (2) the permission to extract a small amount of ore to help out the heavy deficit of the maintenance operation and to allow variations from time to time in the tonnage extracted, and (3) the consideration of use or exchange of a small amount of strategic materials as required. So far, we have been unable to make Washington officials understand these

operating problems. I do not believe that such misunderstanding is the result of being arbitrary but is probably due to the fact that they are too far away from our operations to see the true picture. My thought is that if the administration of Order L-208 could be decentralized and placed in the hands of some Western representative—either Mr. Lane in Denver or Mr. Keating in San Francisco—our operations would receive a more sympathetic consideration based upon a personal understanding by the Administrator. I feel personally that this could be done without interfering in any material way with the purposes of Order L-208; understanding of course that the purpose of Order L-208 is the conservation of manpower and strategic materials for the war effort.

It is of vital concern to this Company and to this community to keep our operation alive if at all possible. The lack of authority given local administrators with respect to Order L-208 seems to unfairly discriminate against the gold mining industry as compared to other forms of business which have been forced to indirectly reduce operations. A local administrator with adequate authority could help materially to clear up this feeling on the part of the gold operators and [fol. 296] of the citizens of the gold mining communities.

Your early consideration of this request would be greatly appreciated.

87. On December 17, the WPB acknowledged and on December 22, 1943, replied to the above letter in part as follows:

> Supplementing our letter of December 17, your problem has been discussed very thoroughly in conference and we fully understand your problems on maintenance in keeping your mine open and ready for operation.
>
> We suggest that you file and appeal from this order, stating your problems in detail, advising what is involved in getting your mine in operation and maintaining it on a minimum basis. In your appeal, also state whether manpower is available, and if so, can you get certification from the War Manpower Commission to

use these men if they are not needed in other essential war industries.

We assure you that as soon as this appeal is filed, we will give it immediate consideration to see what can be done to give you some relief under the order.

We also suggest that you file with your appeal, the possible requirements of material of all types that you will need for approximately a year. If this is not possible, six months will suffice.

* * * * * * *

There is no evidence of an appeal under L-208 other than the letter quoted in finding 86.

88. By reason of the issuance of Order L-208, Central Eureka was deprived of the use and benefit of ownership of its gold mining properties, i. e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

89. No compensation has been paid to Central Eureka by defendant for the closing of its mine as hereinbefore described.

90. On June 30, 1945, the WPB revoked Order L-208. Thereafter in 1947 or 1948 Central Eureka reopened its mine and has operated it continously since.

FINDINGS RELATING TO PLAINTIFF IDAHO MARYLAND MINES CORPORATION

91. Idaho Maryland is now and was on October 8, 1942, and at all times hereinafter mentioned has been, a corporation [fol. 297] duly organized and existing under the laws of the State of Nevada.

92. Idaho Maryland is now and at all times herein mentioned has been the owner in fee of certain gold-mining properties known as the Idaho Maryland Mines, consisting of approximately 8,000 acres of gold-bearing lands situated in the Grass Valley Mining District in the County of Nevada, State of California, together with all necessary mining plant and equipment located on said lands.

93. Idaho Maryland operated the above-described mining properties for many years prior to October 8, 1942, and continuously since July 1, 1945. It was recognized on October 8, 1942, as the second largest gold mine in the United States in terms of ore removed and treated.

94. Idaho Maryland's mining equipment located on said lands included on October 8, 1942, machine shops, electric shops, welding shops, blacksmith shop, carpenter shop, cyanidation plant and smelting plant, a sawmill and other mills, shops, automotive and all other necessary equipment required to carry out mining and servicing of the underground workings and the extraction of gold from the ore bodies.

95. It would not have been necessary for Idaho Maryland to acquire, during the life of L-208, any critical materials, supplies, equipment or facilities to enable it to continue operation on a profitable basis, because, (1) the mine was a fully developed mine comprising extended drifts, crosscuts, raises and winzes, fully equipped with a large amount of modern mechanical equipment, including an efficient hoisting layout; (2) the company owned sufficient equipment in good condition, a large inventory of supplies and materials necessary for operating the mine, including large quantities of pipe and rail, steel, drill steel, building machine repair parts, tires, tubes, repair parts for milling machinery, valves, pipe fittings and miscellaneous supplies, a large supply of mercury and all other materials required to operate the mine. At no time during the war were industrial or commercial explosives, including dynamite, fuses and caps, subject to priority restrictions, and were available in large supply in the open market.

[fol. 298] 96. During the period of close down, Idaho Maryland was not wholly dependent upon the use of the mining machinery and equipment actually owned by it on October 8, 1942. There was a considerable quantity of secondhand mining machinery available at all times in California which could have been purchased by Idaho Maryland had the necessity arisen. Secondhand mining machinery was not rationed and was freely obtainable in the open market.

97. Idaho Maryland owned and operated its own cyanidation plant, but such operation was not essential to the continued operation of the mine as a gold mine. Two-thirds of the gold content of the ore is and was on October 8, 1942, recovered at the Idaho Maryland Mine in the amalgamation process, and prior to subjecting ore concentrates to the cyanidation process. Some of the free gold was recovered on

the jig table prior to the amalgamation process. The Idaho Maryland mining properties are peculiar in that the ore contains considerable free gold. The cyanidation process is a further treatment of the residue of the concentrates to recover the remaining gold. The concentrates could have been sent to the American Smelting and Refining Company Smelter at Selby, California, for smelting and the final recovery of the remaining gold therefrom. The Selby smelter operated during the entire period of the war.

98. Idaho Maryland operated its own saw mill and had its own supply of timber. The mine obtained its power in 1942 from the Pacific Gas and Electric Company and continued to use such power throughout the period of shutdown. There was no shortage of electric power at the mine nor was it curtailed or restricted during the shut down but was available at all times.

99. The operations at Idaho Maryland were curtailed due to the loss of manpower between December 1941 and October 8, 1942. The payroll was reduced from over 800 employees to 212 employees between those dates. As the separations of employees reduced the number of employees, it became necessary before the closedown ordered by L-208 to alter their mining methods so as to more effectively utilize the employees who had stayed.

100. On October 8, 1942, 116 of Idaho Maryland's remaining employees were underground workers. The average age [fol. 299] of all employees as of October 8, 1942, was 47.7 years and 43 of the underground men were over the age of 50. If *all* of Idaho Maryland's underground workings had been kept safe and accessible as permitted by L-208, none of the 116 underground workers would have been released.

101. During the period of October 8, 1942, to June 30, 1945, while Order L-208 was in effect, Idaho Maryland could have continued to operate its mine, except for the prohibition contained in Order L-208, on a satisfactory basis with a reduced force of men by resorting to shrinkage stoping, which is a method of operation requiring fewer underground men. This method of operation has been customarily followed in the Idaho Maryland Mine. It is a method customarily used in other gold mines, such as Homestake. It would also have been possible to operate with a reduced crew by eliminating extensive development work.

Extensive development work is not necessary in a mine such as Idaho Maryland, located in a well-known mineralized area such as Grass Valley Mining District. In fact, Idaho Maryland has operated continuously without the necessity of having blocked out proven ore bodies.

102. Upon the issuance of Limitation Order L-208 on October 8, 1942, Idaho Maryland, under threat of criminal persecution for failure to comply therewith, immediately notified its employees that the mine was being closed down and discontinuing work. In compliance with said order Idaho Maryland completely closed down the opration of its gold-mining properties and suspended all mining production from and after the period prescribed in said Order L-208, to wit, on October 15, 1942.

103. The properties of Idaho Maryland are, and were, useful for no other purpose except the production of gold, and said mining properties were adaptable to no profitable use other than the conduct of a gold-mining business and were not capable of being used for any purpose other than the production of gold.

The blacksmith shop, machine shops and other shops and equipment of Idaho Maryland, which were used for the repair and maintenance of mining machinery, were not capable of being utilized in the mass production of any item and were not devoted to any other use during the period of [fol. 300] shutdown following the issuance of L-208.

104. With a greatly reduced labor force and without acquiring any critical material, supplies, equipment or facilities subject to government control, Idaho Maryland could have operated its mining properties on a profitable basis during the period L-208 was in effect.

105. On October 8, 1942, there were 81 employees who had terminated their employment with Idaho Maryland after October 8, 1942, who were thereafter reemployed by that firm, which obtained a record of the employees' intervening employment in most but not all instances. Of the 69 as to which the firm had a record of intervening employment, 6 were employed in other mining activities during some or all of the time they were out of the company's employ, 8 were in military service, 4 were employed in the Miners' Foundry, Nevada City, California, 6 worked with the railroads, 4 were employed in shipyards, and the remainder as

to which there was information were engaged in other types of employment.

106. Grass Valley, Nevada County, California, located near Idaho Maryland's gold mining properties, was wholly dependent upon the operation of the gold mine for its continued prosperity. The closing of the mine caused considerable community dislocation and individual hardship. Since 1848, the principal occupation of the inhabitants of the communities of Grass Valley and Nevada City had been gold mining.

107. Pursuant to an appeal taken by Idaho Maryland Mine to the War Production Board, the mine was permitted to complete a second exit between the mine and the Brunswick Mine which was required by California State Law. On December 13, 1943, Idaho Maryland filed a second appeal calling to the attention of the Board specific conditions which existed underground in the mining properties by reason of the shutdown. The underground workings were caving and collapsing and the mine contended that it was essential for the protection of the underground workings that mining operations be resumed forthwith. On May 3, 1944, Idaho Maryland was permitted by WPB to resume operations on a limited basis wit hnot over 200 men who must be over 40 years of age and not working for other industries. Production permitted was limited to 7,800 tons [fol. 301] of ore per month but Idaho Maryland was not able in 1944 to reach that production because of the time it took to prepare for production and to open up the necessary ground workings due to the destruction which had already occurred to the mine. A third appeal on November 24, 1944, asking permission to hire additional men was denied.

108. By reason of the issuance of Order L-208, Idaho Maryland Mine was deprived of the use and benefit of ownership of its gold mining properties, i. e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

No compensation has been paid to Idaho Maryland by defendant for the closing of its mine as hereinabove described.

Findings Relating To Plaintiff Oro Fino Consolidated Mines, Inc.

109. The petition as to this plaintiff was originally filed on February 8, 1950, in the name of Oro Fina Consolidated Mines, Inc. Thereafter on September 9, 1952, an amended petition in this case was filed in the name of Oro Fino Consolidated Mines, Inc.

110. Oro Fino Consolidated Mines, Inc. was incorporated under the laws of the State of Nevada on January 4, 1950.

111. Under date of September 5, 1935, Hazel P. Gridley leased to one J. C. KembpvanEe certain gold mining property in Ophir Mining District, Placer County, California, known and described in the lease as the Ora Fina Mine. J. C. KempvanEe thereafter operated this property as Oro Fino Consolidated Mines, but this was simply a trade name, and the lessee continued to be the said KempvanEe.

112. Mr. KempvanEe was operating said gold-mining properties on October 8, 1942. On November 16, 1942, he requested permission of the War Production Board to continue the removal and milling of broken ore until January 15, 1943, representing that there were then 1,912 tons of broken ore in the mine. Such permission was granted by the War Production Board under date of December 2, 1942. The record does not disclose when operations at the mine [fol. 302] actually ceased, but it was apparently prior to March 27, 1943. The mine has never operated since that date.

113. As of October 8, 1942, there were approximately 11 employees in the mine as contrasted with about 40 in "normal" times. The record does not disclose the employments into which these men went following the closing of the mine, although it does show that as of November 8, 1942, one of these employees was awaiting a call to duty in the armed forces.

114. There is no evidence in the record as to the amount of machinery or equipment in the mine as of October 8, 1942, or as to the availability of materials for the maintenance of such machinery or equipment. The mill had been newly erected in 1938, and there were certain parts available for its maintenance, although it does not appear how long the mill could have continued operating without replenishment of this inventory of parts. The record does not

indicate the disposition, if any, which was made of these parts and equipment following the closing of the mine.

115. The properties of Oro Fino were useful for no other purpose than the production of gold and were adaptable to no other use than the conduct of a gold mining business.

116. By reason of the issuance of L-208, Mr. KempvanEe was deprived of the use and benefit of the gold mining properties leased by him, i. e., the right to mine and sell gold.

117. In 1948 a Mr. MacBoyle, Mr. KempvanEe's financial backer, died. Mr. KempvanEe then turned to Mr. Nugent for financial assistance as there were certain royalty payments under a lease and certain other expenses recurring. Mr. Nugent agreed to furnish such assistance and did so. He suggested that the operation be incorporated. On January 4, 1950, Oro Fino Consolidated Mines, Inc., was organized. On February 2, 1950, Mr. KempvanEe assigned all his right, title and interest in the lease of the mining property from Mrs. Gridley to Oro Fino Consolidated Mines, Inc.

The assignment provides in part as follows:

> The undersigned J. C. KempvanEe does hereby sell, assign, tranfer and grant unto ORO FINO CONSOLIDATED MINES, INC., a corporation, all right, title and interest in and to that certain mining agreement and the real property therein described and all rights arising by virtue of said agreement, dated September 5, 1935, by [fol. 303] and between HAZEL P. GRIDLEY, a widow, designated as lessor and J. C. KEMPVANEE, designated as lessee, * * *
>
> Said agreement is hereby incorporated herein and made part hereof for all purposes as though fully set morth herein.

118. No compensation has been paid to Mr. KempvanEe or to Oro Fino Consolidated Mines, Inc., by defendant for the closing of the mine as hereinbefore described.

Findings Relating to Plaintiff Alaska-Pacific Consolidated Mining Company

119. Alaska-Pacific Consolidated Mining Company (hereinafter referred to as Alaska-Pacific) has been since prior to October 8, 1942, and still is a corporation organized and existing under the laws of the State of Washington. Alaska-Pacific is the successor in interest by way of merger of two predecessor corporations and has been, since 1938, the sole operator of the mining properties referred to hereinafter.

120. Alaska-Pacific is the owner and operator of certain mining properties located in the Willow Creek (Wasilla) Mining District in the Territory of Alaska. With the exception of two groups of mining claims hereinafter noted, all of Alaska-Pacific's properties on October 8, 1942, and thereafter were held in fee or by location notices which later matured into patents in fee issued to Alaska-Pacific by the defendant. As to one of the excepted groups, that known as the "Alaska Free Gold" claims, bearing General Land Office Survey No. 980, Alaska-Pacific held the mining rights on October 8, 1942, and has continued to hold them since then, by virtue of a lease and royalty agreement, coupled with a purchase option, which does not expire until 1961. The other excepted group, namely, the Hamburger, Red Eye and Weeny claims, were held by Alaska-Pacific on October 8, 1942, and are still so held by virtue of location notices.

121. On the aforesaid properties, Alaska-Pacific, since 1938, and its predecessors before them, operated an underground or lode mine, consisting of about 5 miles of underground workings with two entries.

122. Geographically, Alaska-Pacific's mine is located about 20 miles from Wasilla and 28 miles from Palmer, in an isolated section of the Wasilla precinct, there being no [fol. 304] other inhabitants except a few miners employed in neighboring mines. Except for timber which was purchased locally, all supplies, including foodstuffs, were imported from the States. These supplies moved by ship to the port of Seward, thence by railroad a distance of about 409 miles to Wasilla and thence by truck to the mine. Because of climatic conditions, as a result of which the road was often blocked, the isolation of the mine and the uncertainty of steamship schedules, Alaska-Pacific customarily followed a practice of carrying a substantial inventory of

parts, equipment and supplies. At the time of the closure of the mine by virtue of Order L-208, Alaska-Pacific had in inventory, parts, equipment and supplies sufficient to permit continued operations for at least one and one-half years, special efforts having been made to accumulate a substantial inventory not only because of the foregoing factors but in anticipation of possible shortages.

123. Because of its isolated location, a company village was maintained at the mine, consisting of the mine and mill buildings, various warehouses, shops, dormitories, a school and an office building, a store, a messhall and various recreation facilities. All buildings were of frame construction and were serviced with central underground water and sewage systems. Because of severe winter conditions with snows ranging to 25 feet in depth and temperatures ranging to minus 50 degrees, and because of heavy rains in other periods of the year, constant maintenance and attention to surface installations were required to prevent early deterioration and serious damage from the elements.

124. Normally, Alaska-Pacific operated its mine with a crew of about 125 men. In October of 1942 it had a mining crew in its employ of 101 men. Of these, only three had experience in mining other than gold mining, that being in the employ of either of the two coal mines then operated in Alaska.

Aside from the two coal mines, there were no other types of mines in Alaska except gold mines.

125. Alaska-Pacific not only produced gold from its mine but also, as a kind of byproduct, a type of concentrate essential to the smelting of copper. Alaska-Pacific's concentrates were shipped to the Tacoma Smelter, Washington, and furnished about 10 percent of its requirements.

[fol. 305] 126. Under date of October 15, 1942, Alaska-Pacific submitted an appeal to the WPB for relief from the provisions of Order L-208. This appeal emphasized:

* * * * * * *

> First: The position of the company as a tungsten producer, actually and potentially.
>
> Second: The position of this company as the supplier of valuable and necessary materials to the copper smelting operations of A. S. & R's Tacoma Smelter.

* * * * * * *

It also referred to the hardship upon the company and its employees of closing the mine, and requested:

* * * * * * * *

> In the light of these showings, and particularly in view of the progress made by this company in the production of a strategic metal, we again request the Board to restore the P-56 rating which had been revoked by the general order of March 2nd last. If the said rating is granted, the company will agree to curtail its gold production by at least 50% by ceasing development of sections of its mine where no deposits of scheelite in recoverable quantities exist.

* * * * * * *

The WPB granted this appeal, by telegram reading as follows:

> Re Your appeal from order L-208 you are hereby authorized to continue operations until December 8th, at your Independence Mine under the following conditions: During that period you will drill, break and develop, as rapidly as possible, the Scheelite ore shute you have opened, in order to show the monthly tonnage of Scheelite which you can mine, treat and ship to the Metals Reserve Company's stockpile at Anchorage (stop) You are; under the terms of the order, permitted to remove from the mine any other ore broken and in the mine as of October 15th, and mill the same (stop) You are at the same time required to prepare that partof your mine not carrying [T]he Scheelite ore to be in stand by condition by December 8th (stop) On or before November 30, you must furnish a complete progress report to us on your tungsten development and also on the amount of broken ore you have removed from your mine and milled, with metallic content (stop)

[fol. 306] 127. Under date of November 27, 1942, Alaska-Pacific submitted to the WPB a report on its scheelite (tungsten) production, as requested in the grant of the appeal. This report pointed out that approximately 2,000 tons of ore had been processed since the grant of the appeal, yielding

113 pounds of gold, 56 tons of concentrates for the Tacoma smelter, and about 20 tons of crude scheelite ore containing at least 80 units of tungsten trioxide. In the letter transmitting the report, Alaska-Pacific stated that:

> * * * By no stretch of the imagination is scheelite likely to become anything more than an important by-product of our gold operation. Actual financial loss will attend the scheelite phase of our operations, and such losses are likely to persist for the entire period during which scheelite is produced, unless subsidies are granted, or scheelite prices raised. * * *
>
> * * * * * * *
>
> The scheelite situation at Independence, is in the same category. Frankly, it is a case of no gold, no scheelite. We cannot waste the economic metal in order to produce the uneconomic one. This company would be hard put to maintain its predominantly gold workings in standby condition and at the same time undertake production of scheelite at a loss, unless income from its gold production was continued.
>
> We submit this letter and the accompanying Progress Report with confidence that the evidence offered will justify the issuance to us, at an early date, of a priority rating which will affectively [sic] suspend L-208 as it may apply to our operation at Independence. In the event that your Board should determine upon action according further time extension in the application of the order, we wish to suggest that not less than six months be accorded us, as any shorter time would be inadequate to bring our scheelite potentialities into production upon an efficient basis. The extension should permit continued normal gold production, so that the hardships referred to in our Appeal of October 15th would not materialize, and so that scheelite production, carried on at a loss, would be reasonably compensated for.

Under date of December 11, 1942, the WPB granted Alaska-Pacific an additional period of operation, its letter of authorization reading in material part as follows:

> [fol. 307] After careful consideration of the facts presented in your Appeal, the following relief from Order L-208 is hereby authorized:
>
> Permission is granted until June 8, 1943, to continue your normal lode mine operations of breaking, drawing and milling gold-bearing ore, for the purpose of producing tungsten-bearing ore and upon the condition that plans for proceeding with this operation shall meet with the approval of the War Production Board.
>
> The provisions of Order L-208 are waived to the extent required to obtain the relief authorized above, provided that Order L-208 in all other respects and all other Orders and Regulations of the War Production Board are fully complied with.

128. Alaska-Pacific submitted certain additional reports and requests for relief in the succeeding months. In a report submitted under date of January 26, 1943, it stated that approximately 35 tons of scheelite ore had been produced in two full months, which "exceeded the 3% minimum of contained WO-3 prescribed by Metals Reserve Company."

129. Under date of April 14, 1943, the Director of the Mining Equipment Division of WPB wrote to Alaska-Pacific in part as follows:

> * * * Your report on the recovery and production of tungsten, and the information contained in the report by the United States Geological Survey, would indicate that it is neither desired or advisable, to attempt to continue your operations on any other basis than for the production of gold with tungsten as a by-product. The limited amount of tungsten that might be produced by hand-sorting of the ore is not impressive. Additional tungsten might be recovered by proper mill treatment of the ore, but the time involved in determining the method of recovery to be used in making installations in your plant, the manpower required in the operation

of your mine and mill, the materials consumed, and the potential tungsten production, do not justify the continuation of your project.

It is the opinion of all groups concerned, after a thorough review of your case, that neither your present production of tungsten or potential production under either of the proposed plans for recovery, justifies the continued operation of your gold mine.

The production of a high iron sulphur concentrate as diluent, for use at the Tacoma Smelter, through the [fol. 308] mining and treating of an estimated 30,000 tons of ore annually, to produce 1,000 tons of concentrates, is not economical in the use of manpower or materials consumed. Every possible effort is being made to provide that type of flux from other than a gold mine. For these reasons, the issuance of a serial number under Order P-56 for your gold mine, has not been recommended.

The grant permitting continuation of your gold mining operations at the Independence Mine, Wasilla, Alaska, expires June 8, 1943. You are hereby advised that your mine and mill should be placed in standby condition by that date. This is in accordance with the policy of the War Production Board, established through the issuance of Limitation Order L-208, directing the closing of all nonessential mines in the United States. This policy has been extended to Latin America and other foreign countries, through the curtailment of supplies and materials being furnished for gold mining. The reduced consumption of materials, supplies and equipment, through the cessation of gold mining, transfer of idle equipment for use in production of strategic materials and defense projects, has been effective in stimulating production, accelerating completion of projects and reducing the load on the production lines, which are needed to produce for direct military requirements, as well as our vital industries.

130. Under date of May 12, 1943, Alaska-Pacific submitted to WPB a final and voluminous appeal, emphasizing the hardship to itself and its employees which would result from the close down of operations.

By telegram of June 6, 1943, the WPB allowed a further extension of operations to August 8, 1943. On June 21, 1943, the administrator of Order L-208 wrote to Alaska-Pacific advising that after August 8, 1943, the mine must be placed in standby condition.

131. On July 29, 1943, Alaska-Pacific sent the following letter to the WPB Mining Branch:

> This is to advise you and the various members of the Board that on or before August 8th, 1943, our operations near Wasilla, Alaska, will be closed down pursuant to the above referred to Order and the various directions issued thereunder. This step is taken by us under the threat of the criminal and other penalties which are provided for in the order. It is not voluntary on our part, but under express protest. [fol. 309] We hereby advise you of such protest and that we reserve all of our legal rights against those responsible for the promulgation and enforcement of this order, it being the position of this company that the order itself and the various actions taken under it are without sufficient foundation in law and are illegal.
>
> We are unable at this time to estimate the extent of the damage which we may sustain by virtue of the enforcement of this order. However, you are advised that it will amount to a substantial sum.

On August 13, 1943, the administrator of Order L-208 wrote the following letter to Alaska-Pacific:

> Your letter of July 29 with reference to the closing of your Independence Mine at Wasilla, Alaska, has just been brought to my attention.
>
> We regret that conditions necessitated the action which made the closing of your mine necessary, however, we feel that you are following the wisest course by ceasing operations at the expiration of the extension of the grant made to your company. Little hope of extension could be anticipated in view of present conditions in Alaska, with respect to coal shortage and the difficulty in securing men to work in those mines.
>
> We trust that your company will encourage in every way possible the transfer of men released from your

operations, to coal mines. That is one of the most important contributions that could be made to the war effort at this time.

132. The plaintiff received a formal notice dated August 13, 1943, from the WPB in the following terms:

> This is with reference to your appeal filed under date of May 12, 1943, requesting relief from the provisions of Limitation Order L-208.
>
> An extension of time was given you on the grant under which you had been operating, permitting you to continue your operations until August 8, 1943, under the same limitations and prohibitions as the original grant.
>
> You ask that an exception be made in your case by the grant of permission to continue your lode mine operations in the Independence Mine located at Wasilla, Alaska, for the purpose of extracting gold in conjunction with your tungsten ore production.
>
> The Appeals Board has given full and careful consideration to all of the facts brought out in your appeal and has consulted the War Manpower Commission as to the advisability of permitting your workers to con- [fol. 310] tinue in a non-essential mine. It is the War Manpower Commission's belief that your workers can be utilized to better advantage in the war effort in the coal mining operations in your immediate vicinity.
>
> Therefore, we regret to inform you that your appeal for relief from Order L-208 must be denied.

133. There is no competent evidence in the record to show the employments to which former employees of Alaska-Pacific transferred upon the closing of the mine on August 8, 1943. On the whole, gold miners are unfavorably inclined toward employment in coal mines, partly because of the hazards involved and partly because equipment and machinery are different. Although the record does not establish the exact number of gold miners who transferred to the two coal mines, at least four, and possibly a few others, did. There were no other strategic-metal mines in Alaska for the gold miners to transfer to.

134. Subsequent to the closure of the mine, Alaska-Pa-

cific sold most of the perishable items in its inventory to such agencies as the Alaska Road Commission and the Alaska Railroad, and stored at the mine the other items.

135. Prior to the closure pursuant to L-208, Alaska-Pacific was operating its mining properties at a profit.

136. By reason of the issuance of L-208 Alaska-Pacific was deprived of the use and benefit of ownership of its gold mining properties, i.e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

137. No compensation has been paid to Alaska-Pacific by defendant for the closing of its mines as hereinbefore described.

Findings Relating to Plaintiff Bald Mountain Mining Company

138. Bald Mountain Mining Company (hereinafter referred to as Bald Mountain) is a corporation incorporated under the laws of the State of South Dakota.

139. On October 8, 1942, Bald Mountain was the owner of certain gold-bearing lands in Lawrence County, South Dakota. On that date it was engaged in mining gold on said properties.

[fol. 311] 140. Subsequent to the issuance of Limitation Order L-208 by the War Production Board, Bald Mountain filed an appeal for relief from its provisions, and was granted permission to remove broken ore from the mine and to operate its mill up to June 1943. This firm continued operation on that basis to that date. The War Production Board granted permission to continue operations to August 8, 1943, but notification of this action was received by this plaintiff after it had already ceased operations.

141. Bald Mountain had approximately 150 employees shortly before October 8, 1942. The record does not disclose the nature of the employments to which these men shifted after the closing of the mine.

142. The record does not disclose the nature or size of Bald Mountain's inventory of mining equipment, materials and supplies as of October 8, 1942, or the length of time it could have continued to operate without replenishment of such inventory. The record does not disclose the extent, if any, to which this plaintiff may have sold or otherwise

disposed of any of its mining equipment during the period its mine was shut down.

143. Bald Mountain reopened its mine shortly after the revocation on June 30, 1945 of Limitation Order L-208, and has remained in operation since.

144. By reason of the issuance of L-208 Bald Mountain was deprived of the use and benefit of its ownership of its gold mining properties, i.e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

145. No compensation has been paid to Bald Mountain by defendant for the closing of its mine as hereinbefore described.

Findings Relating to Plaintiff Alabama-California Gold Mines Company

146. Alabama-California Gold Mines Company (hereinafter referred to as Alabama-California) is a corporation organized under the laws of the State of Washington.

147. On October 8, 1942, Alabama-California was the owner of certain gold-bearing lands located in the State of California.

[fol. 312] 148. On August 8, 1942, Alabama-California closed its gold mine, and ceased all operations at the mine either that day or the next. This closing was the result of a shortage of manpower and materials, and the possibility that such a closing would be necessary had been contemplated by the Board of Directors for several months.

149. During the year 1943, Alabama-California sold $40,000 to $50,000 worth of supplies and materials from its mine. Additional sales were made thereafter, and in 1949 most of the balance of the machinery and equipment at the mine was sold.

150. Alabama-California has never reopened its gold mine since its closing in August of 1942.

Findings Related to Plaintiff Consolidated Chollar Gould & Savage Mining Company

151. Consolidated Chollar Gould & Savage Mining Company (hereinafter referred to as Consolidated Chollar) is a corporation organized under the laws of the State of California.

152. On October 8, 1942, Consolidated Chollar owner certain gold-bearing lands in Story County, Nevada.

153. On October 8, 1942, the above-named firm was operating a mine producing gold and silver on this property, the proportion of the two metals produced being about fifteen ounces of silver to one of gold. Its method of operation at that date was an open-pit one, that is to say, it had explored the location and size of the veins of gold and silver through an underground shaft, but finding the cost of mining through that shaft to be excessive, had stripped off the rock above the veins containing precious metal, and was recovering ore by use of power shovels. It had limited its operations exclusively to open-pit mining sometime prior to the middle of 1942 when the underground mining was discontinued.

154. Prior to the issuance of Order L-208, from about March 1942 until such issuance, it had been apparent to this plaintiff's officers that the pit operations of stripping off the surface rock, or overburden, preliminary to mining the gold and silver ore, were becoming prohibitively curtailed because of the shortage of rubber essential to the trucking of waste from the stripping operations. For several months [fol. 313] prior to October 30, 1942, in anticipation of that point when the development of new ore would no longer be practicable, Consolidated Chollar's management had been making preparations to conduct operations which would consist of the rehandling of previously mined and processed ore. Machinery was installed for this purpose.

The record does not show the extent of the open-pit operations which had been conducted by this firm.

155. On October 30, 1942, Consolidated Chollar requested of the WPB permission to conduct operations which would consist of the rehandling of previously mined and processed ore called tailings. It stated that the operations would require a crew of only six men and that they would be available from the local community and were of advanced age so they were precluded from employment in copper mines or defense plants. It also stated that the planned operations would require no steel consumption and that the supplies on hand and available from mines already closed down would enable the operations to be carried to completion.

On November 25, 1942, Consolidated Chollar was notified by the WPB that it was authorized to conduct the rehandling operations desired, and on February 26, 1943, this authority was extended to June 30, 1943.

156. Consolidated Chollar's operations involving the rehandling of previously processed ore turned out to be unsuccessful and resulted in financial loss. On April 28, 1943, it advised WPB of this and requested permission to resume its normal operations consisting of open-pit mining. It informed the WPB that a resumption of such operations had been impossible three to six months previously because of the lack of adequate equipment but that it then anticipated equipment would be available for a resumption of normal operation as a result of the completion of defense projects in the area of its operations.

Consolidated Chollar anticipated that its return to open-pit operations would require not to exceed 20 men from the locality whose ages averaged over 50 years. This plaintiff also anticipated that steel consumption in the open-pit operations would be extremely low and estimated that there were sufficient steel-contained materials on hand to last about six months. Necessary operating supplies and fab-
[fol. 314] ricated repair parts were expected to amount to about $6,000 per month.

One June 19, 1943, the WPB refused to transfer the application of serial number 36-209, which had authorized Consolidated Chollar's rehandling operations, to the resumption of open-pit mining, and thereby refused it permission to resume open-pit operations.

157. On June 23, 1943, in furtherance of its attempts to obtain permission to conduct open-pit operations, Consolidated Chollar advised the WPB by letter that there were 15 men not suitable for work in war industries available in the locality and that there were sufficient operating supplies and fabricated repair parts on hand, with the exception of sodium cyanide, for the conduct of operations for six months. It stated in this letter that if such operations were authorized, priority assistance for supplies and equipment would not be required for six months except in the event of unexpected equipment breakdown.

158. On August 28, 1943, the WPB issued Serial No. 36-26-T under Preference Rating Order P-56 which had the result of removing Consolidated Chollar from the restrictions of Order L-208. It was permitted to conduct open-pit operations as a result of the issuance of this serial number. Also, it was authorized by the serial number the

use of a priority rating under P-56 for the obtaining of maintenance, repair, and operating supplies. The rating was extended at least through the first and second quarters of 1944.

By letter dated December 10, 1943, Consolidated Chollar reported to the WPB in respect to its operations under the serial number for the previous ninety days, as follows:

> Owing to inefficiency of available labor and lack of adequate equipment in the form of power shovels and trucks for the pit operation we have as yet been unable to bring the operation up to capacity. As time goes on we hope this condition will improve.

The letter also stated that up to and including November 30, 1943, it employed 23 men and that the average daily tonnage of ore produced was 320 tons. These figures compared with the 1942 operations which resulted in a total [fol. 315] tonnage of 144,192 tons, or roughly 400 tons per day, with about 23 or 24 employees.

The record does not disclose how long this plaintiff continued operations under the aforementioned serial number or its reasons for discontinuing its operations, if it did.

159. After the war when Consolidated Chollar resumed operations, it conducted open-pit operations. At that time this plaintiff found it necessary to first remove overburden from above the ore vein because no ore was clear for breaking. The reason for this was that during the effective period of Order L-208, it had been able to process all of the ore which it had stripped of overburden prior to the close of 1942.

160. From the issuance of L-208 to August 28, 1943, Consolidated Chollar was permitted to carry on the rehandling of previously mined and processed ore in accordance with plans the company had made early in 1942. From August 28, 1943, to the end of the war, Consolidated was in possession of a serial number which permitted it to carry on open-pit mining operations and to use a priority rating under P-56 to obtain maintenance, repair and operating supplies. Consolidated Chollar was never required to close its mine under L-208.

FINDINGS RELATING TO PLAINTIFF ERMONT MINES, INC.

161. Ermont Mines, Inc. (hereinafter referred to as Ermont), is a corporation organized under the laws of the State of Oregon.

162. On October 8, 1942, Ermont was the owner of a compact block and contiguous Quartz Lode Mining Claim, designated Nos. 1 through 34 inclusive, located in Montana unorganized Mining District, County of Beaverhead, State of Montana.

163. In October 1942, Ermont was working claims numbered 1 (with drifts on claims numbered 2, 3 and 4), 2 (working over into claim No. 6), 7, 9, 19, 20, 23, 24, 28, and 32. After receiving WPB order to close down in October 1942, Ermont continued taking out the ore already mined during the latter part of October and into November, ran it through the mill and the refinery and shipped it to the mint. [fol. 316] Thereafter the mine and buildings were closed and a watchman was employed to look after the property.

164. On October 8, 1942, Ermont employed a crew of men, number not established, adequate to work the above claims. The men had their homes in the vicinity of the mine. The mine had sufficient supplies, machinery and equipment, in good working order to continue operations for at least a year from October 8, 1942, if the owner had not closed down in compliance with L-208. Mining operations were resumed at Ermont at some time subsequent to the revocation of L-208 in 1945.

174. By reason of the issuance of L-308 Ermont was deprived of the use and benefit of its ownership of its gold mining properties, i.e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

175. No compensation has been paid to Ermont by defendant for the closing of its mine as hereinbefore described.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact, which are made a part of the judgments herein, the court concludes that as a matter of law plaintiffs Homestake Mining Company, No. 50195; Idaho Maryland Mines Corporation, No. 50182; Central Eureka Mining Company, No. 49468; Alaska-Pacific Consolidated Mining Company, No. 49693; Bald

Mountain Mining Company, No. 50214, and Ermont Mines, Inc., No. 50214, are entitled to recover, the amounts to be determined in further proceedings under Rule 38(c) before a commissioner of the court.

The court further concludes that as a matter of law plaintiffs Oro Fino Consolidated Mines, Inc., No. 49486; Alabama-California Gold Mines Co., No. 50214, and Consolidated Chollar Gould & Savage Mining Company, No. 50214, are not entitled to recover and their petitions are therefore dismissed.

[fols. 317-318] ORDER OVERRULING MOTION FOR NEW TRIAL —July 12, 1956

On March 21, 1956 defendant filed a motion for a new trial.

On July 12, 1956 defendant's motion for a new trial was overruled with an opinion by Littleton, Judge. Judges Madden and Whitaker concurred. Judges Laramore and Jones (Chief Judge) dissented. Said opinion is as follows:

[fol. 319] IN THE UNITED STATES COURT OF CLAIMS

No. 49468

CENTRAL EUREKA MINING COMPANY (a Corporation)

v.

THE UNITED STATES

No. 49693

ALASKA-PACIFIC CONSOLIDATED MINING COMPANY

v.

THE UNITED STATES

No. 50182

IDAHO MARYLAND CORPORATION

v.

THE UNITED STATES

No. 50195

HOMESTAKE MINING COMPANY

v.

THE UNITED STATES

No. 50214

(1) BALD MOUNTAIN MINING COMPANY, (7) ERMONT MINES, INC.

v.

THE UNITED STATES

Mr. Phillip Barnett for Plaintiff Central Eureka Mining Company. *Messrs. Ralph D. Pittman* and *Rodney H. Robertson* were on the brief.

Mr. John Ward Cutler for Plaintiffs, Bald Mountain Mining Company, and Ermont Mines, Inc.

[fol. 320] *Mr. O. R. McGuire, Jr.*, for Plaintiff Alaska-Pacific Consolidated Mining Company. *Messrs. Hogan & Hartson* and *V. A. Montgomery* were on the brief.

Mr. George Herrington for Plaintiff Idaho Maryland Mines Corporation. *Messrs Orrick, Dahlquist, Herrington & Sutcliffe* were on the briefs.

Mr. Edward W. Bourne for Plaintiff Homestake Mining Company. *Messrs. James D. Ewing, Eugene Z. Du Bose, Edward E. Rigney, J. Kenneth Campbell* and *James W. Misslback* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant.

OPINION ON DEFENDANT'S MOTION FOR NEW TRIAL—
July 12, 1956

LITTLETON, *Judge*, delivered the opinion of the court:

In support of its motion for a rehearing in the above cases, the Government says that the court erred in holding that the issuance of War Production Board Limitation Order L-208 amounted to an exercise of the Government's wartime power of requisitioning or eminent domain because (1) in issuing L-208 the Government did not ex-

pressly intend or purport to exercise such requisitioning powers and (2) if L-208 was an "invalid" order, as defendant insists the court held it was, it conferred no right on the plaintiffs to just compensation. On the whole record the court is of the opinion that defendant's motion should be denied.

Defendant attempts to create the impression that this court held that the War Production Board purported to act under a single act, i.e., the Act of October 16, 1941, 55 Stat. 742, containing certain requisitioning powers, when it issued L-208, whereas, defendant says, the record in these cases will not support such a conclusion.

The court did not hold that WPB purported or intended to exercise any of its several requisitioning powers when it issued L-208. The court noted the various authorities actually cited at the conclusion of L-208 including Executive Order 9024 which contained a delegation of the President's requisitioning authority conferred by section 120 of the National Defense Act of 1916 (39 Stat. 312). Beyond that, the court merely noted the various statutes in effect on [fol. 321] the date of the issuance of L-208 which gave the Government wide powers to take private property needed by the Government to carry on the defense of the country in wartime, and held that under such a statutory scheme the Government appeared to have had adequate power to take what it in fact took from the plaintiff gold mine owners and operators.

On the matter of whether WPB "intended" or "purported" to act under any of the statutes giving the Government the power to take or requisition private property for war purposes, the court held that WPB purported to issue a priorities and allocation regulation; that to the extent that L-208 prevented the gold mine owners and operators from acquiring new equipment, material and facilities, L-208 was a proper priorities and allocation order, but that to the extent that L-208 denied those owners the right and clear authority which they and every other citizen have to make use of the materials, facilities and equipment which they owned and had on hand, in the operation of their legitimate and legal mining enterprises, L-208 had the effect of completely depriving them of a valuable property right. The court then held that because the Government had the

authority to exercise the power of eminent domain and thus to deprive the gold mine owners of that property right, the Government must pay just compensation therefor whether this was done by the WPB in one form or another."

The court did not hold, as counsel for defendant says it did, that L-208 was an invalid order. The court held that to the extent that L-208 actually allocated scarce materials away from the gold mine owners and operators it was a valid allocation order, but that to the extent that it deprived the gold mine owners of the right to use their mining properties by "immobilizing" the materials, equipment, and facilities owned by them and which they had on hand and needed to use to operate their mines, the order amounted to a temporary taking of their right and authority to profitably operate their mines.

The court expressly stated that an unauthorized taking is not compensable. It also stated that where there exists authority for a taking of a type of property and the Government, as it did here, takes that property, the use by [fol. 322] the Government of a means of acquiring that property, which means was not specifically spelled out by some specific statute, does not relieve the Government of the obligation of paying just compensation, citing, among others, the case of *Edward P. Stahel & Co., Inc., et al.* v. *United States*, 111 C. Cls. 682, cert. den. 336 U.S. 951. Where there is authority to take and a taking is accomplished, it is compensable. In the *Stahel* silk cases the Government had the statutory authority to take plaintiffs' silk; the Government did not "purport" to exercise that power but rather it purported to exercise a regulatory power by issuing Order M-251 freezing or immobilizing the silk in the hands of the owners themselves until the Government should place mandatory orders requisitioning the silk. This freezing order was held to be a taking and, because the Government had the necessary power and statutory authority to "take" the silk, the court held that it must pay just compensation for it and it did so.

Defendant next attempts to analyze some of the requisitioning statutes noted by the court, in order to indicate that WPB did not in fact invoke any of those statutes when it issued L-208. This court did not hold that WPB invoked

those statutes any more than it held that the Government invoked the requisitioning statutes available to it in the *Stahel* silk cases. In fact, this court noted that WPB issued L-208 with the express (see preamble to the order) intention of exercising only its priority and allocation powers. The court held that what WPB said it was doing and what it in fact and law did, were two different things and that the Government could not escape the obligation of paying just compensation for what it had the authority to take and in fact took, simply by calling its action of taking a "priorities order" or an "allocation order".

Defendant's counsel also says that the expression used by the court, "war necessity", does not appear in the "taking statute" of October 16, 1941, *supra*. In using that expression the court was merely paraphrasing, as it had a right to do, the statutory language concerning the basis for the President's determination that the property proposed to be taken was necessary to the prosecution of the war; that the property was needed for the defense of the [fol. 323] United States; that the need was immediate and impending and that all other means of getting the property had been exhausted. Inasmuch as that statute and other requisitioning statutes then in existence required no particular procedure to be followed in the making of those determinations and provided no appeals therefrom, the court held such determinations were within the discretion of the President or his delegees.

The main complaint of defendant's counsel seems to be that this court held that the Government had the necessary authority to take plaintiffs' property whereas the question of "authority" was not exhaustively briefed by the parties to the court.

It should be noted that this is the *first* occasion in this lengthy litigation on which the Government has taken the position that it lacked authority to take plaintiffs' property. No such contention has heretofore been made. Up to this point, defendant has contended that it did not take the property but merely "regulated" it. It would seem that as a defense "lack of authority to take", if there was any such lack of authority, which we think there was not, should have been raised and supported at an earlier stage. However, both parties may have felt that authority to take this prop-

erty in wartime was perfectly clear, or they may have felt the point was decided in the court's decision in *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, in which the court held that if the Government took anything from the gold mine owners when it issued L-208, "it cannot escape liability by pleading that it lacked authority to take what it did in fact take and retain," citing *International Paper Co* v. *United States*, 282 U.S. 399. The court in the *Oro Fino* case even went so far as to say that if L-208 resulted in an *unauthorized* taking, "it was a taking of which the Government retained the benefit and for which it would therefore be obligated to pay."

In the *Central Eureka* opinion, the court did not go as far as suggested in the *Oro Fino* decision because the court found that the existing statutory scheme at the time of the issuance of L-208 contained sufficient authority to cover the taking complained of and thus avoided that twilight [fol. 324] area involving the right to just compensation where authority to take the property involved is not clear. On that point, in the recent decision of the Supreme Court in *Bill Hatahley et al.* v. *United States*, No. 231, decided May 7, 1956, the Court stated:

> * * * The fact that the agents [of the Government] did not have actual authority for the procedure they employed does not affect liability. There is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment. * * *

The point involved in the *Central Eureka* opinion was not the lack of authority to take, but rather the use by the Government of an *unauthorized means* of accomplishing an *authorized* taking. The court held that the use of an unauthorized means of taking what the Government had the authority to take, did not relieve the Government of the obligation to pay just compensation for what it took, citing *Edward P. Stahel, supra*, (silk cases), and *Hurley* v. *Kincaid*, 285 U.S. 95, (in which the Government took by *flooding* what the statute said it must take by *condemnation proceedings*).

The final position of defendant's counsel seems to be that the only cases in which the Government may be required to

pay just compensation for property which it is authorized to take and does take, are those cases in which the Government has expressly invoked a particular taking or requisitioning statute, has used the precise means of taking provided for in that statute, and has then refused to pay for what it has taken. This theory, if adopted, would rule out many taking cases among which are cases such as the silk cases, the set-aside order cases, the flooding cases, the Causby chicken farm case, and, in fact, most of the "taking" cases.

In these cases the court held simply that what the War Production Board did through the issuance of L-208 amounted to and constituted a taking through the placing of a servitude upon the use by plaintiffs of their property and plaintiffs were accordingly held entitled to recover. From this it seems clear, under the decisions, that there was a temporary taking under the Fifth Amendment. The court did not hold that there was anything illegal about the [fols. 325-326] issuance of L-208 so far as its provisions were concerned. It merely held that when a Government agency has the power to take private property, as the War Production Board did, it does not have to act in some particular formal way in order that its action shall amount to a taking.

In view of the fact that defendant's allegations of error are based on a demonstrably mistaken understanding of the court's opinion and upon conclusions clearly not warranted by that opinion, inasmuch as the court did not hold that L-208 was an invalid order and did not hold that the War Production Board purported to act under or invoke the requisitioning powers contained in any particular statute, defendant's motion for a new trial is overruled.

MADDEN, *Judge*, and WHITAKER, *Judge*, concur.
LARAMORE, *Judge*, and JONES, *Chief Judge*, dissent.

[fol. 327] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 328] IN THE UNITED STATES COURT OF CLAIMS

Nos. 49468, 49486, 49693, 50182, 50195, 50214

CENTRAL EUREKA MINING COMPANY (a Corporation), ORO FINA CONSOLIDATED MINES, INC., Alaska-Pacific Consolidated Mining Company, Idaho Maryland Mines Corporation, Homestake Mining Company, Bald Mountain Mining Company, Inc., et al.

v.

THE UNITED STATES

MEMORANDUM RE PRETRIAL CONFERENCE—Filed October 3, 1952

The parties met, pursuant to notice of the Commissioner, at the United States Court of Claims Building, Washington, D. C., on October 1, and 2, 1952.

The following were present:

Honorable Samuel E. Whitaker, Judge.
Honorable William E. Day, Commissioner.

Phillip Barnett, Esq., Ralph Pitman, Esq., James D. Ewing, Esq., Eugene Z. DuBose, Esq., George Herrington, Esq., William H. Orrick, Jr., Esq., Guy Martin, Esq., George A. Nugent, Esq., Kingdon Gould, Esq., O. R. McGuire, Counsel for plaintiffs.

Kendall M. Barnes, Esq., Thomas McGrail, Esq., Counsel for defendant.

Judge Whitaker participated in the discussions during the morning session on October 1.

The parties, through counsel, agree that a joint trial may be had as to the cases listed in the caption in accordance with the provisions of Rule 38(a) limited to the question [fol. 329] of liability, pursuant to Rule 38(c), reserving to any party the right to introduce evidence regarding facts peculiar to a particular case, the matter of just compensation to be treated separately after the question of liability is finally determined.

Counsel for each party handed to the Commissioner a list of witnesses to be called as to its case in chief, with the exception of counsel for Central Eureka who advised that

its list of witnesses was identical with that of Idaho Maryland.

Plaintiffs offered as Plaintiffs' Exhibit No. 1 a report dated June 1, 1944, entitled, "The Closing of the Gold Mines (August 1941 to March 1944)," Report No. 9, Policy Analysis and Records Branch, Office of the Executive Secretary, War Production Board. This exhibit was admitted over objection of counsel for the defendant who will state his objection fully at the trial.

Counsel agree that copies of any exhibits may be received in evidence with the same force and effect as the originals thereof, subject to check for authenticity by either party.

Counsel for the plaintiffs and for the defendant are agreed that the documents listed below are admissible upon the proffer of any party without objection as to genuineness or authenticity, other objection to the admissibility of any document being reserved by all counsel. Counsel further agree that the only objections which might be made with respect to any such documents would be on the basis of relevance or materiality, reserving to each party the [fol. 330] right to complete any documents which are incomplete.

Plaintiffs' Exhibits for Identification

2. House Committee hearings on H.R. 4393, A Bill for the Relief of Owners of Gold Mines as Result of Operation of L-208, December 18 and 20, 1945, February 14 and 15, 1946, March 11 and 12, 1946.

3. OPM Document, Part 959-Materials for the Production of Mining Machinery and Equipment Specified Herein, Preference Rating Order No. P-23, dated July 29, 1941.

4. OPM Document, Part 982-Mines (Maintenance, Repair, and Supplies), Preference Rating Order No. P-56.

5. OPM Document, Preference Rating Order No. P-56-a, Material Entering Into the Production of Mining Machinery and Equipment. (7 pages)

6. 7. [These numbers reserved.]

8. Ltr dated Oct. 13, 1942, from Wilbur A. Nelson to Idaho Maryland Mines Corporation, with L-208 and Press Release dated Oct. 8, 1942, attached.

9. WMC Directive XIII, Employment of Workers Previously Employed as Production or Maintenance Workers in Gold Mines, dated Oct. 7, 1942.

10. SPAB Minutes, Nov. 18, 1941, Status of Gold Mining. (7 pages).

11. Memo dated Nov. 26, 1941, from S. L. Phraner to Donald M. Nelson.

12. Ltr dated Dec. 19, 1941, from Milo Perkins to Donald M. Nelson, attaching Statement on Priorities for Gold Mining Machinery, dated Dec. 17, 1941.

13. Ltr dated May 26, 1943, from Edward H. Rott to A. S. Knoizen, transmitting "Report on Gold Mine Order L-208, Its Effect and Accomplishments," dated May 24, 1943. (18 pages)

14. Appendix F. to Report No. 8, "Lead and Zinc Policies of WPB and Predecessor Agencies," Supply and Requirements Estimates for Zinc. (9 pages)

15. Memo dated Aug. 3, 1942, from Wilbur A. Nelson to A. I. Henderson, re Proposed Limitation Order on Gold Mining.

16. Memo dated Aug. 14, 1942, from Wilbur A. Nelson to H. O. King.

[fol. 331] 17. Memo dated Sept. 1, 1942, from H. O. King to Wilbur A. Nelson.

18. Memo dated Sept. 9, 1942, from Wilbur A. Nelson to H. W. Dodge re Proposed Gold Mining Limitation Order Based on 50% Gold Value as Limiting Factor.

19. Ltr dated Aug. 27, 1942, from Hon. Pat McCarran to Donald Nelson with statement attached, "Employment Statistics of the Principal California Gold Mines."

(Defendant reserves the question as to whether the document attached to the letter is the enclosure referred to in the letter, this being a qualification of the prior stipulation with respect to authenticity. Counsel for both parties are going to attempt to verify this.)

20. Ltr dated Sept. 15, 1942, from Guy N. Bjorge to Wilbur A. Nelson.

21. Memo dated Sept. 15, 1942, from M. Creditor to Donald M. Nelson

22. Report of Interdepartmental Committee on Non-Ferrous Metals Meeting of Sept. 8, 1942.

23. Memo from W. L. Batt to Donald M. Nelson, with notation "noted by DMN 10/1/42".

24. Memo dated Oct. 3, 1942, from Wilbur A. Nelson to W. L. Batt re Labor Statistics on Gold Mines in the United States.

25. Ltr dated Oct. 2, 1942, from Robert P. Patterson to William L. Batt.

26. Memo dated Oct. 5, 1942, from Robert P. Patterson and James V. Forrestal to Donald M. Nelson.

27. Memo issued by G. Lyle Belsley containing quotation from minutes of Oct. 6, 1942 meeting of the War Production Board.

28. The Gold Curtailment Order Agenda, Oct. 7, 1942.

29. Ltr dated Jan. 5, 1943, from Idaho Marland Mines Corporation to Edward H. Rott, with attachments. (6 pages)

[fol. 332] 30. Ltr dated Dec. 20, 1943, from Howard I. Young to Albert Crase, with ltr of Dec. 20, 1943 from A. S. Knoizen to Albert Crase attached.

31. Ltr dated Jan. 31, 1944, from Idaho Maryland Mines Corporation to A. S. Knoisen, transmitting the Appeal of Idaho Maryland. (16 pages)

32. Ltr dated May 5, 1942, from Idaho Maryland mines Corporation to WPB Mining Branch.

33. Ltr dated Sept. 1, 1942, from Donald M. Nelson to Hon. Pat McCarran.

34. Memo from Paul V. McNutt and Donald M. Nelson to All Worker in Gold Mines.

35. Memo dated Dec. 23, 1941, from Donald M. Nelson to the Supply Priorities and Allocations Board with the following attachments: (total 10 pages)

35a. Ltr dated Dec. 18, 1941, from Cordell Hull to Donald M. Nelson.

35b. Ltr dated Dec. 16, 1941, from M. S. Eccles to Donald M. Nelson.

35c. Ltr dated Dec. 15, 1941, from H. M. Morgenthau, Jr., to Donald M. Nelson.

35d. Copy of ltr dated Dec. 15, 1941, from H. Morgenthau, Jr., to Hon. Ralph W. Close.

36. Memo dated Dec. 2, 1941, from Edwin B. George to Donald M. Nelson re Status of Gold Mining (meeting held in the Department of State on Nov. 24, 1941.)

37. Memo dated Sept. 25, 1942, re Interbranch Meeting of Branches Concerned with Mineral Production.

38. Memo dated Apr. 7, 1943, from Edward H. Rott to A. S. Knoizen re Proposed Plan for Amending Limitation Order L-208.

39. Memo dated Nov. 16, 1942, from John J. Corson to Brig. General F. J. McSherry, attaching memo dated Nov. 11, 1942, from A. W. Motley to John J. Corson.

40. Memo dated June 8, 1943, from Donald D. Davis to Donald M. Nelson.

41. Letter dated May 24, 1943, from Hon. Pat McCarran to Donald M. Nelson.

42. Memo to Howard L. Young from D. M. Nelson directing him to prepare a reply to the attached ltr dated May 24, 1943, signed by 30 Senators.

[fol. 333] 43. Memo dated June 7, 1943, from M. Creditor to Donald M. Nelson.

44. Memo dated July 10, 1943, from A. S. Knoizen to Hiland G. Batcheller. (3 pages)

45. Memo dated Aug. 26, 1942, from Donald M. Nelson to H. W. Dodge, directing him to prepare a reply to the attached ltr to Mr. Nelson dated Aug. 26, 1942, from Hon. Pat. McCarran.

46. Memo dated May 6, 1943, from Edward H. Rott to A. S. Knoizen.

47. Memo dated April 17, 1943, from Edward H. Rott to A. S. Knoizen.

48. Memo dated Sept. 7, 1943, from Gilbert J. Brown to Hugh S. Porter re Final Report on Gold Mining in Canada.

49. Ltr dated Sept. 29, 1942, from Hon. Pat McCarran to Donald Nelson, enclosing clipping from The Washington Post of the same date.

50. Memo dated Oct. 20, 1941, from Shaw Livermore to E. B. George.

51. Memo dated Oct. 30, 1943, to Hiland G. Batcheller, John J. Hall and Howard J. Young from A. S. Knoizen.

52. Memo dated Apr. 30, 1943, from Wilbur A. Nelson to Howard I. Young. (5 pages)

53. Memo dated Mar. 30, 1943, from A. S. Knoizen to William L. Batt and Howard I. Young re South African Gold Mines.

The right is reserved to all parties to offer additional documents.

Upon the production of a certified copy of the Certificate of Incorporation for Idaho Maryland, defendant withdrew denial previously made to that allegation of the petition and agreed that Idaho Maryland Mines Corporation is a Nevada corporation.

[fol. 334] A trial was set for 10 a. m., November 19, 1952, to be held in Seattle, Washington, for the purpose of presenting proof on behalf of Alaska-Pacific. It is estimated that this will take about three days.

The cases were also set for trial in Washington, D. C., beginning at 10 a.m., on January 5, 1953, and continuing from day to day. The defendant will be expected to continue with its proof upon the closing of proof by the plaintiff.

Respectfully submitted,

William E. Day, Commissioner.

[fol. 335] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. —

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 24th, 1956.

Earl Warren, Chief Justice of the United States.

Dated this 9th day of October, 1956.

[fol. 336] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—January 14, 1957

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and case transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1] IN THE UNITED STATES COURT OF CLAIMS

Nos. 49,468, 49,486, 49,693, 50,182, 50,195, 50,214

CENTRAL EUREKA MINING COMPANY, ORA FINA CONSOLIDATED MINES, ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ET AL., Plaintiffs,

vs.

THE UNITED STATES, Defendant

Transcript of Testimony

Seattle, Washington,
Wednesday, November 19, 1952,
at 10 o'clock a. m.

TESTIMONY FOR PLAINTIFFS

The parties met, pursuant to notice of the Commissioner, at the time above stated, in Customs Court Room, Federal Building, Seattle, Washington.

APPEARANCES

Present: Hon. William E. Day, Commissioner; O. R. McGuire, Jr., Esq., V. A. Montgomery, Esq., Phillip Barnett, Esq., William H. Orrick, Jr., Esq., and Carlton Connor, Esq., counsel for plaintiffs; and Gorden F. Harrison, Esq., counsel for defendant.

Mr. R. B. Draper, a reporter, was thereupon sworn by the [fol. 2] Commissioner to well and truly take down and transcribe the questions propounded to and the answers given by the witnesses, and to do all other things required of the reporter.

Pursuant to the order of reference by the honorable, The United States Court of Claims, in the above-entitled cause, testimony on behalf of the plaintiffs was taken, as follows:

The Commissioner: All right, gentlemen, if you are ready, you may proceed.

COLLOQUY

Mr. Barnett: Your Honor, before we start, there is probably an oversight in the memorandum of the pre-trial conference, dated October 3, on page 2, at the second para-

graph, and after the words "Idaho-Maryland", there should be added "Homestake."

The Commissioner: May I see it, please?

Mr. Harrison: Mr. Commissioner, I would like to say that I have with me the original pre-trial conference memorandum, and all of the exhibits.

Mr. Barnett: The list of the witnesses will be the same as the Idaho-Maryland and the Homestake.

Mr. Harrison: I thought I would like counsel to know that I have all of the exhibits here.

The Commissioner: As I recall, Mr. Ewing, at the pre-trial conference, indicated that he was going to send over a list of the witnesses and furnish it to me, and I don't believe I have received it.

[fol. 3] Mr. Connor: No, that has not been completed yet.

Mr. Barnett: If you will recall, Your Honor, we stated that our witnesses would be the same as Idaho-Maryland and Homestake.

The Commissioner: I don't have a list from Homestake.

Mr. Barnett: When it is submitted, all of the witnesses will be the same.

The Commissioner: I think we had better read the pre-trial memorandum as it is now, because there was a list, as I recall, from Idaho-Maryland.

Mr. Connor: I think we submitted a list, but I think it was the preliminary list.

The Commissioner: No, I don't believe you did.

Mr. Connor: I know there is one being worked on.

The Commissioner: As a matter of fact, that doesn't make too much difference, anyway. What I was driving for, more than anything else, was to get counsel to working on the preparation of it.

Mr. Connor: You have succeeded in that.

Mr. McGuire: May we proceed?

The Commissioner: Yes.

Mr. McGuire: The first witness will be Mr. Harold H. Waller.

[fol. 4] HAROLD H. WALLER, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. McGuire:

Q. Mr. Waller, will you state your full name and address for the record?

A. Harold H. Waller, and my business address is 416 Queen Anne Avenue, Seattle.

Q. What is your occupation, Mr. Waller?

A. Civil engineer and surveyor, licensed civil engineer and licensed surveyor, and I am also United States Deputy Mineral Surveyor for Alaska.

Q. When were you appointed to that position?

A. 1912, by the Department of the Interior.

Q. Now, will you state for the record a summary of your professional background?

A. I am a graduate of the University of Washington in civil engineering, and I have practiced civil engineering all of my life, and a great part of my practice has been the surveying of mining claims for patents.

Q. Now, are you familiar with the mining property of the plaintiffs in this case?

A. I am.

[fol. 5] Q. And located in the Wasilla precinct in Alaska?

A. Yes, I am.

Q. Will you state for the record what your activity has been, with respect to those properties?

A. I surveyed for patent nearly all of the mining claims that are now owned or held by the Alaska-Pacific Consolidated Mining Company.

Mr. McGuire: Will you mark this, please? I think, in these cases, it will be well for the exhibits to be marked with the initials of the individual plaintiffs, and I think we may start off with Plaintiffs' AP No. 1.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 1.)

By Mr. McGuire:

Q. Mr. Waller, I hand you a map, which has been marked for identification as Plaintiffs' AP Exhibit No. 1, and ask you if you can identify that exhibit?

A. Yes, I can. I drew it.

Q. You personally drew it?

A. Yes, I did.

Q. In what year, Mr. Waller?

A. I will have to look at the date of it. I don't see a date on here; it ought to be on there. Yes, it is obscure on this one. It is August, 1941, and September, 1942. It was [fol. 6] brought down to date in September, 1942, because the original date would be the first draft of it.

Q. From what source did you draw the information, whereby you delineated the boundaries of the claims shown on this map?

A. This map was drafted by me from data obtained from the patent surveys, which I executed for the plaintiff, and also from the field notes of adjoining properties which were surveyed both by me and one Charles S. Hubbell, another mineral surveyor, with whom I had been associated since 1912. Consequently, I had access to all of the records, all of the surveys, which are shown on this map.

Q. Is this map a true and accurate representation of the boundaries of the various claims that are indicated on the map?

A. Yes, they are; and furthermore, all of these claims were surveyed for patent, I believe, with the exception of one or two small ones; and all our field notes and plats were turned into the Public Survey Office in Juneau, Alaska, which is a branch of the Department of Interior, and were approved and accepted by them as being correct.

Q. Mr. Waller, will you explain for the record the procedure that is followed in surveying mineral claims?

A. The procedure that is followed in mineral claims is laid down by the manual of surveying instructions, and the [fol. 7] mining laws of the United States. Shall I describe it further?

Q. Yes, give us a general idea of it, please.

A. When an owner of a mining claim wishes to obtain title to it from the United States Government, his first

step is to obtain from the local recorder of the mining district in which the claim is situated, a certified copy of the original location notice. This location notice is attached to a form, which states that it is an application to the United States Land Office for a patent covering such mining claim.

Q. I don't want to interrupt your chain of thought, but will you explain for the record what a location notice is.

A. A location notice is the notice required by law, when a prospector stakes a mining claim. To make that location valid, he must first stake out on the ground, with a suitable monument, either a wooden post, or stone cairns, or some other type of monument, which is evidence to the public of being a monument; he describes the claim as close as can be, and writes that description in the location notice. He is then required by law to record that location notice with the local recorder, who is a government officer, and that goes into the record book of that precinct.

The Land Office—and when I say "Land Office",—it used to be called the General Land Office, which is now the United States Bureau of Land Management, but at the time these surveys were made, it was the General Land [fol. 8] Office, so I will refer to the General Land Office. When application for a patent survey was made to the General Land Office, a deposit was also made with the application, and the Surveyor General of the Public Survey Office of the Land Office then issued an order, to the U. S. Deputy Mineral Surveyor, whom the applicant has designated, to execute that survey of the mining claim, giving it a number, which appears here on this plat for each group of mining claims, and ordering the Deputy Mineral Surveyor to execute that mining claim, the survey of the mining claim, in accordance with the mining laws of the United States.

Q. Then what is done by the Deputy Surveyor, following that order, Mr. Waller?

A. The Deputy Mineral Surveyor moves onto the ground, and actually executes the survey, according to the mining laws. That is a very complicated question, because it involves so many different angles, but the maximum size of a mining claim may be 1500 feet long, and 600 feet wide, or 300 feet either side of the lode line.

The surveyor is required to first locate, by preliminary survey, the original location monuments that were put there by the prospector; he is also supposed to locate on the ground the legal discovery of valuable minerals, that the prospector based his valid location on. The surveyor then is required to run the survey of the claim within the [fol. 9] location monuments, as set by the prospector. In case he finds that the prospector overran—in other words, had his claim too long and too wide—he is required to pull in the end lines or sidelines the legal distance.

If there are overlapping claims by other prospectors, he is required to find those, and locate them on the ground, and show them on his map and in his field notes.

The Mineral Surveyor is then required to set permanent corners, according to the requirements of the mining laws, and mark them in certain ways, so that they can be identified. He is required to put in reference marks to all of those corners. He is also required to run the actual boundaries on the ground, and show any items of topography. He is also required to locate and measure up all of the work that the prospector or applicant performed on this mining claim, such as tunnels, roads, buildings, and other improvements; and then the surveyor is required to appraise the value of these improvements, and make a report of them in his field notes, to go to the United States Land Office.

He is required to certify, under oath, that at least $500 worth of improvements have been made in the ground, or in such manner that would benefit and tend to the development of this mining claim.

After all of this is done, field notes and plats are pre- [fol. 10] pared and filed with the United States Land Office; they are inspected and approved by the United States Land Office.

And incidentally, the surveyor is under $5,000 bond, payable to the United States Government, to back up the accuracy of his work; but the surveyor is not paid by the government; he is paid by the applicant for the surveying of these lands. That is the law.

Q. And from the survey made, all of the necessary data is taken down in what, Mr. Waller, and recorded in what book?

A. They are recorded in what we call a surveyor's field book, and I have brought down some, if you want them in evidence. They are taken down, more or less in shorthand fashion. From those are transcribed the typewritten field notes, and the plats, such as this, filed with the United States Land Office as a basis for application for patent.

Q. When you said plats such as this, you were refefring to Plaintiffs' Exhibit AP No. 1?

A. Yes, sir.

Q. Do you have available here in the courtroom the transcribed field notes, which were filed with the government, and from which that plat was made?

A. I do.

OFFER IN EVIDENCE

Mr. McGuire: If the Court please, I offer in evidence Plaintiffs' Exhibit AP No. 1. I have furnished a photostatic copy of it to the government; I don't know whether it has reached Mr. Harrison or not.

[fol. 11] Mr. Harrison: No, it has not.

By Mr. Harrison:

Q. Mr. Waller, I notice on this exhibit for identification, Plaintiffs' AP No. 1, various names set forth in blocks. Do those names have any particular significance?

A. You are referring to the names of the mining claims?

Q. Yes; names like Independence, Brightness No. 3, Hamburger, Redeye, and so on.

A. The prospector, when he stakes a mining claim, can call it anything he wishes, and that is a matter of record, and goes in with the original location notice, and is recorded; from that time on it is a matter of record. There is no restriction as to what he can call it.

Q. Well now, would you explain the significance of the various colors used in the blocks. I notice one is called "Independence claims", and another "Alaska Free Gold claim" and "Jap claim" and "Black claim", and the claims held by location. Will you explain those, please?

Mr. McGuire: Those colors were placed on there not by Mr. Waller, but by another witness for the plaintiffs, and will be connected up by subsequent testimony.

Mr. Harrison: What I am trying to determine is—we

have here an exhibit which, on its face, purports to be a map of the Alaska-Pacific Consolidated Mining Company's [fol. 12] properties, and as I look at it, it seems to have all kinds of names and colors, and it doesn't seem to be tied down to Alaska-Pacific, in any way, on its face.

Mr. McGuire: It will be.

Mr. Harrison: It will be?

Mr. McGuire: Yes.

Mr. Harrison: I don't want to let this in evidence until such foundation has been laid, but I do have a few more questions to ask of this witness.

The Witness: I can explain it, if you wish.

By Mr. McGuire:

Q. Will you explain the numbers appearing on the exhibit, after the names of the various companies?

A. Those are the survey numbers issued by the Surveyor General of the General Land Office to the surveyor, when he gives him a survey order to survey a piece of land. For example, No. 980—all of the claims numbered 980 were included in one group. That was based upon a survey order from the Surveyor General's office, and were surveyed as one group, although each individual claim was run out, and the corners staked in the field. Still there was one application, and the same thing applies to all of the other like numbers on the map.

By the Commissioner:

Q. What is the significance of the heavy blue lines? [fol. 13] A. These (indicating)?

Q. Yes.

A. Those were drawn by me to designate the boundaries of the properties owned or claimed by the Alaska-Pacific Consolidated Mining Company. The light lines I have colored were neighboring claims, which were not included in these properties.

By Mr. McGuire:

Q. What is the significance of the dotted line appearing in the group of claims headed by Survey No. 958-A and Survey No. 980?

A. Those designate underground workings, such as tunnels, drifts, stopes, grades, the way they would appear, looking down at it from a surface view.

Q. The underground workings of the Alaska-Pacific Consolidated Mining Company?

A. Yes; those are workings which were used before the application for patent was made, to support the application.

Q. Now, with respect to the Granite Mountain No. 2 claim, I notice there are two of them, one designated old and one designated as new. What is the reason for that, Mr. Waller?

A. Survey No. 961, which covers Granite Mountain No. 2, and Granite Mountain No. 3 claims, were made about 1912, but for some reason or another, unknown to me, they were never patented; that is, the government did not, at any [fol. 14] time prior to a certain date in 1940, I believe, issue title to that land; so it was necessary, according to the mining laws, to continue to do assessment work on those two claims until title was issued. We found out, while I was working for Alaska-Pacific, that the assessment work on these two claims had been overlooked, and it was then necessary to go up and re-stake those two claims and apply to the Surveyor General for a new survey order and a new number, and they were resurveyed exactly along the same lines they were surveyed back in 1912, and they were actually patented, I believe, as survey No. 2046.

By the Commissioner:

Q. Getting back to my question about the heavy blue lines, you said they represent land owned or claimed by Alaska-Pacific. What is the distinction?

A. When a patent is issued, the company actually owns it; after the United States Land Office has issued title for the land, then the company can actually own the ground. Up to that time, it simply holds it by right of possession, and having staked it.

Q. Is there any indication as to which—by color, or otherwise, as to which is claimed, and which is owned?

Mr. McGuire: All of that is in evidence, Mr. Commissioner.

The Commissioner: The reason I am asking the question

is because I am thinking about the ruling of the Commis-
[fol.15] sioner with respect to the admissibility of this exhibit.

Mr. McGuire: Obviously, Mr. Waller is not competent to testify as to the titles to the properties. I offer the exhibit as a delineation of the boundaries by the survey, but we will have a subsequent witness to prove the actual title to these various claims, and that will apply to this particular numbered claims.

Mr. Harrison: Before you rule, I would like to ask a few more questions.

The Commissioner: All right. Let us go off the record a minute.

(Here followed discussion off the record.)

The Witness: The heavy lines include within their boundaries all of the mining claims which the Alaska-Pacific Consolidated Mining Company had employed a surveyor to execute a patent survey on. Whether or not, as a result of that, title was issued, I do not know, but you notice all of those within the heavy blue lines have numbers, which means that they had had—the Surveyor General had issued survey numbers and authorized a mineral survey—I did most of it, and Hubbell did the rest of it—to execute a patent survey on those mining claims for this company, within the boundaries of those lines, or these companies' predecessors.

By Mr. Harrison:

Q. Mr. Waller, you indicated that you did not make the
[fol. 16] actual survey of all of these applications for patents?

A. I didn't execute all of the surveys actually as U.S. Mineral Surveyor. I originally went into the country in 1910 and 1911, before I became United States Mineral Surveyor, and worked with Mr. Hubbell, who surveyed, at that time, Survey 980 and Survey 958-A and 958-B, those two. I did all of the rest.

Q. You did all of the rest?

A. Yes, sir.

Q. But not as Deputy Mining Surveyor?

A. Well, I assisted on Survey 980 and Survey 958-A and

958-B, which is the mill site, the Independence mill site. I actually acted as principal surveyor, as mineral surveyor on the balance of them, on the rest of them.

Q. Now, do you know whether or not the results of your survey, as sent to the General Land Office, were actually approved and accepted by the General Land Office as accurate?

A. To the best of my knowledge, they were. If they were not, that means that the General Land Office would hold up or reject any of the surveys which were made, and I don't recall that any of them were held up or rejected; they certainly would have notified me, if they had been.

Q. Do you recall whether or not, when you made these various surveys, as Deputy Mineral Surveyor for the Government, the applications were in the name of the Alaska-Pacific Company, or any of their representatives, or in the [fol. 17] names of individuals?

A. Surveys No. 980 and 958-A were executed in the names of others, predecessors of the Alaska-Pacific Consolidated Mining Company.

Q. Do you know about the balance of these claims?

A. The balance—our field notes show that, but I believe they were.

Mr. McGuire: Mr. Waller, I suggest that you refresh your recollection from the field notes, and then testify to their accuracy.

I suggest that Mr. Waller read those off for the record.

The Witness: Surveys 958-A and 958-B were executed by the Alaska Gold Quartz Mining Company in August, 1911. I assisted Mr. Hubbell on that survey.

By Mr. Harrison:

Q. Is Mr. Hubbell living or dead?

A. Yes, he is.

Q. He is living?

A. Yes, he is now 100 years old.

Mineral Survey 980, executed by the Alaska Free Gold Mining Company, in July, 1913.

Survey No. 2038, executed by Alaska-Pacific Consolidated Mining Company, by myself, in July to September, 1938.

Survey No. 2041, Alaska-Pacific Consolidated Mining Company, executed by myself, in April to August, 1938.

[fol. 18] Survey No. 2037, executed by Alaska-Pacific Consolidated Mining Company in August and September, 1938.

Survey No. 2046 for the Alaska-Pacific Consolidated Mining Company, by myself, in July, 1939.

Survey No. 2047, by Alaska-Pacific Consolidated Mining Company, by myself, in July and August, 1939.

Survey No. 2093 was executed by the Alaska-Pacific Consolidated. I haven't got the field notes here, but my recollection is it was in 1940.

Survey No. 2094, executed by Alaska-Pacific Consolidated Mining Company, by myself, in August and September, 1941.

No. 2040 was for the Alaska-Pacific Consolidated Mining Company, by myself, in 1939.

Q. Mr. Waller, it would be your testimony, then, that all but 958-A and 958-B and 980 were actually surveyed for the plaintiff in this case?

A. May I ask permission to speak to Mr. Montgomery a minute?

Q. That is all right with me.

A. Will you repeat your question, please?

Q. My question, as I recall it, was, it is your testimony, Mr. Waller, that all of these applications, as designated by numbers here, were surveyed, except for 958-A and -B and 980, for the plaintiffs in this case?

A. Yes, correct.

[fol. 19] Q. Do you know whether or not a patent, when issued, contains a description of the land covered by the patent?

A. It does, yes. I would like to say that all of the ones I have seen, do. I have seen quite a few patents, and they all do: they describe the property.

Mr. Harrison: May I ask counsel for the plaintiffs if he intends to produce the patents?

Mr. McGuire: They are here.

Mr. Montgomery: We have the patents in court here, the original patents, and of course there will be some chain of title, also.

Mr. Harrison: Defense counsel feels that this exhibit, at this time, is premature, because no foundation has been laid to show that these claims, which were not surveyed by

the plaintiffs, were ultimately acquired by the plaintiffs, and without the patents, which we feel to be the best evidence of title, in contrast to a map, which represents a survey conducted, I think, in 1941, we feel that it would be incompetent at this time. We recognize that, if subsequent testimony ties in the locations, as shown on this plaintiffs' Exhibit AP No. 1 with the patents, and with the chain of title properly correlated, then at that time we might be glad to withdraw our objection.

The Commissioner: It may be admitted.

[fol. 20] (Said map, marked "Plaintiffs' Exhibit AP No. 1", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Mr. Waller, will you tell us, from your general knowledge, what procedure is followed by the government agency, the General Land Office, or the Bureau of Land Management, after your survey is turned into them?

A. They inspect it; their office engineers check the computations and the field notes; and in many cases, they send inspectors to the field to check up.

Q. Do they compare the survey that you turn in with any key maps in their possession?

A. Yes; they have a key map of the mining district, showing all of the surveys which have been executed there, and you can obtain from the General Land Office, the Public Survey Office, a map of the district, showing all of the claims that have been surveyed in that whole district. They call that the district map.

Q. If the Land Office were to find that a survey, which you turned in, conflicted with a patent previously issued, what would be their disposition on the patent?

A. Our survey would be rejected, and the surveyor would be reprimanded for making such a survey.

Q. And no patent would be issued, based on it?

[fol. 21] A. Absolutely not.

Q. Now, when an applicant files an application for a patent, is he required to post that application and make publication of it in any manner?

A. After the survey has been approved by the Land Office, then the applicant is notified then to post upon the land a map, and a copy of the advertisement that is run in

the local newspaper, and it has to be so posted and advertised for a certain number of days, as prescribed by law, that is the notice to the public that that mining claim is being patented, and all adverse claimants are supposed to appear before the Land Office and file counterclaims within certain prescribed time limits; if that isn't done, they are barred by the statute.

Q. As a matter of caution, I think I had better ask Mr. Waller if patents, when issued as a result of his survey, do not bear survey numbers, which were assigned by the Land Office?

A. Yes.

Q. And if they do not also refer, by name, to the named claims?

A. You say, do they?

Q. Yes.

A. All the ones I have ever seen, did.

Q. So that, if, for example, the plaintiffs were to apply [fol. 22] for a patent on Beefsteak claim, and survey number of 2037 were assigned by the government, and you made the survey, and returned it promptly, and the patent eventually issued, the patent when issued would bear the name "Beefsteak", and would also refer to the same No. 2037?

A. Yes.

Q. And the boundary which you have delineated on Plaintiff's Exhibit AP 1 would be the boundary of Beefsteak and Survey No. 2037, and would show on this plat a description that would be identical with the description of Beefsteak, as it appears by metes and bounds in the patent, itself; is that correct?

A. Yes, sir; with this exception: That any adverse claims which have been approved by the Land Office would be approved—that area would be eliminated.

Q. Would be eliminated from the patent?

A. Yes. For example, your Beefsteak claim—that has three claims overlapping. Now then, if the Land Office had decided, after proper investigation, and hearing, and so forth, that Beefsteak only was entitled to the balance, after these conflicts had been taken out, then the patent would describe what was left.

Q. That's right. And in drawing this plat, however,

you took the description from your field notes and the patents?

A. Yes; when we make a survey, we describe any known [fol. 23] conflicts; we set them up in a table, in our survey. We say the area of the Beefsteak is so many acres, and the area of the conflict of Eagle No. 24 would be so many acres, and the conflict with the Mock Duck would be so many acres; and then it is up to the attorneys for the applicant to work it out as to what area Beefsteak will finally cover.

It may be that the Land Office would reject those adverse interests; it depends entirely on the evidence.

By the Commissioner:

Q. But that is all resolved when the patents are issued?

A. Yes, the Land Office takes care of that.

By Mr. McGuire:

Q. One final question: Does the Land Office permit any application to bear a name which has already been taken out by any other applicant, that is, the name of a claim?

A. Yes, they do. You can have any number of duplications on names.

Mr. McGuire: That is all.

The Commissioner: Just a moment. I think there is no connection between the Homestake as it appears on that map, and one of the plaintiffs in this case?

Mr. McGuire: None, at all.

Cross-examination.

By Mr. Harrison:

Q. Mr. Waller, I asked you if the survey measurements [fol. 24] that are made in connection with Exhibit No. 1 were accepted by the Land Office, and I think you responded that, so far as you know, they were, or else you would have heard from it, or something along that line?

A. Yes.

Q. And I asked you also, I believe, if you knew whether or not patents had been issued on various claims in Plaintiffs' Exhibit AP 1, and I think you testified, if I am not

mistaken, that you were not sure about all of them. Did you so state?

A. The law under which we operate as mineral surveyors bars us from acting as attorney for our clients, so we do not know when patents are issued; we are not notified, they are not sent to us, but they are sent to the applicants' attorney.

Q. Let me ask you this: Were patents issued for the various claims outlined on Plaintiffs' Exhibit 1?

A. Were they?

Q. Were the patents issued?

A. I, personally, do not know.

Q. I think, about three minutes ago,—didn't you testify that you compared the chart that you prepared as Plaintiffs' Exhibit 1, with the description—the metes and bounds descriptions in the patents that were issued?

A. No; according to our survey and field notes.

Q. According to your field notes——

[fol. 25] A. I said patent surveys.

Q. Yes.

A. I said this map was prepared from the patent surveys which were filed.

Q. I understand.

A. Here (indicating) is the return of the patent survey to the Land Office, and what happens to it after it is filed with the Land Office and accepted,—the responsibility of the surveyor ceases. From that time on, it is up to the attorney to carry the ball.

Q. Just so the record will be clear, you did nothing, in the preparation of Plaintiffs' Exhibit AP 1, to compare the metes and bounds description therein, with the patents, assuming that there were patents actually issued to cover those particular locations; is that correct?

A. These (indicating) simply cover patent surveys. This is a patent survey here (indicating).

Q. My question was, was that correlated by you with the patents, themselves, the descriptions there?

A. No.

Mr. Harrison: I have no more questions.

The Commissioner: Anything further, Mr. McGuire?

Mr. McGuire: No, sir.

The Commissioner: Any other questions?

Mr. Barnett: I would like to ask one question, Your [fol. 26] Honor, please.

By Mr. Barnett:

Q. In reference to the dimension of the claim, Mr. Witness——

A. Waller.

Q. Mr. Waller, I want to ask you one question.

A. All right.

Q. In reference to the maximum distance or footage of the claim, you were referring to the territory of Alaska; is that correct?

A. That is the mining laws of the United States.

Q. Does that cover all of the territories and the States?

A. All the States and territories.

Q. I thank you.

By Mr. Harrison:

Q. Mr. Witness, when you speak of the mining laws of the United States, do you have any particular period of time in mind?

A. You mean——

Q. The mining laws of the United States, as they existed in 1912, or 1913, or currently?

A. Well, any surveys which are executed have to be executed according to the laws at the time they were executed, but not now. In other words, when we were making [fol. 27] those surveys in 1912, we were working under the mining laws as they were set up at that time. Any amendments or changes that have been made since, of course, the Mineral Surveyor has to conform to. However, they haven't been changed very much during the years.

Q. Is this process of staking claims still current?

A. Absolutely, yes.

Mr. Harrison: That is all.

The Commissioner: I have a question.

The Witness: That is on the unsurveyed public lands of the United States that I am referring to. When you get into the National Forests, or other reservations of the government, they set up rules of their own.

By Mr. Harrison:

Q. Are all these claims of the plaintiffs in this case staked on government-owned land?

A. They were staked on unsurveyed public lands.

Mr. Harrison: I thank you.

By the Commissioner:

Q. I was wondering about the statement that you made, with respect to the limitation imposed by the statute are on the amount or extent of a claim filed by an applicant.

A. Yes.

Q. By that I mean a plat indicating a larger area. Is that limitation inapplicable, if accompanied by the claims of several prospectors?

[fol. 28] A. This one location, like the Beefsteak, cannot be more than 1500 feet long and 300 feet wide, containing 21 and some fraction acres, and any one location cannot encompass more than that area or length and breadth.

Q. And that one location is limited to one individual?

A. There, again, the mining laws have changed, from time to time. They allow a prospector to stake, maybe, two a month, and maybe, with a power of attorney, they might have power to stake two more, and in that way, if you go into a new mining district, armed with a power of attorney, the law allows you to stake so many a month, and so on. Then companies like Alaska-Pacific can buy that prospector's interest, and the company can go out and stake it. There is no law against a corporation doing it.

Q. But the limitation is related to time?

A. In the beginning, yes.

By Mr. Montgomery:

Q. I think, for further clarification, for an individual location on one particular mineral discovery—isn't that right?

A. Well, the law requires that every one of these claims, like the Beefsteak, has to have a discovery; is that what you mean?

Q. Yes.

A. And it is up to the surveyor, when he surveys it, to [fol. 29] verify that discovery and locate it.

By the Commissioner:

Q. How do you do that?

A. Well, you have to go out and find it.

Q. That is a little hard, isn't it?

A. Well, sometimes it is a little hard. On lode claims, it is difficult. The mineral is supposed to be in place, and you can see it, and a mining engineer can tell whether it is mineral land, or not, or whether it is solid granite, or if it has quartz in it, or any valuable mineral. Sometimes it requires assay, that is true, but the burden of proof is up to the mineral surveyor to prove that it is a valuable discovery; that is a part of his job.

Q. Well now, what is the significance of the title "U. S. Deputy Mineral Surveyor"? Are you appointed as a surveyor by the government?

A. Will you hand me that shingle over there (indicating)?

Mr. McGuire: You had better read that into the record, Mr. Waller.

The Commissioner: I see a certificate here by the United States Surveyor General for Alaska.

By the Commissioner:

Q. Would that have the same effect, if we can draw the comparison, of a member of the bar of the court?

A. Right.

[fol. 30] Q. You are actually working for the people who are concerned with the mining; you are not working for the government?

A. No.

Q. But this accredits you with the government, I gather, as a qualified surveyor?

A. Do you want me to read it?

Mr. McGuire: I think you had better read it into the record, and explain the significance of it.

The Witness: It reads: "United States of America. To all to whom these presents shall come, Greetings:

"Know ye that, imposing special trust and confidence in the integrity, ability and discretion of Harold H. Waller, I do appoint him to be United States Mineral Surveyor for the District of Alaska, and do authorize and empower

him to execute and fulfill the duties of that office, according to law, and to hold said office with all the rights, emoluments thereunto legally appertaining to him, the said Harold H. Waller, during the pleasure of the Surveyor General of the United States for the District of Alaska for the time being.

"In testimony whereof, I have hereunto affixed my signature. Given under my hand and seal at Juneau, Alaska, the fourth day of June in the year of Our Lord 1924, and the Independence of the United States of America, 148."

Signed "Carl Field, Surveyor General for Alaska."

[fol. 31] I wish to qualify the statement I made in the beginning, that I have been Mineral Surveyor since 1912. We have to have a new appointment. This is the only shingle I have, the only one they ever sent me, but Mr. Ballinger, when he was Secretary of the Interior, came to Seattle, and I was appointed first in 1921, and I have held that appointment ever since, and it runs in four-year appointments, with $5,000 bond, taken out every four years. We only have to take an examination the first time, and we get it renewed without examination.

By Mr. McGuire:

Q. Let me ask one further question. You said there could be duplication of names, as between various mining claims. Is there any duplication of survey numbers, as between claims?

A. There isn't supposed to be. If it is, it is in error.

Q. If a patent issue, bearing Survey No. 2037, for example, that might refer—or is supposed to refer only to the claim which bears No. 2037?

A. Yes; under the jurisdiction of the United States Land Office. In other words, there might be—in Colorado, there might be another such number as that, but not another such number as that in Alaska for a mining claim.

The Commissioner: Any further questions?

Mr. Harrison: I have no further questions.

The Commissioner: The witness may step down.

[fol. 32] (Witness excused.)

The Commissioner: We will recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearing.)

Mr. McGuire: The next witness will be Mr. Horvath.

PAUL HORVATH, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. McGuire:

Q. Mr. Horvath, will you state your full name and present address for the record?

A. Paul Horvath, 1215A Force Street, Whittier, California.

Q. What is your occupation, Mr. Horvath?

A. At the present, I am a retail food operator.

Q. Was there a time when you were employed by the Alaska-Pacific Consolidated Mining Company?

A. Yes, sir.

Q. Will you give the details of your employment by them?

A. I first went with the Alaska-Pacific Consolidated in 1937, and worked for them through 1943. I was away for a short time in 1938, and was with them until the closure in 1943.

Q. In what capacity were you employed by the company?

A. In several capacities.—During my closing period [fol. 33] there, I was mostly camp manager and mine manager.

Q. Prior to that time, what were your duties?

A. Prior to that time, I was a storekeeper, and prior to that I was working underground as a miner, with the men.

Q. Now, what were your duties as mine office manager and camp superintendent, or camp manager?

A. My duties were the purchasing of all material that came into camp, issuing vouchers, buying all of the supplies for the camp, and supervision of the entire camp, itself, and of the record and records of bookkeeping for the mine.

Q. What were your duties with reference to the personnel of the company?

A. I had authority to both hire and fire personnel.

Q. Did you, in fact, hire and fire personnel?

A. Yes, I did.

Q. As a matter of fact, you hired all of the personnel, other than the supervisors, did you not?

A. Yes, I did.

Q. And during what period of time did you exercise the authority to hire and fire personnel?

A. During 1941, 1942 and 1943.

Q. Now, Mr. Horvath, will you give us a general description of the properties, the physical properties of the Alaska-Pacific Consolidated Mining Company, as they existed, as you knew them?

[fol. 34] A. Yes. They were located in the Willow Creek District, about 20-odd miles out of Wasilla, which was our unloading place, or the railroad terminal, and situated in the Talkeet Hills district, and about 3,500 feet elevation, and with a roadway leading to both Wasilla and Palmer.

Q. And how far from the mine was Palmer?

A. Palmer was about 28 miles from the mine.

Q. Now, Wasilla you said was the rail unloading point?

A. That was our unloading point, yes, sir; at Wasilla.

Q. And all supplies had to be brought in over the railroad, and then trans-shipped by truck at Wasilla, and thence overroad to the mine?

A. To the mine, yes, that is correct.

Q. Now, where did the railroad lead, to what point?

A. The railroad, of course, started at Seward, the gateway to the Territory, in southern Alaska. The ships unloaded at Seward, and the railroad line ran from Seward through Fairbanks, and Anchorage being an intermediate point, and Wasilla was about 40 miles out of Anchorage, along the way to Fairbanks, without stopping——

Q. Approximately how far from the port of Seward was Wasilla, by rail?

A. I would say about 400 miles, roughly 400 miles.

Q. I believe you testified that Wasilla was about 20 miles [fol. 35] from the mine, by road; is that correct?

A. I said, roughly, 20 miles, and possibly 25 miles.

Q. Who maintained the road between Wasilla and the mine?

A. Between Wasilla and the mine, the Alaska Road Commission maintained it only up to a point, and that was a point of about six miles before reaching the mine. The stopping point might be referred to as "Fish Hook Inn", and from that point to the mine, a distance of another six miles, the mine, itself, maintained it.

Q. Now, can you give us a general description of the mining camp?

A. The mining camp, yes, sir; starting across from the mine buildings, themselves, which were situated on the west hillside, the mill buildings housed the entire power plant, the diesel engine, which produced the electricity. The entire camp was run on a diesel electric basis; and under the same roof, of course, our milling units and flotation units were installed, and the various bunkers for receiving the ore from the lower levels coming out of the mine. Coming from the mines into the camp, the road was lined with warehouses, various warehouses, and various shops, such as the tin shop, the tinsmith shop, the pipe shop, the carpenter shop, and the framing sheds for our timber; and coming into the camp, a large warehouse building, which housed all of the facilities for perhaps 50-odd men; and on the opposite side were two large dormitories, which [fol. 36] housed in the neighborhood of 80 or 85 men, each, with various recreation facilities in each, comprising a billiard room, a card room, and so on, and also drying rooms, to dry the men's clothing. The other building contained a movie theater, which was also used as a school room for the miners' youngsters.

On into the camp, the office building, which also housed the company's store, or commissary, as we refer to it, which had all of the clothing and food and odds and ends, and so on, and the original cookhouse structure, which handled our food problems for many years, up until 1942, at which time we moved into a new house, which was built a little below the camp.

Above the old cookhouse was also the original house, housing quarters for the miners, running down to the new cookhouse, where there was a new messhall, we called it, with facilities there for feeding 300 men at one feeding; and above that, quarters for the cookhouse crew, and also several apartments for the staff members.

In the camp, also, we had tanks erected to carry our diesel oil supply throughout the operating period, and various docks where we stored our lubricating oils, timbers, mining props, and usually our rails, pipes, and for the entire camp, we had a large incinerator plant for the disposal of the camp refuse.

[fol. 37] That pretty well covers the campsite.

Q. Now, did any of the miners maintain dwellings anywhere near the camp?

A. Yes; immediately out of the camp, on the main entry road into the camp, perhaps one-eighth of a mile, the miners themselves had constructed, at their own cost, small dwellings, where they and their families lived.

Q. And at the time of closure, about how many of those dwellings were there?

A. At the time of the closure there were perhaps 25 or 30 of those dwellings built.

Q. Were all of these buildings frame buildings?

A. Yes, all frame buildings.

Q. Now, were there any other towns or villages, or any evidence of civilization, closer than Wasilla?

A. Close to Wasilla, I was going to mention the mine immediately above the Independence mine, which is known as the Gold Quartz mine. That is just above the hill, at an elevation of perhaps 200 or 300 feet, a small mining operation, I think, employing a dozen men or so; and above that, farther, yet, up into the very top of the valley, a little mine known as the High Grade mine, which was quite inactive; you might say they were prospecting.

Now, going down the hill, there was nothing beside Wa-

[fol. 38] silla and Palmer.

Q. Now, from what source did you draw your supplies for your operations? From what source did you acquire your supplies?

A. From what source?

Q. Yes; did they come from the States?

A. All of our supplies came from the States, with the possible exception of timbers, which we bought locally.

Q. Did you follow the practice of accumulating substantial quantities of supplies on hand?

A. Yes, we did. That is, of course, something we always did, for various reasons, the most important of which, of course, was the isolation of the camp, and the fact that the

winter months developed very bad road conditions, and the hazards of transporting certain items of equipment and supplies in the wintertime; and then again, of course, the uncertainty of your steamship connections many times, such as the strikes that we always have, which would tie up shipments of items, and more or less necessitate a carrying of heavy inventories for good operation.

Q. What were the climatic conditions at these locations?

A. The climatic conditions—well, the summer was generally from about the first of June, when the snow was generally off of the road, and during the summer months, we generally had rain, I would say 70 per cent of the time. [fol. 39] Winter began generally in late September; we generally had snow on the ground any time after the middle of September, and many years quite heavy. During the winter months, we have very heavy drift snows, and road-block conditions, and so forth, but winter conditions generally break about the latter part of May.

Q. What were the temperature ranges?

A. The temperature ranges—the summer temperature, I would say, was about 70, which was a top figure, and in the wintertime anything down to 50 below zero. In fact, we have had oil lamps freeze up, because it was so cold.

Q. Now, does the severity of the climate impose considerable maintenance problems, with respect to the buildings?

Mr. Harrison: If the Court please, I am going to register an objection. It is my understanding that we are not concerned here with the damages feature, and this question might pertain to damages. I have been pretty liberal in allowing a lot of things into the record, which I confess I don't see the materiality of; but I think the description of the property might well be pertinent to the question of what the plaintiff actually owned, in the way of property; but as fas as the conditions that existed at the mine, whether they be climatic, or whether they relate to the working conditions, is to me something that I fail to see in relation to any issue in the case.

[fol. 40] Mr. McGuire: Perhaps I can explain that. We will contend, of course, that this particular location—the climate is such a severe climate that; in order to maintain these buildings in any condition, at all, they had to be kept

in use. These conditions were brought to the attention of the government, before the closure order was effective as to this particular mine; and it will be our contention that the order was particularly arbitrary, with respect to this particular claimant or plaintiff, due, in part, to the fact that the government knew, or certainly should have known, from a reading of the documents in the case, that the closing down of operations would result in the destruction of these buildings.

The Commissioner: Overruled. He may answer.

Mr. Harrison: May we have a continuing objection to this type of evidence?

The Commissioner: Yes.

By Mr. McGuire:

Q. The question was whether the severity of the climate imposed any particular maintenance problems, with respect to these buildings?

A. Yes, it did; it definitely did. You continually had the snow-removal problem, which was quite severe. In fact, we have had snow so high that it would come to the top of buildings 25 or 30 feet in the air, and in order to save the heavy weight from breaking these buildings down, it re- [fol. 41] quired constant care to keep these buildings cleared off and cleaned off; likewise, to keep the roads open, so traffic could be maintained through to the camp.

Mr. Harrison: Your Honor, I would like to have the record reflect that I also object on the basis that whether or not the order was arbitrary is an issue in this case, but whether it was particularly arbitrary as to this particular plaintiff is beside the point. The order must stand or fall on whether or not it was arbitrary, and I feel that the only possible way they can show it was particularly arbitrary and was particularly damaging to them, is to get into the damage phase of the case, but I would like the record to reflect the objection.

The Commissioner: All right.

By Mr. McGuire:

Q. Now, ordinarily, would there be any difference between the maintenance problem, if a building was in use and if the building was not in use?

A. Oh, yes. Of course, as I mentioned before, because of the severe weather, your plumbing and your heating impose quite a problem in keeping them open and in repair. It is certainly much simpler, with people on hand to catch these various things as they develop, before they can cause serious damage.

Q. If the buildings were heated, I take it that there would [fol. 42] not be so much problem with respect to the weight of the snow on the roofs?

A. That is true. All of the roofs of the buildings were of corrugated sheet metal, and with a very high pitch, in order to take away the heavy snows, and of course it requires heat in order to do that.

Q. Now, what type of water system was there in the camp?

A. Well, in the camp, we had a water system that originated from several sources: One, an underground reservoir system we had built in the workings that had been used and discontinued, or built for that specific purpose; and another, several dams above the campsite, that we built ourselves, which supplied water to the entire camp; and there was a four-inch line, as I recall, leading from the workings and the dams.

Q. Was the central water system piped to various locations?

A. Piped to various locations, yes. In fact, the mill was the distributing point; the four-inch line ran into the mill, and from the mill into the various buildings, pipes of smaller sizes.

Q. Was that water system subject to damage, if not continuously in use?

A. Yes, it was.

Q. What type of water system was employed in the village?

[fol. 43] A. In the village, they had something of the same order. The villagers, themselves, in fact, installed their own water system; they purchased the pipe and built their own little dam above the village on another creek, running down the outside of this valley, and made their own dam and piped their own water into their own homes.

Q. That, again, was a central water system?

A. Yes, sir.

Mr. Harrison: Let us have the witness testify.

By Mr. McGuire:

Q. Now, did you have charge of the inventory at the camp, during the period immediately preceding the closure?

A. Yes, I did.

Q. What would be the chief items of that inventory?

A. The chief items?

Q. Yes.

A. Well, I would say your timber, your explosives, your powder, your detonators, your various machine tools, machine replacement parts, lubricants, diesel fuel for operation, of course, food, tin for the tinsmith's shop. We did our own building of vent pipes, iron of all sizes for the machine shop and the blacksmith shop, drilling steel, the drills themselves, additional pipe, rails; and of course, in the store, we carried a good supply of clothing and food of all kinds to supply the men. They had pretty full coverage.

[fol. 44] Q. Did you carry grinding balls for the mill?

A. Yes; grinding balls for the mill, and liners, replacement liners, and replacement parts for the flotation units, and classifiers, and various chemicals for our milling process, and agents for the flotation process.

Q. Calcium carbide is one?

A. Yes; calcium carbide, yes. We used that underground, and carried a good supply of carbide always.

Q. What about belting and transmission supplies at the mill?

A. We had a very good supply of them on hand.

Q. Now, at the time of the closure, what was the condition of the inventory, with respect to these supplies?

A. Well, we had a tremendous supply on hand. We had supplies to run for a considerable period of time, with what we had stored. Of course, I don't know, but I would say we had a year or a year and a half supplies on hand, and they were very necessary supplies for the operation.

Q. So that, at the time of the closure, if I understand you correctly, the company could have operated the mine for a period of a year or a year and a half, without any additional supplies?

A. Yes, with a few exceptions, I would say, for the food, which we had to ship quite regularly. We had a tremendous supply of food, and the fact that we couldn't get a lot of [fol. 45] that locally, when needed, I would say we carried

about a six-months' supply. Dry storage food, we carried about a six-months' supply. On fresh stuff, naturally, we got it as we needed it, every three weeks or a month.

Q. Now, was any special effort made to accumulate a large inventory?

A. Yes.

Q. What was the reason for that?

A. Well, several reasons, and it always comes back to one thing, and that is, because of the location of the place, first of all; and second, the continuing of the operation, and the possibility of various shortages, we would get things and have them on hand.

Q. You speak of shortages that might develop. Was there some anticipation of possible shortages at that time?

A. Was there?

Q. Yes.

A. There was, perhaps, for some items, yes.

Q. You mean that, in anticipation of possible shortages, you acquired substantial supplies?

A. That's right.

Q. Now, would these supplies have been easily disposed of by sale, at the time of the closure?

Mr. Harrison: I think that is very hypothetical, and I object to it.

[fol. 46] The Commissioner: Sustained. The mine was closed, then, was it?

Mr. Harrison: Yes.

By Mr. McGuire:

Q. Speaking generally, was the transportation cost a large part of the cost of acquiring supplies and bringing them to the mine?

A. The transportation was really a big item there, yes.

Q. Taking timber, for example, what was the chief cost of the timber, as included in the inventory at the mine?

A. Well, the transportation, of course, of the timber. As I say, we purchased all of our timber locally, and hauling it to the mine was a tough problem.

Q. And with respect to the heavy items of balls, and ball bearings, and pipes and rail and iron fittings, was the transportation cost again the chief factor of that?

A. I don't quite follow your point. What do you mean, chief factor? The chief factor in the cost, you mean?

Q. Yes, that's right.

A. Yes, it was, on those items, mill balls, definitely were, and items like that. The value of the things themselves wasn't very great, but the transportation exceeded the cost of the articles.

Q. At the time of the closure, did you take an inventory of all of these supplies on hand?

[fol. 47] A. Yes, I did.

Q. And was that recorded?

A. It is recorded. In fact, the record is still at the mine; it is all set up in a card index system.

Mr. McGuire: I am going to make an offer, at this particular time, to make those records available to any agent that the government may care to send to the mine, to verify the condition of the inventory at the time of closure.

The Commissioner: That would go to the matter of damages, I would think.

Mr. McGuire: No, no sir. The government has taken the position, as I understand it—and they certainly made that clear in order L-208—that this order was issued to conserve materials. This mine had on hand—we will prove that through oral testimony, and offer corroborative evidence in the form of the inventory of materials on hand sufficient to operate for a year or a year and a half by a mill which was in an isolated portion of Alaska; and we will argue, with respect to this particular mine, that it had no particular purpose, whatever, so far as the conservation of material is concerned.

Mr. Harrison: I would like to say that the order was not directed to this particular mine, and also the fact that they might have had a lot of critical materials on hand is no argument that those critical materials could not, in one way or another, be put to better use in the war effort.

[fol. 48] Of course, we have our general objection to materiality, anyway. As far as this inventory is concerned, I suppose it is something in writing?

Mr. McGuire: Yes.

Mr. Harrison: It is pretty unrealistic to try to check that writing, today. If you had the inventory here, and had somebody who made the inventory swear, under oath, that

the inventory was accurate, it would be possibly be the best evidence we could present of that, I suppose, at this time.

By Mr. McGuire:

Q. Did you, personally, prepare the inventory?

A. Of course, I assisted in it. I think we can possibly get another man that—Dan is dead, isn't he?

Q. Yes, Dan Hickman——

A. Hickman died, didn't he?

Q. Yes.

A. He is the man who actually typed it up for us on the cards.

By Mr. Harrison:

Q. Is he the man who physically made the inventory?

A. He put it on the cards. It is in the record in the form that you will see. In other words, they were taken from rough forms made on the scene, and placed on these forms for a permanent record.

Mr. Harrison: I don't see how the government can admit [fol. 49] it in evidence, without objection, an inventory made by a man who is not in court and prepared to testify that the written account of the inventory is accurate.

The Commissioner: There has been no offer of the inventory; it is merely an offer by counsel of the fact that such an inventory was made.

The Witness: I think a lot of that can be borne out by many sales that have been made since then, from this particular inventory, and much of it is still there and in existence today; in fact, the great bulk of it is there.

By Mr. McGuire:

Q. At whose direction was this inventory made?

A. At whose direction?

Q. Yes.

A. Mr. Stoll, then general manager of the organization.

Q. Now, in the course of your duties with respect to the hiring and firing of personnel, did you become acquainted with the personnel?

A. Quite well; I knew the men very intimately, some of them, in fact.

Q. What was the normal size of the mining crew?

A. The normal size? I would say about 125 men.

The Commissioner: Is that in what period? Is that in the period of operation?

Mr. McGuire: The normal size of the crew during the [fol. 50] period of operation.

By Mr. McGuire:

Q. Now, at the time of—in October, 1942, do you recall the size of the crew, at that time?

A. October of 1942?

Q. Yes.

A. In the neighborhood of 100 men.

Q. How many mills were you operating at that particular time?

A. Two mills.

Q. Now, do you recall when Order L-208 was issued, in October, 1942?

A. Yes, I do.

Q. Did it receive publicity, and come to the attention of the mining crew?

A. Oh, yes, definitely.

Q. What effect, if any, did the order have upon the mining crew?

A. Well, in some instances,——

Mr. Harrison: I am going to raise another objection to the effect of the order. I don't see what difference it makes, what the effect of the order was on the mining crew.

The Commissioner: Sustained. You might inquire what the miners did, following the order, if you care to.

[fol. 51] By Mr. McGuire:

Q. What did the miners do, following the issuance of the order?

A. Quite a number of them left our employment, knowing that—or sensing the inevitable closure.

By the Commissioner:

Q. Do you know where they went?

A. Some of them, I do, yes, sir; some, I do not. As I say, I knew some of them quite well.

By Mr. McGuire:

Q. Where did they go?

A. Some of them stayed in the Territory, some went to Anchorage, and some came outside to the States.

Mr. Harrison: I would like to make objection to that testimony as to where the miners went, or what they did, because the order may have been—I certainly don't think it was, but even if it were a miserable failure, I don't see how that could reflect on whether or not the act was arbitrary. Did the people, at the time the order was issued, act in an arbitrary way?

That is the issue in this case. What happened afterwards is immaterial.

Mr. McGuire: What people are you speaking of?

The Commissioner: What people?

Mr. Harrison: The War Production Board has been ac-[fol. 52] cused of making an arbitrary order, and the defendant contends it was not an arbitrary order. The fact that the order may not have been as successful as hoped for is completely immaterial. At the time they passed this order, the facts that they had on hand at that time, we think, made their action in good faith in passing the order; and whether or not miners transferred, or did not transfer, or what happened, or did not happen, is completely immaterial, and we would like a continuing objection to any such testimony.

By Mr. McGuire:

Q. I hand you a document, consisting of four pages, which I request the reporter to mark as Plaintiffs' Exhibit AP-2 for identification, and ask you what it is?

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 2.)

The Witness: This is the payroll for the month of October, 1942.

By Mr. McGuire:

Q. Have you compared the list of names on this document with the actual payroll records?

A. I have, yes, sir.

Mr. McGuire: I have available in the courtroom the original payroll records of the company for the month of October, 1942, which are available for examination by government counsel.

[fol. 53] By Mr. McGuire:

Q. Are the names that appear on Plaintiffs' Exhibit AP-2 for identification the same names which appear on the payrolls of the Alaska-Pacific Consolidated Mining Company for the month of October, 1942?

A. They are the same names.

Q. Now, opposite each name there is a description, such as opposite the name of Abrahamson, there is the word "mucker". What does that mean?

A. Mucker is an underground worker, who does the basic labor work; in fact, he is the laborer of the mining business; he does the shoveling work in the mining business.

Q. This list of terms which appears opposite the names on the list—is that the name of the job held by that particular man?

A. The name of the job held by that person, as shown on our payroll records.

Q. Now, that is an asterisk after the name of some people, and down below there is a notation, "worked until closure". What does that mean?

A. That means they worked until the closing period in 1943, the 8th of September, 1943; that they worked up until that time. The 8th of August is correct.

Q. Now, opposite some names that is a question mark. What does that mean?

[fol. 54] A. A question mark?

Q. Yes.

A. That means that I don't recall the men—I mean, as to their disposition, or very little about them.

Q. Opposite the names of others, still, there is a notation, such as, in the case of Betts, Thurman Betts, "local trucking". What does that indicate?

A. That means that is what he was doing after he left our employ. I happen to know that; personally, that he went to the valley; in fact, he and his brother both started a little trucking business, a private business, based out of Wasilla, Alaska.

By the Commissioner:

Q. So you were only there a month after the close-down?

A. Yes; after the closure in 1943, I was there another month. I was there until the middle of September.

By Mr. McGuire:

Q. Then, with reference to these notations, which follow the names of certain of these men, are they intended to indicate what happened to the man after he left the employ of the Alaska-Pacific, but prior to the closure?

A. Prior to the closure?

Q. Yes.

A. Prior to the closure, that's right.

Q. Do you know that these occupations indicated after [fol. 55] the men's names were, in fact, the places where they went, and the occupations that they took after leaving the company's employ?

A. Well, in the cases where I have indicated it, yes. In other words, after they left our employ, they did construction work, or took work with the local trucking company. Those are the men that I actually know went to this other work.

Mr. McGuire: If the Court please, I offer in evidence Plaintiffs' AP Exhibit No. 2.

Mr. Harrison: I am going to object to it, until I ask some more questions.

By Mr. Harrison:

Q. You say you know that these comments were the destinations of the various individuals, besides whose names the comments are made?

A. Yes.

Q. You say you know that?

A. Yes.

Q. I want to ask you, which one of these cases you actually know that, from personal observation——

A. That's right.

Q. That the man actually went——

A. Yes.

Q. Let's take Mr. Dimmick, and the comment says, "To [fol. 56] Armed Services.

A. That's right.

Q. Do you know he went in the Army?

A. That's right. I saw him in uniform, and shook hands with him in uniform, and said goodbye to him.

Q. Now, let's take Erickson, and it says "To States". Do you know he actually went to the States?

A. Why, yes; he bought a ticket in Anchorage, on the Alaska Steamship, and went outside, yes.

Q. Did you see him sail?

A. I didn't see him sail, no.

Q. He could have stayed in Alaska?

A. He could have; that's possible, but not very likely, though.

Q. I don't want to be picayunish, but I feel, if we were to go down all of these names,——

A. You see, I didn't mention the names of men that I definitely didn't know. Those I didn't know, I indicated. I couldn't know them all.

Q. I have grave doubts about whether or not you know that these actual people—that you could actually start at the top and testify that they went here or there. That is what you believe to be so?

A. That is what I believe to be so, because of my association with them. After all, I did know them quite well, and [fol. 57] lived with them, and worked with them. In fact, some of them I still maintain relations with, today; I still exchange letters with them, and have visited with many of them. I saw one of them last week at Lake Tahoe, one of these men, when I hadn't seen him for years.

By Mr. McGuire:

Q. And what is he doing in Tahoe?

A. He is a retired businessman, taking care of the water valve that controls the level of the water in Lake Tahoe; he stands there and turns a knob.

Q. Let's go down the list. The first man's name you indicated is George Bahns, and the comments is "To construction work." How do you know he went to construction work?

A. Well, George was a blacksmith; I knew him very well; he was with us for many years, and he left, and he went to town, and he would hang around town for two or three weeks, before he did anything.

Q. When did he leave?
A. He left the mine—let me see!

By Mr. Harrison:

Q. His leaving had nothing to do with L-208?
A. Whether it did, or not, I don't know.
Q. I would assume that only those marked with the asterisks had anything to do with L-208.
A. I didn't say that, whether they did, or they didn't. [fol. 58] I didn't say that. Other than a few cases—I mean a real close case. As a matter of fact, I think this man I mentioned at Tahoe—he left because of L-208; that I know, and perhaps some others, but the majority—no, I don't know that. Many of them did, of couse.

Mr. Harrison: I can't possibly let this in evidence, without going down the list, and finding out the facts about each particular individual, when he left, and how he knows that these people left.
Mr. McGuire: I will do just that, and satisfy you.
Mr. Harrison: All right.
Mr. McGuire: I will go back to Bahns.
Mr. Harrison: You understand, of course, that I am going to object to the materiality of this thing, and if it should go in, I want it completely verified by the pay rolls.
Mr. McGuire: That can be verified here.

By Mr. McGuire:

Q. Going back to Bahns, the comment is "To construction work." How do you know he went into construction work?
A. He went into construction work right in Anchorage. He went out to the base, on construction work, the work of constructing an Army base there.
Q. How about——

By Mr. Harrison:

Q. How do you know that?
[fol. 59] A. I saw the man, and talked to him, and said, "What are you doing, George?" And he said, "I am out here, working with Morrison-Knudson, working on a building out here."
That is how I know that.

Q. When did he leave the mine?

A. When did he leave the mine?

Q. Yes.

A. Let me see if I have any record of that. I will have to go to the pay roll record to find that.

Q. Well, was it around——

A. It was sometime after October of 1942; just exactly when, I am not positive.

Q. You haven't got an asterisk after his name, because he didn't work until the closure?

A. No. In fact, as I say, I saw him several times during the following year, after this particular time. As a matter of fact, I could go to the records and let you know exactly the day he left.

By Mr. McGuire:

Q. If you want to do that——

A. I can do that on any of them. I never went into that much detail on the October, 1942, pay roll. I did on the closing period, however.

Q. Now, coming back to Thurman Betts, you have a notation that he went to local trucking. How do you know that? [fol. 60] A. By seeing him, and talking to his brother. I saw him and his brother together, and they started a little trucking agency out of Wasilla. That is a matter of record. If I am not mistaken, they are still running the trucks out of here. They haul oil to various locations. In fact, they started a route that went over the Alcan Highway, trucking material even into the States. That is the business they went into.

Q. Now, Alan J. Dezanger, you say he went into construction work?

A. Yes; the reason I know that man particularly well, he was a utility man. He was an older man, went to work as a laborer, after he was laid off.

By Mr. Harrison:

Q. How do you know that; did you see him working?

A. I didn't see him working.

Q. In Anchorage?

A. Like I saw the man on the street. Have you ever been to Anchorage?

Q. No, but the point is, I don't think you are actually competent to say he went to work in Anchorage, unless you were there, and unless you saw him working in Anchorage.

A. I was there, and I saw the man in Anchorage. I didn't see him on his actual job. I stopped the man on the street, and I said, "What are you doing, George?"

[fol. 61] Q. What did he say, if anything?

A. I do not know, I couldn't tell you exactly verbatim what he said, but he said he was working out on the base, which was his comment, and they were working on the base at that time.

Q. This is in Anchorage?

A. That's right, in Anchorage. Men of that type were just laborers, what particular job he was doing, I don't know. He was working on the base, doing construction work on the base. He went to construction work on the base, like so many of these men did.

By Mr. McGuire:

Q. Now, Martin Boscovich—is that a similar case?

A. Yes, sir.

Q. It shows that he went to construction work in Anchorage?

A. Yes.

Q. How do you know that?

A. Well, the fact that you mentioned Boscovich—that was a Slavonian man, and a Slavonian name, and in our pay rolls, we had a considerable number of Slavonian people, and they centered in town around one hotel, the Fifth Avenue Hotel in Anchorage; in fact, a location where, many times, I would walk in and find labor, and I think I knew every Slav or Slavonian that had visited that hotel. In fact, I know that, to this day, I can recruit labor there right [fol. 62] now, and these men, just about all, without exception, lived there; and invariably, on my trips to town, I would stop there and talk to these men. Many of them were close personal friends. That's one that brought that to my mind. I speak a little of their language, the reason they accept me, too.

Q. Now, Hugo Brodin, you say went to construction work at Anchorage?

A. Yes; he was another. He was a blacksmith, and he went to work as a laborer—a pretty good blacksmith, too.

Some of these men, incidentally, I saw in Anchorage, after the layoff, and during this period, and many of them had made considerable money at our mines before leaving, and did nothing, except lie around hotels and take it easy for a considerable period of time, and you could see them sitting in hotel lobbies any time you wanted to see them.

By the Commissioner:

Q. There has been testimony here with respect to what many of these people did, beyond the month after you left,——

A. You mean after the closure?

Q. Wait a minute! Wait until I ask the question.

A. I am sorry.

Q. Does that go beyond the period which you have stated, the time you left, namely, about a month, or longer, after the closure?

[fol. 63] A. Some of them do, yes, sir.

Q. Which ones?

A. Which ones?

Q. Yes.

A. I think I have a list here, perhaps, after my departure, and the men I saw after that, maybe a year or two years later, and talked to them.

The first man on the list here, Adams, he went to work at the Northern Commercial Company at Anchorage, and stayed there all during the war, after he left our employ. I know him.

Then there is Joseph Arkus, after he left our employ, he went to work in a camp in Anchorage, as a flunkey.

Max Bohman,—he went to work in town, as a cook. He was our cook during the closing period. He was a German alien.

Q. The point I have in mind is this: After you left, how do you know they stayed there?

A. After I left, how do I know they stayed in that employment?

Q. Yes.

A. I don't know exactly, with the exception that, after returning to Alaska in 1945 and again in 1949, I had a chance to renew a lot of acquaintances; in fact, I re-hired a lot of these men.

[fol. 64] The Commissioner: Off the record.

(Here followed discussion off the record.)

The Commissioner: Well, the only way he would know—after these men left, the only way he would know where these people were was by talking with them.

Mr. McGuire: I know; but my examination was confined to the names that are on Exhibit AP-2, that has been offered for identification. I am speaking of the period between October, 1942, and the date of the closure, and this mine did not close until August of 1943, due to certain extensions, so Mr. Horvath was on the scene during all of this period I am speaking of now. I have not come to the period following August, 1943, and at that point, I will examine him very closely as to how he knows what happened to the man, but at the moment my examination is confined to the period Mr. Horvath was on the scene.

Mr. Harrison: I will say that all of this is immaterial, anyway. Right now, the question we have is whether or not we are going to admit in evidence a document here, which will indicate the ultimate destination of some individual, some former workers. I want to know when they left, how long they stayed at the places they did go, and what personal experience enables him to qualify to testify, and I think that is going to be a long job, and I am prepared to stay for a couple of days, if need be.

[fol. 65] Mr. McGuire: I am prepared to stay here——

Mr. Harrison: I think the whole thing is immaterial, and I think I should warn you of that.

Mr. McGuire: The materiality, if the Court please,—I am glad Mr. Harrison brought that up—I am not just doing this for the sake of burdening the record. We will show you, and put in the record, the fact that Alaska-Pacific obtained several extensions from this order, and filed several appeals to the government, and made representations in these appeals as to just what would happen, among other things, to the men, if they were laid off, as a result of the mine being shut down, and that is in black and white; we told the government, in black and white, that these men would not go into coal mines, and that they would not do anything, and they were unemployable.

What I am now doing here with this witness is verifying, with this witness, the facts which we told the government,

in black and white, before the government issued the final closing order, and required the mine to shut down.

Mr. Harrison: There is nothing in the record to show that these men left Alaska-Pacific mine, and went to these other places, because the mine was closed; there is nothing to show the foundation for that.

Mr. McGuire: That has nothing to do with it. We told you, we told the government, that this is what would happen [fol. 66] to the men, if this mine were shut down; and the reason why we knew it was because the testimony that this witness was giving just now shows what happened to some of the men.

Mr. Harrison: This witness can't testify that the reason it happened was because this mine was closed.

Mr. Connor: I think we have to have a little sense in this thing. For instance, with Homestake, with all of our records,—are we going to spend three months, taking the testimony of each of our workers. I think we have got to arrive at some sensible way of handling this, or we are going to be on trial for the next ten years.

Mr. Harrison: I am sure counsel for the defendant has no desire to be facetious. I will be glad to let in any evidence that is competent, but if it is not competent, I think it is my duty to the government not to let it in.

Mr. Connor: I think that this is a good time, perhaps, for us to have a meeting of the minds, and let the Comissioner decide the proposition, how he wants us to produce this proof.

I am willing to do it any way the Commissioner wants to do it, but I think we ought to have some understanding along the line some place.

Mr. McGuire: To review the situation for the moment, what I am proving is what became of some of these men who left this mine afte the issuance of L-208, and during the pendency of the appeal filed by Alaska-Pacific, and [fol. 67] based, in part, on the fact that this order would not produce any available manpower for the coal mines in Alaska. This is how the company knew it: They knew that this blacksmith would not go to work out there in a coal mine, but he went out and became a laborer.

So that, when they filed the appeal with the government, they were not talking from fright; they knew exactly what

they were talking about, for these reasons, and this is the man who can testify to it; so it is extremely material, I think, if the Court please.

Now, as to the competency of his testimony, that is another matter; but I think, as to the matter we are talking about now, the question of competency is not in issue, because he saw them in Anchorage.

As to the men who were available, as to where the men went after they left Alaska, that is another question, and we will go into that in a moment.

The Commissioner: The question I asked was, did this exhibit—you have already offered it. There has been an objection, and you asked a number of questions after the objection, to establish the competency of the exhibit. There is no indication that is any limitation in point of time.

How could this witness know what happened after he left?

Mr. McGuire: He doesn't know. He just knows he went to [fol. 68] construction work after the mine was closed down, for some time, and that is material in the case, we say.

Mr. Harrison: Of course, I feel that, in addition to that, there has to be a showing that this particular individual left the mine because of L-208; and the mine was not closed at the time these people left, so L-208 had not taken effect as to the Alaska-Pacific Mining Company; so how can they be charged against L-208? I say they can't, and this witness certainly can't testify what was in their minds, when they left.

Mr. McGuire: I have answered that several times, but I will do it again, Mr. Harrison. You say it is immaterial, unless we can connect it with L-208. I deny that. I say it is completely material, because this shows, and the witness has testified as to what happened to some men, and the records that we got from the government, in the course of our appeals, stated that the men would not leave this mine, who happen to have been laid off at the time of the closure, and would not go into the coal mines. Our people knew that, because they knew what happened to these men.

The Commissioner: I am prepared to rule on the exhibits.

Because of the indication that some of the names—as to where some individuals might have gone, I am going to sustain the objection of the government. I mean that the witness, if he is able to testify where the employees did go,

[fol. 69] may do so; but it seems to me there is a better way to establish the evidence you are attempting to establish.

Mr. McGuire: I am going to do it orally, Your Honor. I was trying to take a shortcut with this exhibit. I will sit here all afternoon, and ask this man what happened to these people, name by name.

By Mr. McGuire:

Q. Now, do you know or did you know a man by the name of Hugo Brodin?

A. Hugo Brodin?

Q. Yes.

A. Yes, I did.

Q. Was he on the payroll in October, 1942?

A. Yes, he was.

Q. Did he leave the employ of the company some time between October, 1942, and the time of the closure?

Mr. Harrison: Let's not lead the witness.

The Witness: Yes, he did. He left the employment after October, 1942.

By Mr. McGuire:

Q. Now, will you state to what employment he went, if you know?

A. Hugo went to construction work on the base.

Mr. Harrison: I object to the answer, without foundation being laid to show the basis for his knowledge.

[fol. 70] The Witness: Merely my word on it.

The Commissioner: Objection sustained.

By Mr. McGuire:

Q. Do you know to what employment he went? Don't say what employment but do you know where he went after he left your employ?

A. To what employment?

Q. Yes.

A. He went to work for one of the contractors on the base that was being constructed in Anchorage.

Q. I am asking you if you know just where he went?

A. Yes, I know.
Q. And on what basis do you know?
A. By meeting the man on the street, and talking to him.
Q. And you met him in Anchorage?
A. In Anchorage.
Q. After leaving your employ?
A. After leaving our employ.
Q. What did he tell you?

Mr. Harrison: Objected to as hearsay.
The Commissioner: Objection sustained.

By Mr. McGuire:

Q. What did you say to him, when you met him?
A. I don't recall the exact words, but "What are you doing?" or "How are you doing?" or something to that [fol. 71] effect, and he told me where he was working, and what he was doing.
Q. And what did he say?

Mr. Harrison: An objection.
The Commissioner: Sustained.
Mr. McGuire: An exception, of course.
The Commissioner: Do you feel that you have any way of establishing this kind of proof?
Mr. McGuire: We can subpoena the records in Alaska.
The Commissioner: No, I am not talking about subpoenaing the records; but it does seem to me that it would be easy to get the Social Security records, on a cooperative basis, so the government can check the Social Security records, and the other accounting records, to know, to see just the employment of the individuals, following their departure from the mine, and that would be something definite.

An individual might have told the witness that he was doing so-and-so, and that might not be the fact.

Mr. McGuire: That may be true, but that goes to the weight, if the Court please, but hardly to the competency.
The Commissioner: There was an objection, and I have got to sustain it.
Mr. McGuire: There are any number of exceptions to the hearsay rule. Here is the general manager of the company, and he tells things that were done in the regular

course of business, and he wanted to find out where a man [fol. 72] went, why somebody left there, and he asked the man, and the man told him.

That may not have much weight, but it is certainly competent and an exception to the hearsay rule.

The Commissioner: If you can show me I am wrong, I will be glad to reconsider my ruling.

We will recess until 2 o'clock.

(Thereupon, a recess was taken in the hearing until 2 o'clock, p.m.)

AFTERNOON SESSION

(The hearing was resumed, at the time above-mentioned, pursuant to the recess previously taken.)

PAUL HORVATH, resumed the witness stand and was examined and testified as follows:

Direct Examination (Resumed)

By Mr. McGuire:

Q. With reference to Plaintiffs' Exhibit AP-2, for identification, which the Court has excluded up to now, it is your testimony, as I understand it, that the names which appear on that exhibit are the names of persons on the pay roll of the Alaska-Pacific Consolidated Mining Company in the month of October, 1942?

A. That is correct.

[fol. 73] Q. And I believe you testified that, as to the names opposite which the asterisk appears, those individuals remained in the employ of the company until the closure?

A. Yes, sir.

Q. The closure took place when?

A. August 8, 1943.

OFFER IN EVIDENCE

Mr. McGuire: If the Court please, I offer, or re-offer Plaintiffs' Exhibit AP-2, for the limited purpose only of establishing the names of the persons on the pay roll as of

October, 1942, and the names of the persons on the pay roll as of October, 1943.

Mr. Harrison: I object to this exhibit.

The Commissioner: It may be received.

(Said pay rolls of Alaska-Pacific, marked "Plaintiffs' Exhibit No. AP-2, admitted in evidence and made a part of this record.)

The Commissioner: The effect of that ruling, and the offer, as I understand it, is to let in the exhibit, consisting of the names and the identification or the classification of the work done by the individual, and the dates, without regard to where the individual may have gone?

Mr. McGuire: That is correct. As I understand, it is not received as proof of the type of work to which the individual may have gone after leaving our employ.

The Commissioner: That is right. I wanted to get that clearly shown.

[fol. 74] By Mr. McGuire:

Q. Now, Mr. Horvath, what other types of mining operations were carried on in Alaska in 1942 and 1943, other than gold mining?

Mr. Harrison: I object to the competency of this witness to answer the question, and I object to its materiality.

The Commissioner: Does he know? If he does know, the objection is overruled.

Mr. Harrison: I would like to say that I object to the answer, until he has first laid the foundation to show that he does know.

The Commissioner: All right.

By Mr. McGuire:

Q. Mr. Horvath, were you familiar with mining operations in Alaska, other than gold mining?

A. Yes, sir.

Q. Do you know the names of all of the companies engaged in mining operations, other than gold mining?

A. No, perhaps not all, but I know a few in the vicinity of where I was located.

Q. Do you happen to know whether there were any min-

ing companies engaged in the mining of copper, for instance,-

A. No.

Q. —in 1942 and 1943?

[fol. 75] A. Copper? None that I know of.

Q. Were there any companies engaged in coal mining?

A. Coal mining, yes.

Mr. Harrison: I am going to object to this line of testimony as being immaterial to this case. If we are attacking an order of the War Production Board, then I think it has to be attacked on its over-all intention and its over-all objectives. I think whether or not, in Alaska, there happen to be some copper or coal mines, is immaterial.

The Commissioner: Objection overruled.

By Mr. McGuire:

Q. Do you know the names of the companies engaged in coal mining?

A. Yes, I do. The closest one to us was the Evans-Jones Coal Company, just about 40 miles out of Palmer, Alaska, and the other one was just about in Fairbanks, itself, known as the Healy River Coal Company.

Q. There were only two coal mining operations in Alaska, during 1942 and 1943?

A. Yes, to my knowledge, that is true; that is all there were, at that time.

Q. How far was the Healy River Coal Mining Company from the mine of the Alaska-Pacific Consolidated Mining Company?

A. Healy River was perhaps 150 miles farther north.

[fol. 76] Q. Now, were you familiar with the experience of the mining employees in the employ of the company in October, 1942, previous to the closure?

A. I didn't get the question?

Q. I said, in the course of your duties, did you become familiar with the previous experience of the personnel of the mining employees of the company in 1942?

A. Yes.

Q. Was it a part of your duty to learn what their prior employment experience had been?

A. Yes, it was. As hiring agent, naturally I checked the references, and so on, to a certain extent.

Q. Now, were there any persons in the employ of the company in October, 1942, who had had experience in coal mining?

Mr. Harrison: An objection. Perhaps it is best that I just register a continuing objection to anything that may come along, because I don't think what happened in this particular company and what type of experience their men happen to have is at all material to the issue, as I see it, and the only issue is whether the War Production Board arbitrarily issued the order.

I think that the over-all figure—I mean, as far as what was in the mind of the War Production Board, was reasonably calculated—that is, that the order was reasonably [fol. 77] calculated to obtain an ostensible purpose, and the fact that, with one company, certain conditions did or did not exist, I cannot see is material. If it concerns the over-all picture of gold mining operations, that might be material, I don't know, but I certainly don't think that what one particular company's circumstances were is material.

The Commissioner: The objection may be shown in the record.

Mr. Harrison: As to all of this line of testimony?

The Commissioner: Yes.

Mr. McGuire: The objection is overruled?

The Commissioner: Yes.

By Mr. McGuire:

Q. Will you answer the question?

A. The question was, how many men had had previous coal mining experience?

Q. Yes.

A. To my knowledge?

Q. Yes.

A. In looking over this list, very few. In fact, I think I can give you an accurate figure. To my knowledge only about three men.

Q. Three men?

A. About three men, and one not necessarily as a coal miner, but worked in a coal mine as a blacksmith.

[fol. 78] Q. When you say you looked over this list, you

are referring to the list of persons on the pay roll as of October, 1943?

A. That is correct.

Q. Now, have you had occasion to become familiar with the attitude of gold miners towards entering the employ of coal mines?

A. Yes, I think I have.

Q. What is, generally, their attitude, and particularly, with respect to the personnel employed by the Alaska-Pacific Consolidated Mining Company?

Mr. Harrison: I object to the witness being asked to testify what the attitude of someone else is. How does he know what their attitude is?

The Witness: I have been a miner myself, and I should know.

Mr. McGuire: He testified that he was an employee of this company for five years, and lived with these men every day, and he certainly ought to be able to tell what their attitude was.

The Commissioner: You are asking about somebody else' state of mind, are you not?

Mr. McGuire: I am asking, in general, the attitude of gold miners to coal mining.

The Commissioner: I will overrule the objection. We [fol. 79] don't have a jury here, and I can settle this question, myself.

By Mr. McGuire:

Q. What is the attitude of gold miners, generally, towards entering coal mining?

A. Generally, it is not favorable. Most gold miners, or hard-rock miners, as we call them,—they never have had experience in coal mining, which is an entirely different field, a different line. They don't care for the coal mines. First of all, it is very hazardous work, and gold mining is just the opposite: you don't have the hazards in gold mining that you have in coal mining. That is probably the primary reason.

Q. Just for the record, would you give some details as to the differences between gold mining and coal mining?

Mr. Harrison: No, Just a minute!

By Mr. Harrison:

Q. Have you ever been a coal miner?
A. No, sir.
Q. Have you ever been in a coal mine?
A. Yes.
Q. How many times?
A. Perhaps half a dozen times.
Q. What were you doing there?
A. Visiting the coal operators up there.
[fol. 80] Q. Did you ever study coal mining?
A. No, sir; I never did; just general knowledge.
Q. When were you in these coal mines?
A. During the years, perhaps, 1942 or 1943.
Q. Which mines were you in?
A. I was in, I think, about all of them. I was in the Evans-Jones coal mine, and also in a few prospects that had been shut down, or were inoperative, and one of them was the Buffalo Coal Mining Company, looking at it with the engineers, years ago, with the possible prospect in mind for our company to go into, but it never materialized, and we never took it on.
Q. You never did any coal mining, yourself?
A. As a worker, no, sir.

Mr. Harrison: I don't think this man is qualified to answer the question as to the difference between coal mining and gold mining. He might know about gold mining—he says he has done that—but I don't know how he could draw the contrast between coal mining and gold mining, when he hasn't done it.

The Commissioner: Overruled.

The Witness: First of all, the difference in coal mining and gold mining is quite basic and elementary, in that, first of all, entirely different machinery and equipment is used; entirely different machinery and equipment; in fact, en-[fol. 81] tirely different mining practices are used. I would have been a novice, myself, in the coal field. I admit I know nothing about coal mining, because it is so different from hard-rock mining. I just noticed it as an observer.

By Mr. McGuire:

Q. A man skilled in using gold mine machinery would not necessarily be able to use coal mining machinery?

A. No; that is correct.

Q. Or different types of tools employed?

A. Yes; different machinery, and different safety factors that are employed in coal mining, that you do not have in gold mining.

Q. Are you referring principally to the question of the explosive conditions in coal mining?

A. That is correct, which is, I would say, one of the basic differences, from my observation of coal mining.

Q. To your knowledge, did many of these men in the employ of the company in October of 1942, enter the employment of either of the two coal companies in Alaska?

A. As I say, a few did, enter into the Evans-Jones Coal Mine, that I know about, yes.

Q. How do you know that they did?

A. How do I know?

Q. Yes.

A. I know by having talked to these men. We re-em- [fol. 82] ployed several of them after our reopening in 1949, and I think the records of the coal mining companies show that, if you want to look into them.

Q. You said a few men. About how many would you say?

A. Let me take a look at my list here, and maybe I can give you the exact figure. That is from October, 1942, you are talking about?

Q. Yes, October, 1942.

A. I know of four men, from October, 1942.

Q. By the way, I forgot to ask you earlier, but you said you were operating two mills at Wasilla at the time of the closure. Did you have any more than two mills on hand?

A. Yes; we had an extra mill on hand, but not in operation; in fact, not installed.

Q. A spare mill?

A. A spare mill, completely spare mill, yes.

Q. What was the capacity of these three mills?

A. Well, these mills were what we term 35-ton-capacity. Marcy gold mills. When I say 35 tons, they were rated at 35 tons, and that means 35 tons minimum output. How-

ever, their tonnage may have varied, depending on the liners in these mills at certain stages; and perhaps the output might have been 50 tons, per day, on these mills, but at other times only 30, because of the heaviness of the liners. As you use them, you gain more grinding space, and you handle more tonnage, but they are rated at 35 tons.

[fol. 83] Q. Were you familiar with the underground workings, at the time of the closure?

A. Yes, I was.

Q. Just what was the extent of these workings; will you give us some approximation of the mileage involved?

A. Of our underground workings?

Q. Yes.

A. I would say, roughly, five miles of workings.

Q. That included not only the entry tunnels, but also the cross courses?

A. I might explain that, or clarify it better by explaining the type of mining that it was.

We went into the hill at our camp level, or main haulage level, which, in that case, was just about a mile long, to get to what we called our working race. This race goes up into our workings, up in the tunnel into the mine, and from there we had take-offs at various levels, from which we had either production or development work going on.

Q. Were these workings timbered?

A. Sir?

Q. Were these workings, in part, timbered?

A. Were they timbered?

Q. Yes.

A. Yes, some were timbered and some were not. In hard [fol. 84] rock mining you have many areas where you go through solid granite, where timbering is not necessary. Timbering is just generally put in places where it is necessary.

Incidentally, that particular mine was recognized as a very safe mine, in very good, solid ground, and timbering was generally carried on to a minimum, and it was not necessary in many places.

Q. Was it a dry mine, or a wet mine?

A. Well, some areas were wet, and some were dry. That is a hard question to answer. Some areas were extremely wet, and others were extremely dry. The reason I say that,

I worked in the south workings, myself, in the early years, and that was just as dry as a bone, as opposed to the north workings, that was so wet that we couldn't put clothing on and stay dry.

Mr. McGuire: If the Court please, there was a suggestion made, prior to the recess, that if the plaintiff would supply a list of the men involved, the government would undertake to obtain from the Social Security Administration such information as the Social Security has with respect to the subsequent employment of these men, after they left the employ of the Alaska-Pacific Consolidated Mining Company; and I would like to be certain that the government would do that, and supply that information for the Court, before I close.

The Commissioner: I think we had better furnish one [fol. 85] additional bit of information along with that,—the numbers.

Mr. McGuire: The numbers, yes.

Mr. Harrison: Well, I am not going to commit the government to do that. Of course, I am not the regularly assigned counsel, but my position at the present time, as defense counsel's position, that it would be asking the government to undertake a great deal of work to try to help the plaintiff prove something which is, in the government's view, completely immaterial to this case.

Furthermore—

The Comissioner: I think, as Commissoner, I am going to call upon the government to cooperate with the plaintiffs in getting the information sought. The plaintiffs could file a motion for call and get the information.

Mr. Harrison: If he files a motion for call, we would have the opportunity of outlining why we feel we should not be put to that burden. If all of the gold mines did the same thing, we might have, conceivably, hundreds of names to look up, and the task of doing that would be very great, I imagine; and I actually think, myself, that the important think is not the individual man, but if they want to try to introduce some proof as to how many men went to what we call essential mines, they can do that by more competent statistics of the particular employment by the particular companies, and I don't think that would be material, either. [fol. 86] I think the only thing that is material is that,

at the time this order was promulgated, what information was available, and what rights, what reasonable rights did the WPB have to expect certain results. Whether the results were obtained, or not, I think is immaterial; but speaking for myself, and as government counsel presently sitting in the case, I certainly could not commit the government to voluntarily assuming the job of working up all of these names.

The Commissioner: I am going to use, as I say, whatever authority, as Commissioner, I have, to require the government to do that, and even though Mr. Harrison is not able to make the commitment, I am going to see if it is at all possible, when I return to Washington, to take the matter up with Mr. Barnes, and I will ask that he communicate directly with Mr. McGuire on this point.

Mr. McGuire: Would that also include the request that the government check the records of the Alaska Employment Compensation Commission, because certain men may have obtained no other employment.

The Commissioner: Is that a government agency?

Mr. McGuire: That is an agency of the Territorial Government.

The Commissioner: If that is a Federal Agency, I think that might be in order.

[fol. 87] Mr. McGuire: Yes.

The Commissioner: But I would not call upon the Federal Government——

Mr. McGuire: It is the Territorial Government, which is a part of the Federal Government.

As I understand, Your Honor is taking the position that this witness' testimony, as to the subsequent employment of the individuals, after leaving Alaska-Pacific, is incompetent, is based on hearsay?

The Commissioner: Most of the testimony that he has given heretofore, based upon that point, was subject to that objection which was made. If he has actual knowledge concerning any subsequent employment of a man, I would rule that that is competent.

Mr. Connor: Your Honor, it is my understanding that the Homestake and Central Eureka and Idaho Maryland—that we have an understanding with Mr. Barnes to the effect that, if we submit to him—if we supply him with a list

of our employees at least six weeks before January 26, he will endeavor to have the FBI check the accuracy of our list; is that your understanding?

The Commissioner: To the best of my recollection, it is, yes.

Mr. Connor: So that won't involve these hundreds of workers that Mr. Harrison talks about, or the Social Se- [fol. 88] curity records. We are working on those lists, and are going to have them to Mr. Barnes, so he can have the FBI check the accuracy of the lists.

The Commissioner: What is that list going to contain?

Mr. Connor: It is going to cover everybody in our employ on October 8, 1942.

The Commissioner: Just to show the number of people?

Mr. Connor: And where they went, and what they did afterwards.

Mr. Barnett: And that information, Your Honor, is secured from the business records of the Central Eureka, the Homestake and the Idaho-Maryland, verified by Social Security data, which we have, and other business records, the thought being that the FBI would spot-check that information that we have at the mine, and the other plaintiffs have at their mines, at least six weeks before the hearing set in January.

Mr. Orrick: Your Honor, please, Mr. Barnes, according to my understanding of what took place at the pre-trial conference, said that, if we furnished him information from the records, including the name of the miner, the birth-date and employment records, the previous underground experience, the dates of re-employment, and their status, as our records show it at the date Order L-208 went into effect,—that, subject to check by the FBI, a summary of those records would be admitted for what they proved.

[fol. 89] Mr. Barnett: Then the other items to be included with that—I won't burden the record with that—whether they were properly handled, and so on, but that was our understanding with Mr. Barnes.

The Commissioner: It might be possible to get an agreement out of Mr. Barnes, and let the list in, but I don't know.

Mr. Barnett: We realize that Mr. Harrison, coming into the thing, knows nothing of what occurred in the pre-trial conference.

Mr. McGuire: We have no such records in our company, indicating what became of these men, other than as shown on Exhibit 2.

Mr. Harrison: Of course, it is understood that any arrangement with Mr. Barnes is unknown to me, and of course I don't know what reasons he has had for making such agreements, or anything else. To me, such data would be —from my view of the case—immaterial, but if he takes another position, of course, that is Mr. Barnes' privilege.

Mr. Barnett: Well, I don't think the stipulation went as far as materiality; I think that was a reservation, but it merely was entered into in the spirit of saving the time of the Court and our time, to the effect that, if we were to examine the records, they would show such-and-such facts.

Mr. Orrick: And it was entered into before all the [fol. 90] parties at the pre-trial conference, when this matter was discussed.

Mr. Harrison: It is not incorporated in the pre-trial memorandum.

Mr. Orrick: No, no.

Mr. Harison: I have no knowledge of that, other than what I have heard.

The Commissioner: I recall some of the discussion. Frankly, I don't recall all of the details of the discussion, and I do remember that it was not incorporated in the pre-trial memorandum, and I don't know why we didn't incorporate it, but I think it can be worked out, but I will caution counsel to get their material together as rapidly as possible, because the job of checking it might be of some extent.

Mr. Barnett: We have ours all ready,—as soon as we get back to our correspondent in Washington, it will be ready for forwarding to Mr. Barnes.

Mr. Harison: I might ask counsel to state for the record the reason why they desire to present that evidence.

Mr. Barnett: I think we have to wait until it is offered back in Washington, at that time. We consider it a material part of the case.

Mr. McGuire: I don't mind stating for the record, as far as Alaska-Pacific Consolidated is concerned, as far as the materiality is concerned, we will offer, with a subsequent [fol. 91] witness, a letter from the War Production Board,

denying the final appeal of Alaska-Pacific on the ground, and the sole ground, that the government—the War Production Board and the War Manpower Commission, wanted our people to go into the coal mines.

That, of course, is the reason for the mentioning of the coal mining, which Mr. Harrison objected to this morning.

Mr. Barnett: If you look at page 15 of the Court's decision, counsel, there are certain items mentioned there that might help you.

Mr. Harrison: Well, of course, my feeling, without being too repetitious, is that the evidence should be directed at the WPB's factual information at the time that this order was promulgated, and that reasonably expect; was it reasonable for them to expect certain things, and the evidence, as I see it, that you are trying to get into the record, would show what, in fact, happened.

Mr. Barnett: That might be a defense mechanism, but we are trying to follow what the Court of Claims suggested that we prove.

By Mr. McGuire:

Q. Mr. Horvath, will you take Plaintiffs' Exhibit AP-2, which is the plaintiff, Alaska-Pacific Consolidated's October payroll, and state, as to every man named thereon, what employment he obtained after leaving Alaska-Pacific, [fol. 92] if you know of your own personal knowledge, or by reason of factors other than conversation with that man, or conversation with someone else?

A. By reason other than conversations?

Q. Yes.

A. Well, as I say, the first name on the list, Ruple Adams, I actually saw that man working at the North Commercial Company in Anchorage.

Q. What kind of employment was that?

A. The North Commercial Company of Anchorage is a large general agency, handling everything from Buicks to Caterpillar dozers, hardware and machinery, and everything down to food; they are one of the largest operators of that type in the Territory of Alaska.

By Mr. Harrison:

Q. When did you see him, and what was he doing?

A. When?

Q. Yes.

A. I don't know the exact date, but sometime after his discharge from our company, sometime after October, before I went to the States.

Q. Do you know when he went to work there?

A. Not exactly, no, sir.

Q. Do you know how long he stayed there?

A. He was there until 1949, or maybe 1950.

[fol. 93] Q. How do you know that?

A. Because I was there the day after he was fired from the job, for sleeping on the job. That is a fact. I was right there, and I know that.

Mr. Harrison: I think I might save counsel a lot of time——

The Witness: I think that can be proved.

Mr. Harrison: I am going to object, because I don't think what you are competent to testify to is enough, and I think we ought to have that in the record.

All you can say is, you saw him working in a certain place, at a certain time.

The Witness: He waited on me, and actually took care of me, and sold me items out of that store; so I know he was actually employed there.

By Mr. Harrison:

Q. You know he was employed there, and when he left there, but could you say that he was working there continuously from the time you first saw him until he was fired?

A. Yes.

The Commissioner: I am going to ask counsel to state the objection, if he can, but otherwise save the questions for cross-examination.

Mr. Harrison: Well, I object to the answer of the witness, and I move that his answer be stricken, because I do not think that he is competent to testify to any facts

[fol. 94] concerning the employment of Mr. Adams that is material to this case.

The Commissioner: Overruled.

By Mr. McGuire:

Q. You may proceed, Mr. Horvath.

A. I am trying to pick out these men who were actually here, and discounting what I say about talking to the men,—I am trying to pick out the men I actually saw working on different jobs; they are very few, and he happened to be one.

Mr. Harrison: Could I make the general objection that, even though they might be working on a job, there is no guaranteeing that that was the job they went to when they left the mine.

The Witness: That had to be that particular man's work.

The Commissioner: The witness will not reply, unless a question is asked of him.

The Witness: I am sorry.

Mr. Harrison: I made an objection to the question.

The Commissioner: Overruled.

The Witness: Max Bohman—he went to work in—I don't recall what restaurant it was, offhand, but one of the restaurants in town, where I saw him working.

DeJohn, Henry, I actually saw him the night he went back to his little cabin on the other side of the hill, as a prospector, and I talked to him many times, and I saw him [fol. 95] picking up ore that was deposited along the hill. He was then about 70 years old.

John Gary, who went to Anchorage and opened a private business as a sheet metal shop, in partnership with his son, and carried on the business all during the war years.

Mr. Harrison: These are all statements, but I would like to know how you know these things?

The Witness: I saw them. I saw the men, and I talked to them. I know these people.

Mr. Harrison: You talked to them—you might have talked to them, but we are trying to prove a fact, but you can't prove that fact by something they told you.

Mr. Connor: Can we reserve this for cross-examination?

The Commissioner: I think it should be, unless you have an objection.

Mr. Harrison: I object that no foundation has been laid to show this witness is competent to answer that question.

The Commissioner: Objection overruled.

The Witness: Shall I continue?

The Commissioner: Yes.

The Witness: Harry Dunn is down at Louisiana, raising tung trees.

By the Commissioner.

Q. Did you see him at Louisiana?

A. No I didn't but I have a letter stating that. He was [fol. 96] a very good personal friend of mine.

Henry Gable returned to the States, to his ranch in Merced, for retirement. He was an old man, too. I saw him once after that.

Edward James went to work in Anchorage, as janitor in various bars, and in fact, he worked for Harry O'Neal, and at different bars, and was still there the last time I saw his in 1949.

Mr. Harrison: I am going to stick to the original objection, that no foundation has been laid to show the witness is competent to answer the question.

The Commissioner: Overruled.

The Witness: Charles Janich, he went to Anchorage, went to work in a hotel there, the Fifth Avenue Hotel, and is still there. He has been there all of these years.

Oscar Johnson, after the closure, remained on at the mine as a watchman for a time, and then took up his residence in Wasilla, where he owns a home, in semi-retirement, doing odd jobs as a carpenter throughout the valley.

Robert Johnson, his brother, went to the Evans-Jones Coal Mine as a blacksmith.

Thor Johnson, he went to the coal mines, also.

Chester Liebing, he went to Palmer, and became a farmer, in addition to doing odd jobs about the countryside there.

Charles Liebing, his father, likewise went into the same [fol. 97] kind of work.

That is all that I see, that I recall directly.

By Mr. McGuire:

Q. As a part of your duties, in charge of hiring and firing, did you inquire of these men who left your employ, to determine what they were doing after leaving your employ?

A. Did I ask what they were going to do?

Q. Yes.

A. At the time of departure?

Q. Yes, that's right.

A. On occasion, yes. In fact, towards the end of the period, we were required by the particular government agency to give a termination notice and, generally, we included on that notice where they were going. I think those records still are on file in the Alaska office.

Q. And in connection with your duties, in attempting to hire new employees, did you have occasion to talk to these men, at any time subsequent to their discontinuing of employment with the company, in an effort to determine whether or not they were still available for employment?

A. Yes; I saw some of them, quite often, in fact; every time I was in town.

Q. Did you, through those efforts, acquire information from the men as to what they were doing?

A. Yes, sir.

[fol. 98] Q. And was the balance of your information, with respect to the subsequent employment of these men, gained through such conversations?

A. That is correct.

Mr. McGuire: If the Court please, I don't want to take up the time of the Court, particularly, on this subject,—I am a little bit afraid that this Social Security information will never be produced, or if it is produced, that it will be in a form that we will be able to use. Therefore, I will ask the witness to testify with reference to one of these men, and if the Court excludes the testimony, I will make an offer of proof, with reference to the balance; so we will be in position, at least, to have a record of the information.

The Commissioner: All right.

By Mr. McGuire:

Q. Now, with reference to Millard J. Gowenlock.

A. Yes.

Q. Did you have occasion to talk to him, after he had left the employ of the company, to determine what employment he had secured.

A. Yes; many times on many occasions. He was a very close personal friend.

Q. And in the course of his conversations, did you learn from him what employment he was engaged in, after leaving Alaska-Pacific?

[fol. 99] A. Yes, sir.

Q. What was that employment?

Mr. Harrison: An objection.

Mr. McGuire: I understand the same objection will be made, although the balance of the employees whose names I give—in other words, the same ruling will be made.

The Commissioner: Yes.

Mr. McGuire: Therefore, I would like to make an offer of proof with reference to this man.

The Commissioner: You can do that by question and answer, if you prefer, or by a narrative statement.

Mr. McGuire: I prefer to make a narrative statement.

The Commissioner: All right.

Mr. McGuire: If the Court please, the witness would testify, if asked and permitted to answer, as to the following—with reference to the following-named men:

Ruple Adams, went to the N. C. Company, Anchorage, Alaska, and designated as over age.

Gust Abrahamson, to smaller gold mines.

Joseph Arkus, to other camps as flunkey.

Ward Beatty, to smaller gold mines.

Max Bohman, to cooking jobs about town.

Roy Boedecker, to smaller mines, gold prospecting.

John Brink, to town, and engaged in no employment; loafing about.

[fol. 100] Hugo Brodin, went to Anchorage, and loafing about, just a floater.

Carl Carlson, to Anchorage, a floater.

Victor Crosby, to Anchorage, a floater, loafing about, no employment.

The Commissioner: Some of those names do not appear on our list.

Mr. McGuire: Yes, I believe they do; they should.

The Commissioner: The last two do not.

Mr. McGuire: Let me give the names, and we will put this list in the record.

The Commissioner: All right.

Mr. McGuire: Lester Davis, to Anchorage, a drifter, no employment.

Gust Dauoff, to Anchorage, loafing about.

Henry DeJohn, went to the hills, as a prospector, and then retired.

Edwin C. Doyle, to the coal mines.

Harry Dunn, to Anchorage, in private business.

John Dempsey, went to the States as a compensation case.

Edward Egland, to smaller mines.

William Fogg, to Anchorage, where he went into construction work.

Frank Fay, to Anchorage, kitchen and flunkey work.

Jack Fabian, to Wasilla, unemployed.

[fol. 101] Robert Frendahl, to Anchorage, general work about town.

Leo Fesl, to Anchorage, floater, unemployed.

Henry Gable, to States, over age, and retired.

Spero Gust, to Anchorage, loafing about.

Henry Hagemenn, to Anchorage, loafing about, no employment.

Olaf Holmberg, to Anchorage.

John Hovland, to the States.

Edward James, to Anchorage, worked as janitor in bars.

Charles Janich, to Anchorage, working about city hotel.

Ivar Johnson, to Anchorage.

Oscar Johnson remained at the mines as watchman.

Robert Johnson, to the coal mines.

John Johanson, to Anchorage.

Thor Johnson, to coal mines.

Mike Kossof, to Anchorage.

The witness has already testified to the Liebings, the father and son.

Roy Lynch, to Seattle.

Joseph LeGlanic, to Anchorage, unemployed.

Matt Lane, to Palmer, died shortly after leaving mine.

Tony Markel, to Anchorage, unemployed.
George Massoz, gold prospector.
Dan McDevitt, to Anchorage, construction work.
Patrick McDermott, to town, unemployed.
[fol. 102] To town, I presume, means Wasilla.
Angus McDonald, to Wasilla.
Edward McGinley, to Palmer, unemployed.
Eddie McKinney, returned to the States.
Charles McLaughiin, he went to Anchorage.
John McNeil, to Wasilla, unemployed.
Angus McPhail, to Anchorage, unemployed.
Peter McPherson, to Wasilla.
John Nelson, to the States.
Charles Nickovich, to Wasilla, unemployed.
A. Nowicki, to Anchorage, cooking jobs.
Peter O'Hare, to Anchorage, unemployed.
Sam Pavlica, to construction work in Wasilla.
Ralph Perich, to construction work, and has subsequently died.
George Pittiff, to Wasilla, unemployed.
Alfred Perry, to Wasilla.
Charles Radosevich, to Anchorage, unemployed.
William Reskwess, to Anchorage, unemployed.
Robert Shimdorf, to Anchorage, construction work.
George P. Smith, to the Armed Services, then discharged after about six months for over age, then went to prospecting.
Edgar Smither, Anchorage, unemployed.
John Stevens, to Anchorage, unemployed.
Ed Solderquist, to Anchorage, unemployed.
[fol. 103] Clyde Thorpe, to Wasilla, retired.
Mike Tomanovich, to Anchorage, construction work.
R. L. Vancil, to Anchorage, unemployed.
Rasmus Wadsten, to Anchorage, unemployed.
Ferma White, to Seattle, and since deceased.
John Saiz, to Anchorage, unemployed.

By Mr. McGuire:

Q. Now, at this point, I would like to ask you, Mr. Horvath, if the list of names that I have just read is not a list of the names of the men who were on the pay roll of the company, at the time of the closure?

A. They were on the pay roll at the time of closure.

Q. At the risk of repetition, I am going to ask the witness again on what date was the closing order effective as to the Alaska-Pacific Consolidated Mining Company?

A. August 8, 1943.

Mr. McGuire: The witness would also testify, if permitted to answer, the following-named men, who were on the pay roll as of October, 1942, but who left the employ of the company, prior to the closure date, engaged in the following employment after leaving the company:

George Bahns, to construction work.

The Commissioner: Couldn't you tie that in with the exhibit, without reading it?

Mr. McGuire: Yes; that the witness would testify, if [fol. 104] permitted to answer, that the men whose names appear on Plaintiffs' AP Exhibit No. 2, with the notation after their names as to some particular type of employment, after leaving the employ of the Alaska-Pacific Consolidated Mining Company.

The Commissioner: Very well.

By Mr. McGuire:

Q. Now, Mr. Horvath, did the company produce for sale anything other than gold?

A. Well, we produced a little sheelite ore, during the tail end of our operations.

Q. Was any concentrate shipped for copper smelting operations?

A. Yes; we produced a concentrate from the flotation process, which was shipped monthly, and bi-monthly to the Tacoma Smelting Company, by rail and by boat.

Q. And approximately what tonnage, per month, of that type of concentrate was shipped?

A. I would say between 40 and 50 tons per month.

Q. Do you know what use was made of that concentrate by the Tacoma Smelter?

A. Oh, yes; they used it as a fluxing agent.

Mr. Harrison: Would you prefer that I wait for cross-examination to ask him the basis of his knowledge of what use they made of it?

The Commissioner: No, you can ask him preliminary [fol. 105] questions.

By Mr. Harrison:

Q. I would like to know how you know what they used it for?

A. Well, that is a good question.

Q. Do you know that any of the concentrate that you sent them was used by them for any particular purpose?

A. I know, by reason of having seen letters from those people, stating what they did with our product, yes, sir.

Mr. Harrison: Objected to, as hearsay.

Mr. Montgomery: We will produce a man from the smelter, if the Court please, who will show what use they made of it.

Mr. Harrison: As to this witness, I object.

The Commissioner: All right.

Mr. McGuire: Very well.

By Mr. McGuire:

Q. Now, you referred, a moment ago, to sheelite. Will you explain for the record what sheelite is?

A. Well, sheelite is an ore generally found in a quartz base, which is used in—well, like in tungsten. Sheelite ore is used in producing tungsten.

Q. You say that, towards the period immediately prior to the closing, the company engaged in the production of sheelite ore?

A. Yes, sir, they did.

[fol. 106] Q. And did the company acquire any special equipment for that purpose?

A. Yes, sir, they did, considerable equipment, that is, in the location of the sheelite, and also in the sorting of the sheelite, in going over the sorting belts,—the ore goes over the sorting belts. In detecting sheelite, the only way it can be detected is by being put under the rays of an ultra-violet ray lamp, which shows it up, and which requires a considerable amount of time and equipment, in order to do that.

Q. Was application made to the War Production Board for priorities for the equipment necessary to trace and to separate the sheelite?

A. Yes.

Q. Were priorities granted for that purpose?

A. Yes, they were.

Q. Can you tell the Court whether or not tungsten was regarded as a critical material, at the time in question?

A. Yes, it was highly critical.

Q. Was the government making any effort to determine a source of tungsten in Alaska, at that time?

A. That, of course, is a question——

Mr. Harrison: Before you answer, I object to the witness' competency to testify what the witness—to testify what the government was trying to do, at that time.

[fol. 107] The Commissioner: He might know about it. If he knows, he may answer.

Mr. Harrison: He may not know what the government was trying to do, but he can testify what he actually knew they were doing.

The Commissioner: He may know.

The Witness: As to what the government—I know that they were limiting it to our particular operation—they were interested in what we were doing in sheelite recovery.

By The Commissioner:

Q. How did you learn that?

A. How did I learn of that?

Q. Yes.

A. By the various correspondence that we exchanged with Mr. Stewart, in the Bureau of Mines, at Juneau. Other than that, I don't know of anything else specific.

Mr. McGuire: The witness is available for cross-examination.

Cross-Examination.

By Mr. Harrison:

Q. Mr. Horvath, you gave some testimony to the effect that coal mining and gold mining were essentially different types of work. Would you say that about gold mining and copper mining?

A. I know nothing about copper mining.

[fol. 108] Q. You know nothing about copper?

A. I know nothing about copper mining, no.

Q. When you say you know nothing about copper, do you also mean that you know nothing about the equipment used in copper mining?

A. Only from hearsay, by the miners who worked in copper mining, that is, that the equipment is similar as used in gold and copper mining.

Q. It is——

A. It is similar, yes.

Q. Now, you made a statement about inventory of supplies that were on hand, at the time of the closure of the Alaska-Pacific Consolidated Mining Company's gold mine, and you made the general statement that you had a tremendous supply on hand,—enough to go ahead for a year or a year and a half, without getting any more.

Now, I want to ask you about some of these things, specifically. What type of explosives were used by Alaska-Pacific?

A. Well, we used the regular gelatin base dynamite of different strengths; in fact, generally our biggest user was what we call 40 per cent powder. We used 30 per cent, 40 per cent and 60 per cent. The strength of the powder was the use of the strength was more or less determined by the hardness and the nature of the ground.

[fol. 109] Q. Does this powder come in bales or cans, or sticks?

A. It comes in sticks, packed in wooden boxes, 56 sticks to the box.

Q. 56 sticks to the box?

A. Yes; it is generally by weight.

Q. How many sticks are used, per day?

A. How many sticks were used, per day?

Q. Yes, were used, per day, by Alaska-Pacific?

A. It varied.

Q. Well, approximately? What would be your idea? Give me some idea.

A. I would say five, six, ten cases per day.

Q. Five or six to ten cases?

A. Yes.

Q. How many cases did you have on hand when the mine was closed?

A. I would have to look at the records to tell that.

Q. You said you had enough supplies to go for a year or a year and a half.

A. Yes, that's right.

Q. Would you say that——

A. There must have been 1500 or 2,000 cases, or something like that.

Q. 1500 or 2,000 cases?

A. Yes, something like that.

[fol. 110] Q. You mentioned lubricants. What are lubricants used for in a mine?

A. Lubricants were used primarily in the power plant.

Q. The power plant?

A. Yes, for various oil needs, in the diesel transmission units, and crankcase oil, and so on, and they go underground for your various mining machinery, operating the mining machinery, and also on the rolling stock, Caterpillars, and so on.

Q. What kind of lubricants, primarily, did you use?

A. Primarily, we used what we call Shell high-duty 40, and we used it throughout all of our diesel engines in the power plant——

Q. Shell high-duty 40?

A. Shell high-duty 40.

Q. How much Shell high-duty 40 would you say you used per week?

A. I would say, a barrel, or a little less,—a 50-gallon barrel, or a little less.

Q. Haw many barrels were on hand, when the mine was closed?

A. Oh, I would say there were maybe 90 or 100 barrels of that particular number, at least, offhand, as I recall. I know there was quite a little of it on hand.

Q. Now, if you only had 90 to 100 barrels on hand, and [fol. 111] you used——

A. A barrel a week.

Q. A barrel a week of oil, it looks like you had plenty. There was plenty of oil there.

A. That is an item that we had plenty of. You see, we bought in carload shipments on the oil, in order to save money on the transportaion costs.

Q. You mentioned chemicals. What kind of chemicals did you have?

A. Well, we used, primarily, in our flotation unit, an

agent called zanthates and fine oil, and a combination of the two is the basic ingredient for floating the ores. Now, it takes very little of it to float ore, and that particular item we had in great quantity, I know.

In fact, we had several others on hand, that we had been experimenting with, too, as I recall, from—well, I can't think of the chemical company, but one of the large chemical companies.

Q. Dow Chemical Company?

A. No, not Dow. There were two other companies, and——

Q. DuPont?

A. No; American Cyanmid Company.

Q. Well now, going back to your testimony about all of these supplies that you had on hand, what did Alaska-Pacific do with all of the supplies after the mine was closed?

[fol. 112] A. Well, those items, of course, were hard items, and merely stored.

Q. Merely stored?

A. Yes. Some of them were sold. The perishable items were sold to different agencies, such as the Alaska Road Commission, the Alaska Railroad. They were sold everywhere. In some cases, some of the hard stuff was sold, also.

Q. And when these sales were made, they were made with the approval of the War Production Board weren't they?

A. I don't know whether there was a requirement there for approval. After the closure, I questioned whether the War Production had any control over the sale of merchandise; they didn't, to my knowledge.

Mr. Connor: I think if the government can tell us what control the government had, or the War Production Board had——

Mr. Harrison: Wasn't Order L-208 amended, so that the sales, which were made available by the closing of mines,—that they could be bought and sold only under certain restrictions?

Mr. McGuire: I think there was some kind of amendment like that, but I think, if you tell the witness what it was——

Mr. Harrison: We are operating in the case without the

basic order having been introduced in evidence, as far as I know.

[fol. 113] Mr. Orrick: I don't recall that the order was amended.

Mr. Harrison: Yes, I think it was, very definitely, amended two or three times.

Mr. Barnett: I think under Order 56, preference order 56, there was some invitation sent to the War Production Board; they tried to get the mines, on a voluntary basis, to sell and dispose of critical materials.

Mr. Connor: I do not think there was any requirement about getting permission.

Mr. Harrison: Off the record, please.

(Here followed discussion off the record.)

Mr. Harrison: I have no further questions.

Mr. McGuire: I have a little redirect examination.

Redirect Examination

By Mr. McGuire:

Q. Mr. Horvath, do you know of any copper mines in operation in Alaska at the time of the closure?

A. No, sir.

Q. Do you know of any other type of non-gold mining operations, other than coal?

A. No, sir.

Q. Now, you stated that you had supplies on hand sufficient for a year or a year and a half of operation.

The length of the operation would depend upon the rate of operation, would it not?

[fol. 114] A. Correct.

Q. When you said a year to a year and a half, you mean a 2-mill operation, the type of operation Alaska-Pacific had been doing?

A. As they had been, yes.

Mr. Harrison: We have not been told how they had operated.

By Mr. McGuire:

Q. Do you know how Alaska-Pacific was operating; whether on a 2-mill basis, or not?

A. On a 2-mill basis, I would say, yes.

Q. And on a one-mill basis?

A. And on a one-mill basis, perhaps a year and a half, or even longer, on a one-mill basis.

Q. Now, do you know whether or not the company was planning to go to a continuous two-mill basis, or only a one-mill basis, at or about the time of the closure?

A. Well, as a matter of fact, no decision had been made. We were thinking of going to a one-mill operation, and making it more efficient. No definite policy had been decided upon.

Q. Now, I believe you testified you returned to the mine in 1949?

A. That is correct.

Q. For how long a period?

A. 1949, I was there for a full year.

[fol. 115] Q. What was your position, at that time?

A. I was the general camp superintendent.

Q. Do you have occasion to examine the inventory of supplies, at that time?

A. Yes, I did.

Q. Could you tell whether or not the supplies on hand, at that time, were the same supplies which you had in the inventory, at the close of the mining in 1943?

A. Many of them were, yes.

Q. How about the supply of powder; was that the same powder that was stored in 1943?

A. A lot of it was, yes.

Mr. Harrison: Well now, unless the witness can show that there was some way that he could positively identify the powder as being the same powder, I want to object to that.

The Commissioner: You can go into that question on cross-examination.

The Witness: The reason that I can tell that——

The Commissioner: Wait a minute! When an objection is made, you don't have to answer until a ruling is made.

Mr. Harrison: I will withdraw my objection.

The Witness: Answer the question?

By Mr. McGuire:

Q. Yes.

A. The question was, how do I know?

[fol. 116] By Mr. Harrison:

Q. No, that wasn't the question. The question was, whether some of the same powder was there, or not?

A. Yes; it was the same powder that was left there.

By Mr. McGuire:

Q. Did you have to make any disposition of that powder?

A. Yes, we did. We had one of the agents of the Atlas Powder Company come up and set it off; it was dangerous to have it about. He set it off up in the hills.

Q. Now, can you give us a brief statement of what was necessary to be done, at the time of the closure, to put this plant in a stand-by position?

Mr. Harrison: I think that is getting into damages.

Mr. McGuire: No; just a matter of completing the record as to what condition this mine was left in, at the time of the closure.

The Commissioner: Overruled.

The Witness: Well, to bring about the closure, there were many things necessary. Taking them in order, the mine, first of all, had to be completely clean in many areas where we had cave-ins. We had to strip our pipe and rail and the equipment that was normally in the hoist, and the various draglines throughout the entire mine, and then coming on down to the blacksmith shop, and the machine shop, and so on, all of the equipment, such as the mine drilling machinery and the various pumps, both the water pumps and the air [fol. 117] pumps, and their replacements, and so forth, all had to be completely cleaned up and sealed away, and all of the other heavy equipment, and they all had to be cataloged, also, and properly, so they would be available on reopening.

Likewise, that same procedure took place throughout the entire camp, with our boilers, our machinery, which had to be torn down and put into a storage condition; and the general cleanup of the camp required a great many man hours, manpower, to shore up the large buildings, in an-

ticipation of the heavy winters, and seal off the dam, and seal off the various oil lines.

By The Commissioner:

Q. Was any maintenance done during the close-down period?

A. It was done prior to the close-down.

Q. I mean, during the close-down, were there any employees on the job for maintenance?

A. There were some, yes.

Mr. McGuire: A subsequent witness will have knowledge of that, and testify about that, and will testify that about eight men were retained at the time of closure.

The Commissioner: All right.

By Mr. McGuire:

Q. About how long did this standby or lay-up operation take?

[fol. 118] A. How long did it take to perform?

Q. Yes.

A. It took a considerable time to complete it.

We started, I would say, in July—along in there, some time—and it continued right up to the time we left there, right up to the end of the year, when we left there for that purpose, to finish up the odds and ends, right up to December.

Mr. McGuire: I believe that is all.

Recross-examination.

By Mr. Harrison:

Q. Going back to the powder—when you spoke of powder, you mean these dynamite sticks?

A. Yes, sir.

Q. You said that, when you came back in 1949, some of the same powder was there. What reason do you have for saying it was the same powder?

A. Well, the powder is all dated.

Q. And you compared the dates with the previous records, did you?

A. Yes.

Q. About how much powder did you have left, when you came back, in 1949?

A. In 1949?

[fol. 119] Q. Yes.

A. I would say there were a few hundred cases. I don't know exactly how many, but a great number of them, 300 or 400.

Q. Now, when the mine was closed, you said there were 1,500 to 2,000 cases. Have you any information as to what happened to that other powder?

A. It was sold.

Q. It was sold?

A. Yes.

Q. Do you know whether or not any of it was sold to other mines?

A. It was sold more generally to the coal mines, and the Alaska Road Commission. It had to be sold through the powder people, out of Anchorage.

Q. Now, you describe a rather elaborate procedure that was undergone, to bring about the closure of the mine.

Do you know whether or not any agent of the United States Government ordered you to take any of those procedures?

A. No, sir, I do not.

Mr. Harrison: No further questions.

Mr. McGuire: No questions.

Mr. Barnett: No questions.

Mr. Connor: No questions.

The Commissioner: The witness is excused.

(Witness excused.)

[fol. 120] The Commissioner: We will recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearing.)

The Commissioner: You may proceed.

Mr. McGuire: Will you take the stand, Mr. Montgomery?

V. A. MONTGOMERY, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct Examination.

By Mr. McGuire:

Q. Will you state your full name and address for the record, Mr. Montgomery?

A. V. A. Montgomery, and I live at 4721 Nineteenth Street, Northeast, in Seattle, and I am a lawyer.

Q. Will you state for the record what your connection has been with the plaintiff in this case, the Alaska-Pacific Consolidated Mining Company.

A. I have been its attorney since its inception, that is, since the organization of the first underlying corporation in June, 1934. I have been its attorney throughout that period, and I will say, perhaps, chief attorney, because it had other lawyers in that time that assisted me.

I had been on the board of directors, with the exception of a short period, or so, and have served in other capacities. I was a secretary part of the time, and assistant secretary, [fol. 121] and I am now president of the company.

Q. You have been continuously connected with the company, either as an officer, director, or as attorney, throughout the period from the time of its organization?

A. That is correct.

Q. What was the name of the corporation, as it was originally organized in 1934?

A. It was the Alaska-Pacific Mines, Inc.

Q. Will you state to the Court what corporate reorganization the company went through?

A. It went through a statutory merger proceeding in the early part of 1938. The merger was, testified as being effective on February 1, 1938; and out of that merger, the present corporation arose and has been continuously in that status since; and by the way, both corporations were organized under the laws of the State of Washington, and have been fully qualified as such during the initial period from 1934 to 1938, and then the present corporation from 1938 until the present time, and both were qualified to do business in the Territory of Alaska.

Q. I am not sure the record will be straight on this, but as I understand your testimony, the Alaska-Pacific mines were organized on June 15, 1938?

A. No, 1934.

Q. The Alaska-Pacific Consolidated Mining Company [fol. 122] was organized in 1938—at what month in 1938?

A. In January, 1938.

Q. And Alaska-Pacific Mines was merged into the Alaska-Pacific Consolidated Mining Company in February of 1938; is that correct?

A. That is correct. All of the property of the Alaska-Pacific Mines became the property of Alaska-Pacific Consolidated Mining Company, and the stock ownership was identical, after the merger, namely, the stock ownership of Alaska-Pacific Mines, and the Alaska-Pacific Consolidated Mining Company.

Q. Now, are you familiar with Wasilla Mining Company?

A. That was a small leasing company that was operated simply—for a short period—I think about six months, in the latter part of 1938—in the latter part of 1937, and they had certain properties which became the properties of the Consolidated Mining Company under the lease, and this Wasilla Mining Company also was absorbed in the Alaska-Pacific Consolidated Mining Company.

The Wasilla Mining Company, by the way, was an Alaska Corporation.

Q. The property of the Wasilla Mining Company was conveyed to the Alaska-Pacific Consolidated Mining Company in February, 1938?

A. Yes; principally the lease that it held the properties under, was terminated and the titles merged in one.

[fol. 123] Q. Since 1938, I take it, the Alaska-Pacific Consolidated Mining Company has been the sole operator of the property, and the sole remaining corporation?

A. That is correct.

Q. Now, have the claims of the Alaska-Pacific Consolidated Mining Company, in this proceeding, been assigned to any other person?

A. No, no; there has been a continuous ownership as to the patent claims, and——

Q. No; I am not talking about the property, I am talking about the claim against the government.

A. Oh, no. There has been no assignment. It is the property of the Alaska-Pacific Consolidated Mining Company.

Q. Has any action ever been taken on the plaintiffs' claim by Congress, or by any department of the government, or any judicial procedure?

A. No; not other than this.

Q. Now, Mr. Montgomery, in the course of your activities as attorney for the corporation, did you have occasion to examine the title documents relating to the real estate owned by the company?

A. Yes; from time to time. May I have plaintiffs' Exhibit 1. I would like to refer to that, if you are going to ask about the titles.

Mr. McGuire: Now, if the Court please, I hold in my [fol. 124] hand the title documents, evidencing the title of the Alaska-Pacific Consolidated Mining Company to all of the properties which appear on Plaintiffs' Exhibit AP-1; all of the mining properties involved in this proceeding, as a matter of fact.

These documents consist of the original patents issued by the government, and in cases where the company has acquired title by virtue of conveyance, not only the original patent to the transferor, but also the subsequent conveyances to Alaska-Pacific Consolidating Mining Company; and in one case where the company holds the property by lease arrangement, we have the original lease, the extensions, and the original patents to the lessor.

All of these documents are either originals, or certified copies; all of them are self-authenticated, in the sense that they are acknowledged before a notary public, according to the statutory procedure; and, therefore, requiring no proof.

I think we can save a lot of time, if government counsel is prepared to examine these documents, and compare them with the numbers appearing on the exhibit and to stipulate their entry into the record. Otherwise, I will have the witness, who is here, cover them all, document by document.

The Commissioner: Well, I wonder if that is the type of thing that could be considered at the close of the hearing, today, between counsel, or perhaps in the morning.

Mr. Harrison: Do these patents have numbers?

[fol. 125] Mr. McGuire: Yes.

Mr. Harrison: Couldn't the witness take this document, or these documents, and correlate them to Plantiffs' Exhibit AP-1, so as to show that the plaintiff did own title to the various plots that are shown on Exhibit AP-1, and just cite the patent number, or the particular deed, that gave them title, without putting all of these in the record, and then the defendant will accept that as ownership established, subject to whatever right—the defendant will accept that as good evidence of ownership, subject to the defendant's right, should it later desire to make some actual investigation or, shall we say, some sort of check or audit of the particular documents.

The Commissioner: All he is asking you—he wants to put these in evidence.

Mr. McGuire: No; they are the original title documents, and I would prefer not to see them go into the court's files.

Mr. Harrison: No, I am not anxious to have to do that, either, as far as that is concerned, but I certainly would like to have the man on the stand who has examined these titles, and indicate that the various holdings, as indicated on Plaintiffs' AP Exhibit 1, actually are owned by the plaintiff, and that title to the various numbered places was obtained by patent number so-and-so, and take the next item, patent number so-and-so, and then we would accept that, subject to any determination that the defendant might later make to it, and after actually checking the records. I don't [fol. 126] think that will be done, myself.

I just feel a little bit this way: That I am not counsel of record, but I am inclined to accept his testimony, and correlate it to that exhibit, and to correlate it to the serial numbers on the patents, as sufficient evidence of title.

The Commissioner: Well, I take this position: While you are here, you are counsel for the government. These documents are here, and counsel wants to establish title now.

Mr. Harrison: Yes.

The Commissioner: We ought to be able to resolve the problem now, without any further delay, or waiver on the commitment.

Mr. Harrison: If your suggestion still holds, I will be very glad to adopt it: That at the close of the proceedings today, counsel for both sides and the present witness will

get together, and check these things; so, tomorrow morning, I can come in and say that is satisfactory.

The Commissioner: I think that is all right.

Mr. McGuire: That is very satisfactory to us.

I may say that I previously furnished Mr. Barnes a copy of Plaintiffs' Exhibit 1, together with an index, or a short title abstract, indicating how we derived title to each one of these numbered parcels, indicating when the patent was issued, and what other conveyances were involved, if any; but now the documents are here, and at the close of the [fol. 127] hearing, today, we will get together on them.

We will now pass to another subject.

By Mr. McGuire:

Q. Now, Mr. Montgomery, what, specifically, was your position with the company in October of 1942?

A. I was—you said, October, 1942?

Q. Yes.

A. I was assistant secretary at that time. I was a member of the board of directors and I was attorney for the company.

Q. Now, did you have occasion to prepare an appeal to the government, to the War Production Board, from Order L-208, on behalf of the plaintiffs?

A. There was more than one appeal, I think.

Q. I am speaking with reference to October, 1942.

A. Yes; I prepared at least the first appeal, with Mr. Stoll's assistance. Mr. Stoll was, I think, then secretary of the company, and really was the moving spirit.

Q. You are speaking of W. W. Stoll?

A. Yes.

Q. Who was vice president and general manager, during this period?

A. Oh, yes. That is what he was.

Q. I hand you a document, which I will ask the reporter [fol. 128] to mark as Plaintiffs' Exhibit AP-3.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 3.)

By Mr. McGuire:

Q. This exhibit consists of seven pages, Mr. Montgomery, and I will ask you what it is?

A. Plaintiffs' Exhibit AP-3 is a carbon copy of the first appeal that was prepared with reference to this Order L-208, which is dated—and the letter of transmittal being dated October 15, 1942.

Q. It was filed with the War Production Board, by mail, on October 15, 1942?

A. It went forward at that time, yes.

OFFERED IN EVIDENCE

Mr. McGuire: I offer in evidence Plaintiffs' Exhibit AP-3 for identification, if the Court please.

Mr. Harrison: Well, the defendant's counsel has no objection, so far as showing the historic background of the case, but of course does not admit the various factual allegations made in the document.

The Commissioner: It may be received.

(Said first appeal from Order L-208, marked "Plaintiffs' Exhibit AP No. 3", admitted in evidence and made a part of this record.)

Mr. Harrison: I would like to ask—I notice there are seven pages, but the last two pages are not numbered.

[fol. 129] Mr. McGuire: No.

Mr. Harrison: I might say, so that the record will reflect it, up until the time I had left Washington, the files, the correspondence files in which these records would be contained, that were maintained by the War Production Board, and which were turned over to the Commerce Department, had not been located; so all of these documents that might be admitted, I would like to have admitted subject to verification. It is unfortunate that we had not, up to that time, located them.

Mr. McGuire: For your information, Mr. Harrison, I submitted a list of these documents to Mr. Barnes, some several months ago.

Mr. Harrison: He did give me the list, and he said that, if he got the documents in time, he would send them to me at Seattle, and I have checked the United States Attorney's Office here, and they have not arrived.

Mr. McGuire: Then I will have to proceed with secondary evidence, for obvious reasons.

By Mr. McGuire:

Q. Now, I hand you a document, Mr. Montgomery, consisting of one page, which I will ask the reporter to mark as Plaintiffs' Exhibit AP-4 for identification.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 4.)

[fol. 130] By Mr. McGuire:

Q. I will ask you whether or not that is the telegraphic order received from the War Production Board, in response to the petition, or the appeal, dated October 15, 1942?

A. Yes; that is a carbon copy of the telegraphic communication. That was among the records of the company. I looked for the original, and was unable to discover it.

The Commissioner What is the date of it?

Mr. McGuire: It is undated, if the Court please, but received in November. It is undated, but it was received either in November or October.

The Witness: November, I think.

By Mr. Connor:

Q. What is the date of the receipt?

A. October 15, 1942.

Mr. McGuire: I am not going to examine these documents, at this time, but I can give Your Honor an idea, orally, what they are about.

This particular order extended operations to December 8, providing that certain reports were made, with reference to the sheelite operations.

Did Your Honor rule it was admitted?

Mr. Harrison: Did you offer it?

Mr. McGuire: I guess I did not. I offer Plaintiffs' Exhibit AP-4 for identification.

[fol. 131] Mr. Harrison: No objection.

The Commissioner: It may be received.

(Said telegraphic order from WPB in answer to appeal, marked "Plaintiffs' Exhibit AP No. 4", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, I show you, Mr. Montgomery, a three-page document, dated November 27, 1942, which I will ask the reporter to mark as Plaintiffs' Exhibit AP-5 for identification.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 5.)

Q. I will ask you if that is not a carbon copy of a letter filed with the War Production Board, conveying the information about the sheelite operations, in response to the order contained in Plaintiffs' Exhibit AP-4?

A. That is correct. It is from the Director General of the War Production Board. It bears Mr. Stoll's signature, in fact, and is a part of the company's records.

Mr. McGuire: I now offer Plaintiffs' Exhibit AP-5 for identification.

The Witness: Walter Stoll, by the way, now is deceased.

Mr. Harrison: This Exhibit AP-5 says, "We submit this letter and the accompanying progress report," and there is no progress report attached, and then it says, "with confidence the evidence will justify the issuance to us of a [fol. 132] priority rating which will effectively suspend L-208 as it might apply to our operation at Independence."

What is the operation at Independence?

Mr. McGuire: These mines are referred to as the Independence mines.

I will ask the witness, so as to get it in the record.

By Mr. McGuire:

Q. The whole property is called the Independence mining property by the company?

A. Yes. I could very easily explain that any reference in any of these papers to the Independence mines refers to the operation which we were carrying on. Well, it mostly is within the limits of the Granite Mountain claim, but it was all, from olden times, known as the Independence mine, and we just carried that name throughout; it is still known

as the Independence mine, although owned by the Alaska-Pacific Consolidated Mining Company.

By Mr. Harrison:

Q. In connection with this document, when you made this writing, you were trying to get permission to keep only a piece of the Alaska-Pacific property; is that right?

A. No; we were attempting to carry on our operations—get permission to carry on operations, gold mining operations, yes.

[fol. 133] By Mr. McGuire:

Q. In other words, the claim—the oldest claim, bearing serial number 958-A, is called the Independence claim?

A. Yes, that is correct. That is one of the old original claims.

By Mr. Harrison:

Q. Is the Independence the only thing that was closed down? Is that the only part of the mines that was working?

A. Well, the whole operation, there, Mr. Harrison, the whole five miles of underground workings, approximately, is known as the Independence mine. That also includes the mill and, in fact, the whole little community down in the valley. Down on the lower part, it was called "Independenceville", so is carried the name of Independence, irrespective of what claim was being penetrated. It wasn't confined to any one particular spot. The whole operation was the Independence mine, and that refers to the entire operation, the gold mining operation, in fact.

The gold mining operation was certainly necessary to the production of sheelite, but it was not economical to produce sheelite, aside from gold, because the gold had to support the sheelite.

That was what we were talking about in these letters, these communications.

Mr. Harrison: I will register an objection as to material-
[fol. 134] ity.

The Commissioner: As to materiality?

Mr. Harrison: Yes, I don't see where it ties into the case, into the central issue in this case.

The Commissioner: It may be received.

(Said letter, dated 11-27-1942, plaintiff to WPB, re: sheelite, marked "Plaintiffs' Exhibit AP No. 5", admitted in evidence and made a part of this record.)

By Mr. McGuire.

Q. Now, I show you, Mr. Montgomery, a document, consisting of one page, dated November 29, 1942, which I will ask the reporter to mark as Plaintiffs' Exhibit AP-6 for identification.

(Said document, marked for identification as Plaintiffs' Exhibit AP No. 6.)

By Mr. McGuire:

Q. I will ask you whether or not this is a copy of a telegram sent to the War Production Board, with respect to the same matter, namely, the report on the sheelite operation?

A. That is correct. It originated at Anchorage and was by our general superintendent, Mr. R. C. Gebhard, and became a part of the company's records at Seattle, and that is where it was when it was found.

Mr. McGuire: If the Court please, I offer Plaintiffs' Exhibit AP-6 in evidence.

[fol. 135] Mr. Harrison: No objection.

The Commissioner: Admitted.

(Said telegram, plaintiff to WPB, marked "Plaintiffs' Exhibit AP No. 6", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, I hand you, Mr. Montgomery, a document, consisting of six pages, dated November 28, 1942, which I will ask the reporter to mark as Plaintiffs' Exhibit AP-7 for identification.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 7.)

By Mr. McGuire:

Q. Now, I will ask you if this is not the report on the sheelite operations, to which reference was made in the two previous exhibits?

A. Yes; Exhibit 7 is a report and discussion of the occurrence and discovery and development, etc. of sheelite in the Independence mine, which was prepared by Mr. R. C. Gebhard, and it was submitted in connection with one of these other exhibits. I don't remember just which one it was, but it was in connection with one of these other exhibits.

Q. In response to the order contained in Exhibit 4; isn't that correct?

A. That is correct, yes, I would say that is correct.

[fol. 136] This was also a part of the records of the company, Exhibit 7 was.

Q. It was filed with the government, was it not, along with the transmittal letter, which has been received in evidence as Plaintiffs' Exhibit AP-5?

A. Let me check that. Yes, that is correct.

Mr. McGuire: I offer Plaintiffs' Exhibit AP-7 for identification in evidence, if the Court please.

Mr. Harrison: I object to its materiality, and also call attention to the fact that it was not submitted until the latter part of November, 1942, when the limitation order under attack here was issued the previous month. I don't see how it could reflect arbitrariness in the issuance of the order.

The Commissioner: It may be admitted.

(Said report on sheelite operations, dated 11-28-1942, marked "Plaintiffs' Exhibit AP No. 7", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, I show you, Mr. Montgomery, a copy of a letter, dated December 11, 1942, from the War Production Board to the Alaska-Pacific Consolidated Mining Company, which I request the reporter to mark for identification as Plaintiffs' Exhibit AP-8.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 8.)

[fol. 137] By Mr. McGuire:

Q. Now, I ask you whether or not this is a letter suspending the effective date of Order L-208, so far as it affects Alaska-Pacific Consolidated Mining Company, until June 8, 1943?

A. Yes, that is correct. That is a communication received by the company in regular course, extending the effective date of the order.

Q. And the copy was taken from the company's files?

A. That is correct.

Mr. McGuire: I offer it.

Mr. Harrison: No objection.

The Commissioner: Admitted.

(Said letter, dated 12-11-1942, WPB to plaintiff, marked "Plaintiffs' Exhibit AP No. 8", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, I show you, Mr. Montgomery, a document, consisting of three pages, entitled "Supplementary Appeal, Alaska-Pacific Consolidated Mining Company", which I will ask the reporter to mark as Plaintiffs' Exhibit AP-9 for identification.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 9.)

[fol. 138] By Mr. McGuire:

Q. Now, I will ask you if this is not the supplementary appeal to the appeal filed on October 15, 1942?

A. Yes, that is correct.

Q. That was prepared by——

A. That instrument was prepared, to a large extent, by me.

Q. And filed with the government?

A. Filed with the government, yes.

Q. In December, 1942?

A. Yes. That is a carbon copy.

By Mr. Harrison:

Q. Mr. Montgomery, do you know the date when this appeal was filed?

A. I wouldn't know it offhand, no.

Q. Do you know whether or not this appeal was filed after the government's notification of December 11, 1942, to Alaska-Pacific?

A. I might be able to determine that from the documents, if it is important. I would have to refresh my recollection of it.

Mr. McGuire: Off the record, please.

(Here followed discussion off the record.)

The Witness: Those things all took place approximately at the same time. Without, maybe, some further examination of the correspondence, and transmittal letters, etc., I [fol. 139] would not be able to testify to the exact date of them; they may be dated at the same time, as far as I know, and received.

Mr. Harrison: Well, all right. With that qualification, for what the document is worth, I will register no objection.

Mr. McGuire: I offer Plaintiffs' Exhibit AP-9 for identification in evidence.

The Commissioner: It will be received.

(Said supplementary appeal, marked "Plaintiffs' Exhibit AP No. 9", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, Mr. Montgomery, I hand you a document, consisting of five pages, dated January 26, 1943, which I request the reporter to mark for identification as Plaintiffs' Exhibit AP-10.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 10.)

By Mr. McGuire.

Q. I ask you if this is not a further report sent to the War Production Board by the plaintiff, respecting the sheelite operations?

A. Yes, that is correct. Exhibit No. 10 is the report the company made to the War Production Board with respect to the sheelite operations.

[fol. 140] Mr. McGuire: Now, I offer Plaintiffs' Exhibit AP-10 for identification.

Mr. Harrison: No objection.

The Commissioner: Admitted

(Said report, dated 1-26-1943, plaintiff to WPB, marked "Plaintiffs' Exhibit AP. No. 10", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, Mr. Montgomery, I hand you a document, consisting of four pages, dated February 25, 1943, addressed to Mr. Ernest C. Kanszler, Director General of Operations, War Production Board, which I ask the reporter to mark for identification as Plaintiffs' Exhibit AP-11.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 11.)

By Mr. McGuire:

Q. I will ask you if this is not the report made to the War Production Board by the plaintiff, respecting the sale of concentrates for fluxing purposes to the Tacoma Smelter?

A. Yes; this is a copy of the report which was transmitted to the War Production Board, at about that time, and refers principally to our concentrates and the use of them by the Tacoma Smelter.

Mr. McGuire: If the Court please, I offer in evidence Plaintiffs' Exhibit AP-11 for identification.

[fol. 141] Mr. Harrison: The defendant does not object to having these things in evidence, to show the historic background of the claim, but these things are replete with factual statements, which of course we don't admit.

Otherwise, we have no objection.

The Commissioner: It may be received.

(Said report, dated 2-25-43, plaintiff to WPB, marked "Plaintiffs' Exhibit AP No. 11", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, Mr. Montgomery, I hand you a two-page document, dated April 14, 1943, which purports to be a letter from the War Production Board to the company, which I ask the reporter to mark as Plaintiffs' Exhibit AP-12 for identification.

(Said document was marked for identification as Plaintiffs' Exhibit No. 12.)

By Mr. McGuire:

Q. I will ask you if this is not a letter received from the War Production Board by the company, which, in effect, notified the company that the granted suspension of L-208 would expire, and not be extended further.

A. Yes, that is correct. It is dated April 14, 1943, received by the company in due course about that time.

Mr. McGuire: I offer in evidence Plaintiffs' Exhibit AP-12 for identification, if the Court please.

[fol. 142] Mr. Harrison: No objection.

The Commissioner: Admitted.

(Said letter, dated 4-14-43, WPB to plaintiff, marked "Plaintiffs' Exhibit AP No. 12", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, Mr. Montgomery, I show you a document, consisting of 44 pages, dated May 12, 1943, entitled "Case of Alaska-Pacific Consolidated Mining Company, operators of Independent mines, Wasilla, Alaska, and War Production limitation Order L-208", which I will ask the reporter to mark for identification as Plaintiffs' Exhibit AP-13.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 13.)

By Mr. McGuire:

Q. I will ask you whether or not this is a copy of the appeal filed by the company from the letter of April 14, 1943, which was received in evidence as Plaintiffs' Exhibit AP-12?

A. Yes, that is correct. It was received from the War Production Board at about that time, April, 1943.

Mr. McGuire: I offer Plaintiffs' Exhibit AP-13 for identification.

The Witness: It was received from the War Production Board about May, 1943.

[fol. 143] Mr. Harrison: Of course, I have not had a chance to examine this in detail, but apparently it consists of much argument and opinion and self-determination and self-serving statements and hearsay, and a lot of other things. I mean, if it is admitted only for the purpose of showing the historical background, okay; otherwise, I would object strenuously to this document. It has everything in it, so far as I can see, by just looking through it.

The Witness: It is a sort of summation.

Mr. Harrison: Yes, sir; it is a sort of editorial writing, put out for a technical journal, or some professional purpose. This is a case which is very significant; I don't think it should be decided on anything that is secondary evidence, and there are lots of letters written in there—I don't know what they are, but I object, anyway, because of what I have seen of it.

I am willing to have it go in for the sole purpose of showing an appeal was made, and that this is the appeal, but limited to that.

The Commissioner: Do you want to respond to that?

Mr. McGuire: Sir?

The Commissioner: Do you want to respond to that?

Mr. McGuire: I don't believe that is necessary. We filed this appeal with the government, and it is a part of the official records. It certainly is a material part of the evidence [fol. 144] in this case.

The Commissioner: It may be received.

(Said appeal, 44 pages, dated 5-12-1943, plaintiff to WPB, marked "Plaintiffs' Exhibit AP No. 13", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, I show you, Mr. Montgomery, a telegram to the company, dated June 6, 1943, purportedly from the War

Production Board, which I ask the reporter to mark for identification as Plaintiffs' Exhibit AP-14.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 14.)

By Mr. McGuire:

Q. I ask you if that is not the telegram received from the War Production Board by the company, extending the suspension of L-208, so far as it affects Alaska-Pacific, to August 2, 1943?

A. Yes, that is the final extension received by the company in due course.

Mr. McGuire: I offer Plaintiffs' Exhibit AP-14 in evidence.

Mr. Harrison: No objection.

The Commissioner: Received.

[fol. 145] (Said telegram, dated 6-6-1943, WPB to plaintiff, marked "Plaintiffs' Exhibit AP No. 14", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, I show you, Mr. Montgomery, a letter from the War Production Board to the company, dated June 21, 1943, which I will ask the reporter to mark for identification as Plaintiffs' Exhibit AP-15.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 15.)

By Mr. McGuire:

Q. I ask you if that is not a letter received by the company from the War Production Board, indicating that operations would not be permitted after August 8, 1943?

Mr. Harrison: The document will speak for itself.

The Witness: Yes, it was received in regular course.

Mr. McGuire: I offer Plaintiffs' Exhibit AP-15, if the Court please.

Mr. Harrison: No objection.

The Commissioner: Admitted.

(Said letter, dated 6-21-1943, WPB to plaintiff, marked "Plaintiffs' Exhibit AP No. 15", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, I hand you a document, dated July 29, 1943, [fol. 146] addressed to the War Production Board, which I will ask the reporter to mark as Plaintiffs' Exhibit AP-16.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 16.)

By Mr. McGuire:

Q. I ask you if that is not a letter sent by the company to the War Production Board, advising them that the mine was closed down under protest, and reserving all of its rights, and so on?

A. Yes; that is a carbon copy of our letter of protest, forwarded in regular course.

Mr. McGuire: I offer Plaintiffs' Exhibit AP-16 in evidence.

Mr. Harrison: No objection.

The Commissioner: Admitted.

(Said letter, dated 7-29-43, plaintiff to WPB, marked "Plaintiffs' Exhibit AP No. 16", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, I show you a document, Mr. Montgomery, dated August 13, 1943, from A. S. Khoizen, Administrator for L-208, War Production Board, to Mr. C. L. Harrison, President, Alaska-Pacific Consolidated Mining Company; which I will ask the reporter to mark for identification as Plaintiffs' Exhibit AP-17.

[fol. 147] (Said document was marked for identification as Plaintiffs' Exhibit AP No. 17.)

By Mr. McGuire:

Q. I will ask you if that is not a letter received by the company from the War Production Board, indicating, in

substance, that no further extension would be granted, and that the mine would have to be closed down?

A. That is correct, and received in the regular course of business.

Mr. McGuire: I offer Plaintiffs' AP-17 in evidence.

Mr. Harrison: No objection.

The Commissioner: Received.

(Said letter, dated 8-13-1943, WPB to plaintiff, marked "Plaintiffs' Exhibit AP No. 17", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, Mr. Montgomery, I show you a letter, dated August 13, 1943, from the War Production Board to the Alaska-Pacific Consolidated Mining Company, which I will ask the reporter to mark as Plaintiffs' Exhibit AP-18.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 18.)

By Mr. McGuire:

Q. I will ask you if this is not a letter from the War [fol. 148] Production Board, received by the company, denying the appeal of May 12, 1943, and stating the substance of the opinion of the government that the company's laborers were needed in coal mining operations?

A. That is correct, yes; that is a communication received in due course, about the date that it bears.

Mr. McGuire: I offer in evidence Plaintiffs' Exhibit AP-18.

Mr. Harrison: This one is not signed.

The Witness: Yes; it came to us through the mail that way.

Mr. Harrison: No objection.

The Commissioner: Admitted.

(Said letter, dated 8-13-1943, WPB to plaintiff, marked "Plaintiffs' Exhibit AP No. 18", admitted in evidence and made a part of this record.)

Mr. McGuire: If the Court please, I have here two photographs, which I wish to offer in evidence through this wit-

ness, purely for the purpose of explaining what the conditions were at the mine, and I will ask the reporter to mark the first one as Plaintiffs' Exhibit AP-19.

(Said photograph was marked for identification as Plaintiffs' Exhibit AP No. 19.)

By Mr. McGuire:

Q. I will ask you if this is not a photograph of the [fol. 149] company's mining property at the Independence mine, taken in 1941?

A. That is a reproduction from a photograph, yes. This shows the condition. I would have to examine the yearbook it is taken from. Yes, that is 1941; that is correct. That shows substantially how the property looked, at that time, down there along about that time and these are the principal buildings here (indicating).

The larger buildings—well, the buildings, for the most part, are located on this—down on this same slope, where there are Snowbird No. 2, and what is known as Homestake No. 17. This is called the staff house here (indicating).

The mill buildings down here (indicating) don't show up very well, and then there is the apartment building; and that, I think, is what they call—well, I can't tell what that is, but this is one of the warehouses along here (indicating).

Spread out in here (indicating) and not shown very much, are the cottages that the miners built for themselves on the company's property. Up here is the "Gold Cord" claim.

Up here is what we call the 900-foot entry. That was used for quite a long time as the main entrance to the workings, and then later on we constructed what is known as the lower level tunnel—we call it the water tunnel—which entered approximately the level of the millshed, and working into the mountain, down low.

[fol. 150] Mr. McGuire: I offer Plaintiffs' Exhibit AP-19 for identification, as to the photograph only, but not any typewritten material on it.

Mr. Harrison: I have no objection.

The Commissioner: Admitted.

(Said photograph of mill, marked "Plaintiffs' Exhibit AP No. 19", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Mr. Montgomery, I want to ask you whether or not any more of these miners' cabins were constructed along the roadway leading to the mine?

A. Yes, there are more there now than appear to be. They don't show up very plain, but there may have been others constructed later, and probably were, after that picture was taken. I would say there were others erected later.

Q. I show you a second photograph, which I will ask the reporter to mark as Plaintiff's Exhibit AP-20 for identification.

(Said photograph was marked for identification as Plaintiffs' Exhibit AP No. 20.)

By Mr. McGuire:

Q. I will ask you if that is not another photograph of the company's buildings, but taken in the wintertime?

A. Yes; that shows the mill building, and I think that [fol. 151] is the mess hall there (indicating), and this is the stuff in front there (indicating). That shows it as it is when we have snow on it.

By Mr. Harrison:

Q. Is this in 1941 or 1942?

A. I wouldn't like to identify the date it was taken. There isn't anything on it that would identify it to me.

Mr. McGuire: I offer Plaintiffs' Exhibit AP-20 for identification, if the Court please.

The Witness: That shows the buildings approximately as they were at the time of the close-down order. There was not much change-over later, Mr. Harrison.

Mr. Harrison: You stipulate that nothing but the picture shall be included in the offer?

Mr. McGuire: Just the picture.

Mr. Harrison: No objection.

The Commissioner: Admitted.

(Said photograph, marked "Plaintiffs' Exhibit AP No. 20", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, Mr. Montgomery, did the company have any forewarning as to the issuance of L-208, so far as you know?

A. No; it just came to us like a bolt out of the blue sky, so far as I know. I knew nothing of the fact that it was [fol. 152] coming, and I don't think that any of the members of the executive staff did; at least, it was not known among the offices in Seattle, at all.

Mr. Harrison: I move to strike the witness' conclusion as to what the other people knew or thought.

The Commissioner: Sustained.

By Mr. McGuire:

Q. You mentioned the offices in Seattle. You mean there was no conversation respecting this order, prior to the time it was issued?

A. No, none that I heard. I was there every day, during that period.

Q. Now, with reference to the sheelite progam, did you have any participation in the preparation of the applications for priorities?

A. From time to time, and one in particular, when we wanted some additional equipment in order to assist in the sheelite recovery. We were experimenting as to the best method of obtaining the sheelite, and we made an application for a table, as I remember, and some little fluorescent lights, and I think some additional drum hoists that were used in the stopes. There were some other items, also. The object was to make it possible to recover this sheelite in a practical way, and of course the equipment was somewhat experimental.

We were going ahead as a gold mining operation, and then we found this sheelite—or it had been known that it [fol. 153] was in there for some time, and we wanted a practical way to recover it, and that is where this equipment was going, into some additional stopes, that perhaps were not even paying for the gold mining, to get out some of the rock used for sheelite.

As I recall it, the request was granted for the purchase of the equipment.

Q. Mr. Montgomery, was the operation of the Alaska-Pacific Consolidated Mining Company's Independence mine profitable, prior to the closure?

A. Well, it had been very profitable from—well, I would say we started making a profit in about 1937. Now, it had been profitable to the stockholders. It had paid out, during that period, something slightly less than $1 million in dividends, and during the period—well now, from 1937, I think was the first time it paid out any dividends, I believe.

I don't want to be held too closely to the dates, but they were paying on until we were closed down. I think we paid a dividend in 1942, and that was during the entire period; and of course, I am quite sure we paid none since, but during that period, we paid out to the stockholders approximately that amount, and just as a demonstration of.

Mr. Harrison: Before you go into the demonstration, aren't we going into the question of damages here whether or not they had a profit?

[fol. 154] I thought we were going to be limited to liability. It seems to me that the previous statements of the witness pertain to damages, and I move they be stricken.

Mr. McGuire: If the Court please,——

The Commissioner: Overruled.

By Mr. McGuire:

Q. It is your testimony that it was a profitable operation, up to the time of closing?

A. It was a highly profitable operation during those years; not only the dividends, but also the purchase of this mining property came out of the profits. We had scarcely any capital to start with, and we had purchased these Independence claims and paid, during that period, $100,000 for them, and we paid $75,000 or $80,000 on our operation on what was known as the Free Gold claims, and we had also acquired what is known as the Jap property and the Black property, mostly by purchase, and they had been paid out of profits, too, plus taxes.

Q. Could you roughly approximate the amount of taxes paid by the company to the federal government?

A. I don't think I would undertake that, Mr. McGuire; it

would be kind of hard to do that. I think it would take an accountant to do that, but we paid substantial taxes, though.

Q. Do you have an opinion, Mr. Montgomery, as to [fol. 155] whether or not the company could have continued operations at a profitable rate, had it not been for the close-down order L-208?

Mr. Harrison: I object to his opinion, which is going into damages, and I don't think he is qualified as an expert to give an opinion.

The Commissioner: I am going to sustain the objection to that. I think he has shown that it was a profitable operation, and that is enough along that line.

Mr. McGuire: Subject to this question of establishing the title, I have completed my direct examination of Mr. Montgomery.

The Commissioner: We will recess until 10 o'clock tomorrow morning.

(Thereupon, a recess was taken in the hearing until 10 o'clock, a.m., Thursday, November 20, 1952.)

[fol. 156] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

Transcript of Testimony—November 20, 1952

TESTIMONY FOR PLAINTIFFS (Resumed)

The hearing was resumed, at the time above indicated, pursuant to the recess previously taken.

Present: (The same appearances as previously noted.)

The Commissioner: You may proceed, Mr. McGuire.

Mr. McGuire: Mr. Montgomery, will you take the stand, again?

V. A. MONTGOMERY, a witness for the plaintiffs, resumed the witness stand, and was examined and testified as follows:

Direct examination.

By Mr. McGuire:

Q. Mr. Montgomery, I believe you have something to [fol. 157] add, this morning?

A. After we adjourned yesterday afternoon, counsel for the government, Mr. Harrison, Mr. McGuire and myself, went over this bunch of instruments, which are evidence of the ownership of the mining properties by the plaintiff, the Alaska-Pacific Consolidated Mining Company.

Generally, these instruments constitute the patents under which the mining company owned the property, notices or certificates of locations, and deeds or other instruments of conveyance, if there were conveyances involved; and these, together with the agreement of statutory merger, which is a part of the corporate records of the Alaska-Pacific Consolidated, and which would constitute a part of the chain of title, constitute our evidence of ownership of these mining claims; and I refer particularly to the mining claims which are shown on Alaska-Pacific Exhibit No. 1, and which are outlined in the heavy blue lines on this exhibit—these heavy blue lines around here (indicating).

Now, just to refer to a specific part of this, it is divided, as you will note, into five different groups; and speaking, first, of this group, which is colored yellow, I shall refer to the Independence claims.

First, there are the original claims, the Independence, the Granite Mountain, and Granite Mountain No. 1, which are referred to as 958-A. Those were owned in fee, at the [fol. 158] time of this closure order. In that time, I refer not only to the date of the order, but the date of the actual closure.

The other claims in the group were, at that time, held by location notices, which later in 1944, during the year 1944, ripened into patents; and that is what these documents show.

I have referred to the Alaska Free Gold claim——

Q. Before referring to the Free Gold claims, is it your

testimony that the Independence claims are still owned by the plaintiff?

A. They are still owned by the plaintiff, and now owned in fee by the plaintiff, all of this particular group having been purchased, as far as 958-A is concerned; they were purchased outright, that is, through royalty agreement, and the others were actually patented in the name of this plaintiff and are now owned by it.

The Alaska Free Gold claims are held under a lease and royalty agreement, which gives the company the full right to mine and possess the claims, this agreement is still in force and effect and was, at the time of this closure order, the company having now paid some $87,000 on the $150,000 agreed option price, and the agreement having been extended to 1961.

Q. Before leaving this Alaska Free Gold property, is it your testimony that the Alaska Free Gold claims, which are [fol. 159] colored blue on Exhibit 1, are held by virtue of a royalty lease agreement, coupled with a purchase option,—

A. That's correct, yes.

Q. In the amount of $150,000?

A. That is correct.

Q. The company has paid $87,000 on the $150,000 purchase price; is that correct?

A. That is correct.

Q. Upon the payment of the balance of the $150,000 the company will be entitled to a deed to the property; is that correct?

A. Under the agreement, that is correct. The actual carrying out of it—I mean the payments are suspended, or were, during the period of the closure.

Also, I might remark that the company, itself, owns 53 per cent of the stock of the holding company, which now is a dissolved Washington corporation; we own 53 per cent of that stock. I think that perhaps is all with reference to the Free Gold claim.

Then, with reference to what is referred to there as the Jap claims, those which are indicated on this Exhibit 1 in green,—they all were, at that time, held under location notices, and purchased from the locators, who were Japanese.

Those that are indicated in green later ripened or matured into patents under our procedure for patent.

[fol. 160] Q. You say, "were held at that time", and you mean

A. When I refer to that time, I refer to the time of the date of the closure order, which was October 8, 1942, and also to the date in 1943, on which we actually closed. I refer to that date and the interim date, also.

Now, as to the others, they are still held under mineral locations.

The Commissioner: You might indicate the time when patents issued.

The Witness: Referring back to the Independence claims, those that we did not own outright at the time of the closure order, they eventually ripened into title during the year 1944. I can't give you the exact date, but it was during the year 1944, that those patents were issued to the company, on those remaining claims shown in the Independence group.

Mr. Harrison: I might say, Mr. Commissioner, that last evening we did spend, I think, about an hour and a half going through all of the title instruments, and I am thoroughly in agreement with this witness that the plaintiff, the Alaska-Pacific Consolidated Mining Company, does have the title and right, such as he is now testifying to.

I have made notes of the dates when patents were issued on various properties for my own information, and in many cases, the patent did not issue until after the time of the closure.

[fol. 161] The Commissioner: The Court might be interested in that.

Mr. Harrison: That is true. Most of the patents, as I see it, did not issue until around 1944, but I feel certain that, at the time of the closure, the plaintiff did have title, either by deed or by assignment of location, which later ripened into patent, or right of purchase, or in some way did really control title to the property, and I think Mr. Montgomery can indicate the patent dates. I know I have some of them.

The Witness: I could get that out of my records, and just to tie it in, also, under Mr. Waller's testimony, the initial steps for patents were taken, according to him, and

his testimony, upon the dates which he furnished, which were, insofar,—well, they were mostly initiated—all were initiated prior to the closure order, and some patents were pending during the time of the closure order and finally—that did not mature into patents until some time subsequently, and in some instances those were considerably delayed, because matters had to be cleared up with the Land Office.

If there was any question regarding a claim, whatsoever, that was taken up with us, and that would cause a delay in the final issuance of the patent; and particularly during the war period, there was added delay in getting those final patents; so while the patents were not issued until—some of them, in the case of the Black group—were not issued until 1950, that had been pending some time, and there [fol. 162] were numerous delays in reference to that.

Then, referring to what is known as——

By Mr. Harrison:

Q. Just to check that up, the Black group patent was not issued until 1950, but isn't it true that the original locators had assigned all of their rights as of June 6, 1944, to the Alaska-Pacific Consolidated Mining Company?

A. That is correct.

Q. So they had quit-claimed any right of title that they might possibly have in the property, and the plaintiff in this case was in the process of having the patent perfected?

A. Yes, sir.

Mr. Harrison: I don't challenge the fact that, as to the Black group, the plaintiff did have full right and title and interest, such as could be demonstrated by the instruments, at that time.

The Witness: Yes; and that the survey had been made, and the initial steps taken, prior to the closure order. I think that pretty well covers the Black group; we held them, as we have stated here, by virtue of conveyances from the original locators, and they were surveyed by us, and actually matured into patents some time, and the patent issued during the year 1950; and I furnished Mr. Harrison not only with the dates of the patents, but also with the patent numbers. Each patent bears a number.

[fol. 163] By Mr. Harrison:

Q. Then I think it might be well to point out that the Black group, when you use the term "the Black group",—the derivation of the word is from a family of people named Black, who were the original locators?

A. Yes: Sidney Black, and his wife.

Q. Those people, prior to the time of the closure, did assign all of their rights to the plaintiff?

A. That is correct, and their title—I also went into their title, to see that their title was correct, at the time we purchased it. In fact, I represented the company throughout the proceeding of purchasing the Black and the Jap groups.

Q. When you speak of the Jap group, I think it might be well to point out that the Jap group is so-called, because they were people of Japanese ancestry who owned the property?

A. That is correct. Then, referring to these claims, as shown on Exhibit 1 as being claimed held by location, now there are certain of those which, for one reason or another, were excluded from the patents, possibly voluntarily by the applicant, and often by the government. Sometimes they excluded claims from a patent, because there was insufficient work performed on it, in order to obtain the benefit of a claim, in order to obtain a patent. In some instances, that had not been done, and those claims we still hold by location; and as to all claims, during the time prior to patent, and to my knowledge, the company has [fol. 164] performed work on, or for the benefit of, the claims, in order to satisfy the requirements of the code as to holding continuous possession in mine rights to those unpatented claims, and all the filings had been done, which were necessary.

I might add that, during the war, the requirements of the performance of the representative work was suspended for certain periods, and during those periods, of course, the company took what steps were necessary in order to hold possessory rights to the claims.

By The Commissioner:

Q. Was that by action of the Land Office?

A. No, that was by action of Congress. During the First World War, they suspended the requirements as to the performance of the work, largely because they did not want to force the loss of claims by holding individuals or companies, due to the fact that labor could not be obtained, or the necessary materials for the performance of the work; so, during those critical periods, Congress does customarily enact suspension laws.

By Mr. Harrison:

Q. I think, Mr. Montgomery, that you can summarize by saying that the plaintiff, the Alaska-Pacific Consolidated Mining Company, actually does now hold patent rights to the Independence claims, the Alaska Free Gold claims, the Jap claims, and the Black claims, as shown on [fol. 165] Plaintiffs' Exhibit AP-1?

A. That is correct.

Q. That the claims in the light yellow color, called "claims held by locator" represent the claims which the plaintiff holds by assignment or by actual original location by the plaintiff, itself, that is the most senior title that personally exits to those particular pieces of property?

A. That is correct.

Q. I think that I am correct in saying that, at the time of the closure, and today, and during the intervening time, no one disputes the title of the superior rights of this plaintiff to the particular plots outlined on Plaintiffs' Exhibit AP No. 1; is that correct?

A. There were no disputes as to—that were not resolved. I don't want to be on record—there may have been some conflicts that had to be resolved out in the Black group, particularly, but they were resolved ultimately, so that we were the owners of all of them. There may have been a few conflicts; I remember there were conflicts come up over some of the Black group, but those were resolved, so that the ownership of the property is as shown on this map now, which was prepared by Mr. Waller. That is the situation.

As I stated, in the course of these patent procedures,

conflicting areas came up and disputes arose, mostly over-
[fol. 166] lapping, but the overlaps were resolved in our favor, so as to show ownership as shown in this map now, and we have had continuous ownership of all of that property.

So, just to blankly state there were no disputes—there were conflicts came up in the patent procedure, or as to incidental parts of patents.

Mr. Harrison: Defendant's counsel is prepared to state that the defendant agrees with the various assertions of title made by the plaintiff, the Alaska-Pacific Consolidated Mining Company; and that agreement is predicated on an examination of the title instruments, including patents, location rights, quit-claim deeds, and other instruments of title, and examination of the corporation's books, concerning the merger of the Alaska Free Gold corporation and the Alaska-Pacific Consolidated Mining Company—that is not correct.

In other words, the merger between the Alaska-Pacific Mines, and the Alaska-Pacific Consolidated Mining Corporporation, the present corporation; so that the defendant feels that no further evidence or proof of title is necessary.

The Commissioner: So it will not be necessary to have the documents showing title introduced into evidence?

Mr. Harrison: That is correct. It will not be necessary.

Mr. McGuire: The witness is available for cross-examination.

[fol. 167] Cross-Examination

By Mr. Harrison:

Q. Now, Mr. Montgomery, is the plaintiff in this case a member of the American Mining Congress?

A. No, I do not believe that we, at this time, maintain membership.

Q. I mean, was the plaintiff a member of the American Mining Congress back in October, 1942, or within six or seven months prior to that time?

A. I can't say.

Q. Your position, at that time, was attorney and president?

A. No, no.

Q. What was your position, at that time?

A. I think, at the time that this closure order was issued, —I know I was a member of the board of directors, and I was attorney for the company, and I believe I was assistant secretary.

Q. Well, at that time,—and I mean for, say, several months prior to October, 1942, of what technical or professional or trade associations was the plaintiff a member, if any?

A. Well, there was the Alaska Miners Association, I believe it is called, that we belonged to. I don't know of any others. I am not too sure about that; I didn't take care of that. All of that was done by Mr. Walter Stoll; he took care [fol. 168] of all of that part of the business. My part of the procedure was that of attorney, and that did not involve memberships. What I would have to say would be a little too indefinite to be of much value.

Q. What was this Alaska Miners Association?

A. It was an association of Alaska Mine owners.

Q. Did they have any kind of publication?

A. I believe they did, yes, something of that sort.

Q. The plaintiffs received copies of it, or do you know?

A. Yes, I think I have seen some.

Q. Do you know whether it came out weekly or monthly?

A. No, I couldn't tell you.

Q. Did the plaintiff have any type of Washington, D. C. representation?

A. No, not at that time.

Q. You say, at that time; and you are referring to 1942?

A. That's right, yes. No, we did not.

Q. Did any of the representatives of this plaintiff have any occasion to communicate with the War Production Board during the year 1942, prior to October, 1942?

A. Oh, I take it that there were applications for priorities that were made. You are speaking prior to the actual order?

Q. Yes.

[fol. 169] A. Oh, yes, there were communications with the War Production Board, yes; I was somewhat in that.

Q. Did you actually go to Washington, D. C.?

A. No, no, I didn't. When we needed a priority to obtain

some materials that were under priorities, we made the necessary applications for them. Now, that was done.

Q. What I mean is, did you have any direct—that is, by personal contact,—representation between the plaintiff and any official or representative of the War Production Board?

A. Not in Washington. There may have some official here that we contacted, but none in Washington, no. I think the only direct contact we had with Washington—Mr. Stoll made one trip to Washington during the process of this appeal that we took; and that, insofar as my knowledge goes, is the only direct contact we had; that is, when you say me, personally, with the War Production Board, or with anyone in Washington.

Q. Do you know whether or not, in the year 1942, in the period of, approximately, June to October,—whether or not numerous representatives of the United States Senate, and the House of Representatives, and mine owners and mine operators and mine engineers, made representation to the War Production Board, relative to the closing of gold mines of the United States and its Territories?

[fol. 170] A. What representations were made?

Mr. Connor: I think the witness could hardly say yes or no to that question. Does he know? He could say yes, or no, and then we will know what we are driving at.

The Witness: Yes; I will have to answer that, that I have no direct——

Mr. McGuire: Wait!

The Commissioner: The witness is a lawyer, and——

Mr. McGuire: I know.

The Witness: I have no direct knowledge.

By Mr. Harrison:

Q. During the summer of 1942, what publications, professional, technical, or mining, or publications relating to pending legislation in the American Congress, did you read, if any?

A. Very few, that I have any direct recollection of at this time.

Q. Did you, as an attorney, subscribe to any war service annotated reports of any kind?

Mr. Connor: I don't think this a proper cross-examination. I was here when the witness testified, and he did not testify to any of this on direct examination. I don't see the relevancy of it, and I don't think it is proper cross-examination.

The Commissioner: Overruled.

[fol. 171] By Mr. Harrison:

Q. Did you?

A. You know, that is taxing my memory pretty hard. You asked if I subscribed to any publication, war publications. I think I subscribed to some of the Prentice-Hall publications, but I can't remember what, at that time.

Q. Well now, Mr. Montgomery, you testified, yesterday, that L-208 came as a complete surprise to you and to the plaintiff, did you not so state, on your direct testimony?

A. Yes.

Q. I think you even said that it came like a bolt out of the blue.

Now, the petition in this case with which we are concerned, and with which you are concerned as attorney, in paragraph 8, after making many allegations of various people, including—including Julian D. Conover, secretary of the American Mining Congress, who evidently, on behalf of his association, prepared and delivered a memorandum to the War Production Board, and other government agencies, and so on.

Then in the last sentence in this particular paragraph, the petition says:

"In addition hereto, numerous other persons, including distinguished and experienced Members of the United States Senate and the United States House of Representatives, mine owners, mine operators, and mining engineers, rendered similar reports to the said agencies prior [fol. 172] to the issuance of Order L-208."

Now, during the period when all of this activity was going on between the War Production Board and all of these representatives of the mining industry, and the United States Congress, you were the attorney, director and assistant secretary of the plaintiff in this case.

Now, do you seriously mean that, during this entire period

of 1942, prior to the issuance of L-208, you knew nothing about it, and it came as a bolt out of the blue?

A. That is correct. My function in the company—and I think I state this as attorney—Mr. Stoll took care of all of the policy part of it.

Q. Who is Mr. Stoll?

A. Mr. Walter W. Stoll. He is the father of the man who was here in court yesterday, and he really was the spark-plug of the whole organization, Walter W. Stoll.

Q. What was his title with the plaintiff?

A. I think, at that time, he was vice president and general manager.

Q. Where is he today?

A. He died in November—on November 12, 1949.

Q. Well, you are not prepared to say, are you, Mr. Montgomery, that the plaintiff in this case was completely aware of the possibility of the issuance of an order similar to L-208, [fol. 173] during the summer of 1942.

A. I don't think I could say that. At that time, there was Mr. Harrison and Mr. Stoll in the company, and I couldn't say what they may have known. At least, it didn't come to my knowledge. While I was there with them every day during that period, as I say, I didn't have much part in the policy-making.

Q. Let me ask you this question: During the summer of 1942, and up to October 8, 1942, did the board of directors of the plaintiff hold any meetings?

A. Oh, yes. I think that will show in our—I could tell you—it has been pretty much the policy to hold regular meetings of the board, and they were held at that time—meetings were held, at the time.

Q. Do you recall whether there were any discussions, at any of those meetings, as to the subject matter involved here?

A. No.

Q. Do you have the minutes of those meetings in the courtroom here?

A. Let me see! During that period—I might have.

Q. I wonder if I could look at them—if you could look at them, and refresh your recollection, if I gave them to you?

A. Yes, let me have them.

Here is a meeting held June 8, 1942.

[fol. 174] Q. We are now examining the minutes of the meeting of the board of directors which was held on June 8, 1942?

A. Yes; and we have also examined the minutes of the regular monthly meeting of July 20, 1942,—speaking of the minutes of the board of directors of the Alaska-Pacific.

The next regular meeting that was held was dated August 19, 1942. It is in the record, but at that time, at the time of this meeting of August 19, 1942, there was brought up that—a great many resoultions had been passed, and it was difficult to run through the entire minutes in order to find them; so it just appeared to be the concensus of the meeting that a book be kept, indexing the resolutions, for the convenience of the board.

Q. In any event, would the minutes of the meeting contain references by title of the particular resolution passed at that particular meeting?

A. I can't recall that that was ever complied with.

Mr. McGuire: I would like to ask this question on the record, please.

By Mr. McGuire:

Q. Isn't it true that all resolutions passed by the board are kept and entered in the company's minutes?

A. Absolutely, yes; this was only a sort of index to them, Mr. McGuire; yes, this had nothing to do with the actual effect of the resolution. It would just be convenient ac-[fol. 175] cess to them; that is all.

Q. There was no consideration given to changing the corporation's practice from entering the resolutions on the corporation's minute books?

A. Not at all. No, all resolutions have, at all times, been entered right in the minutes; and if, for a short period, we maintained this index, it was only for convenience, actually.

That takes up beyond the time that the order was issued: isn't that correct?

By Mr. Harrison:

Q. Yes.

A. We are now reading the minutes of the meeting of September 8, 1942, and the next meeting was September

21. Then we get down to the date of October 19, 1942, and at that time the order had been issued. Then, by that time we were discussing the closure order, you see.

The Commissioner: It may not be entirely clear in the record, but I think it might show that the book the witness has in his hand, or was examining, was handed to him by counsel for the government, was examined jointly between him and counsel for the government and counsel for the Homestake and Alaska-Pacific.

The Witness: Yes, sir; it is the minute book—referred to as Volume 1 of the minute book, which covers the dates from its original organization, January 22, 1938, until—[fol. 176] the last minutes that appear in it were posted on December 21, 1942,—those for December 21st, 1942. Then there are succeeding volumes from there on.

Mr. McGuire: The minute books of the Alaska-Pacific Consolidated Mining Company.

By Mr. Harrison:

Q. Mr. Montgomery, you testified that the company, the plaintiff in this case was highly profitable. Would you indicate—not with the financial statement, of course, but what do you mean by "highly profitable"? What does "highly" mean?

A. Well, it was a successful enterprise, because it paid us all a good profit, and it has paid—well, I think I stated where some of the profits went. For example, we paid dividends, we paid for those mining properties; and we also built quite an extensive plant. I don't know how much money went into the plant, and into the development of the mines. All of that was earned out of the ground, because we didn't have the money, to start with—very little.

Q. Is the plaintiff a highly profitable company, today?

A. I wouldn't say so, no.

By The Commissioner:

Q. Is it operating the mines, today?

A. Not operating, no.

[fol. 177] By Mr. Harrison:

Q. How long has it been since it has operated?

A. Well, that is a question of what we mean by operating here.

Q. Since you have mined gold?

A. Well, the last operation of any extent was closed about January, 1951. Of course, also, in the summer of—this last summer, we carried on some operations, but no milling operations.

Q. When did you open up, after the limitation order was cancelled?

Mr. McGuire: If the Court please, I object to further cross-examination along this line. There has been no direct evidence with reference to operations since the closure order, and it is immaterial, at this particular part of the case, what operations were carried on after the closure order was lifted. We will come to that in due time.

Mr. Harrison: I just thought that, inasmuch as, yesterday, we got into damages—we did allow testimony to go in about whether they made a profit, and so on, it might be pertinent to ask a couple of preliminary questions concerning whether or not they operated the mine after the closing order, and how much.

The Commissioner: Well, I don't really see that it would be very valuable, but I will overrule the objection. I don't [fol. 178] think it is particular material, but you are not going into great detail?

Mr. Harrison: No, no detail, at all. I just want to know when they started. I want some proof that they did start up again.

The Witness: If you are trying to hold me down to whether any profit was made subsequently, I would have to refer to the books again, because I don't know.

By Mr. Harrison:

Q. Let me ask you two questions.

First of all, when did the plaintiff start operations after L-208 was rescinded, if it did start?

A. Well, we maintained a few men on the property right along, but no material operations—I don't think there was

much of any material operations occurring on there until—wasn't the order lifted some time in June, 1945?

Q. I think so. I think June 30, 1945.

A. We operated some that summer.

Q. Did you operate at a profit?

The Commissioner: He said he would have to look at the books.

The Witness: I think there was some profit that year. That was 1945. I would hate to be held down to that, too.

Mr. Harrison: I have no further questions.

Mr. McGuire: No redirect.

[fol. 179] Mr. Barnett: No questions.

Mr. Connor: No questions.

The Commissioner: Step down.

(Witness excused.)

Mr. McGuire: May we have about a 15-minute recess?

The Commissioner: Yes. Off the record.

(Here followed discussion off the record.)

The Commissioner: We will recess until 2 o'clock.

(Thereupon, a recess was taken in the hearing, until 2 o'clock, p.m.)

AFTERNOON SESSION

(The hearing was resumed, pursuant to the recess previously taken.)

The Commissioner: You may proceed, Mr. McGuire.

Mr. McGuire: Will Your Honor swear Mr. Benson?

PAUL T. BENSON, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner was examined, and in answer to interrogatories, testified as follows:

Direct Examination.

By Mr. McGuire:

Q. Will you state your name and address for the record, Mr. Benson?

A. Paul T. Benson. Do you want my home address?

[fol. 180] Q. Business address.

A. Tacoma Smelter, Tacoma, Washington.

Q. What is your occupation, Mr. Benson?

A. General superintendent of Tacoma Smelter.

Q. How long have you been employed by Tacoma Smelter?

A. Twenty-eight years.

Q. Continuously?

A. Yes, sir.

Q. And what was your capacity there with the Smelter, during the years 1940 through 1945?

A. Assistant general superintendent.

Q. Now, do you know whether or not Tacoma Smelter purchased any concentrates from the Alaska-Pacific Consolidated Mining Company?

A. Yes.

Q. I show you a document of two pages, Mr. Benson, which I will ask the reporter to mark for identification as Plaintiffs' Exhibit AP-21.

(Said document was marked for identification as Plaintiffs' Exhibit AP No. 21.)

By Mr. McGuire:

Q. I will ask you whether or not this document is a statement of the tonnages of concentrates purchased by Tacoma Smelter from Alaska-Pacific Consolidated Gold Mining Company, together with an analysis of those tonnages, and if the statement was not taken from the records of the [fol. 181] company?

A. This is a statement of the receipts from the Alaska-Pacific from 1938 to 1943, and shows the correct analysis of the concentrates received.

Q. Is the information shown on Exhibit 21 taken from the records of the company?

A. It was taken directly from the records of the company.

Offer in Evidence

Mr. McGuire: I offer in evidence Plaintiffs' Exhibit AP-21.

By Mr. Harrison:

Q. Mr. Benson, would you be good enough to take that exhibit marked for identification, and tell us what the

meaning is of these abbreviations along the top of the columns, starting with Au, Ag, and so on?

A. Those are not abbreviations, those are chemical symbols.

Q. Chemical symbols?

A. Yes. Au is gold, Ag is silver, Pb is lead, Cu is copper, SiO_2 is silica, Fe is iron, CaO is lime, S is sulphur.

Mr. Harrison: I am about to object on the basis of materiality, but maybe counsel can indicate for what purpose he offers this exhibit.

Mr. McGuire: Mr. Commissioner, we will, at the appropriate time, move the Court for permission to amend the petition in this case, to charge that not only Order L-208 itself was arbitrary, etc., but the action of the War Production Board in refusing to continue to grant to Alaska-Pacific the [fol. 182] right to continue in operation, despite the order, was also arbitrary and capricious. The purpose of this testimony is to show that Alaska-Pacific was producing a concentrate which was useful in the copper smelter, and that of course the action in shutting the mine down barred it from contributing to such effort; in fact, hampered it at least to the effect of cutting off its concentrates.

Mr. Harrison: I am going to object to the materiality of the proffered exhibit, and also object to its introduction at this time, without some foundation being laid to show that these particular chemicals that are listed on the exhibit were used, in fact, for copper smelting, and thus contributed to the production of copper.

Mr. McGuire: The witness will cover the subject of the use of concentrates in his testimony.

The Commissioner: Well, I think that the technical objection of the defendant is probably good.

Mr. McGuire: We will connect it up in just a moment.

The Commissioner: Then I will withhold ruling until that time.

By Mr. McGuire:

Q. Now, Mr. Benson, will you explain, for the record, what use, if any, the Tacoma Smelter made of concentrates purchased from Alaska-Pacific Consolidated Mining Company?

[fol. 183] A. The character of the receipts at the Tacoma plant indicated a deficiency of certain materials for fluxing purposes, particularly sulphur, as compared to the copper content. The concentrates are ores of very high copper content, and must have material high in sulphur added to it, in order to get the proper reaction and the proper separation in the smelting operation.

Shall I elaborate on that a little bit?

Q. I wish you would.

A. The copper analysis of this particular concentrate is in the order of one-tenth of one per cent; whereas the sulphur content is in the order of as high as 30 per cent and as low as 22 per cent. Certain other receipts at the plant would have completely opposite analysis with regard to copper and sulphur; they might be on the order of 30, 40 or 50 per cent copper, and sulphur down in the order of 10 per cent of that.

It is impossible to do a metallurgical job of smelting of high copper and low sulphur material. Therefore, we must have material very low in copper, preferably with none, that is what this amounts to, together with the high amount of sulphur, in order to get the proper metallurgical reaction to the smelting operation.

Q. So that the Tacoma Smelter, in order to smelt copper, bought copper ore, which it combined and blended with [fol. 184] these concentrates, in order to find copper; is that right?

A. That is right.

Q. And the elements you were particularly interested in, so far as Alaska-Pacific concentrate was concerned, was low copper content, combined with the high sulphur content? . . .

A. That is correct, yes.

Mr. Harrison: Let us let the witness do the testifying.

By the Commissioner:

Q. Could you have added sulphur just as well?

A. Elemental sulphur, you mean?

Q. I have seen piles of yellow sulphur, and——

A. No, you cannot use sulphur in that form. You must have it combined in the form of a mineral, preferably py-

rites, which is a combination of iron and sulphur, in order to get the reaction to take place.

By Mr. McGuire:

Q. Would you describe these concentrates produced by Alaska-Pacific as pyrites?

A. Yes, sir; the perfect type of concentrate is pyritic, and pyrite is sulfide and iron.

Q. Did the Tacoma Smelter regard the concentrates produced by Alaska-Pacific Consolidated Mining Company as desirable, or not?

By Mr. Harrison:

Q. Are you a chemist?

[fol. 185] A. I am.

Q. Do you know, of your own knowledge, when you so regarded it? Did you so regard these concentrates furnished by Alaska-Pacific?

A. As being desirable?

Q. Yes, as being desirable?

A. And necessary, absolutely. You have to have those kinds of materials. If you can't get it, you have to buy pyrites to replace it, which is a losing—financially, a losing operation to have to smelt better materials.

Mr. McGuire: Now, I re-offer Plaintiffs' Exhibit AP-21 for identification.

Mr. Harrison: I would like to ask a couple of preliminary questions.

The Commissioner: All right.

By Mr. Harrison:

Q. Mr. Benson, do you know, of your own knowledge, whether or not the actual tonnages listed on Plaintiffs' Exhibit for identification No. 21, were actually used, in fact, by the Tacoma Smelter, in the copper smelting process?

A. Yes.

Q. That applies to all of the tonnages listed on these two sheets?

A. Yes.

Mr. Harrison: My objection then will be to the ma-

[fol. 186] teriality of the exhibit.

The Commissioner: It will be received.

(Said statement of weights and assays of shipments by plaintiff, marked "Plaintiffs' Exhibit AP No. 21", admitted in evidence and made a part of this record.)

By Mr. McGuire:

Q. Now, Mr. Benson, did the company become aware, in October, 1942, of the issuance of Limitation Order L-208 of the War Production Board?

A. Yes; we were so informed by our New York purchasing department.

Q. Did the company take any action, in an effort to have the order suspended, with reference to the Alaska-Pacific Consolidated Mining Company?

A. Yes, I think we did.

Q. What did they do?

A. The general manager of the ore purchasing department in New York City was sent to Washington, D. C., to object to the application of the order to the Alaska-Pacific Consolidated Mining Company's concentrate.

Q. About what time was he sent down there?

A. He was sent down there in October of 1942.

Q. He was sent to the War Production Board?

A. Yes, I think so.

Mr. McGuire: The witness is available for cross-exami-[fol. 187] nation.

Cross-Examination.

By Mr. Harrison:

Q. Mr. Benson, considering now your complete and entire source of concentrates for use in your smeltering process, approximately what percentage of that complete need of the Tacoma Smelter was obtained from Alaska-Pacific during 1942?

A. In 1942?

Q. Yes.

A. Well, this figure here is not totalled.

Q. No, I don't mean how many tons did you get from them. Did you get any from anybody else?

A. Yes. As I understood the question, you wanted to

know the proportion what proportion of the Alaska Pacific's output was of the total needs of that material?

Q. Yes, that is right.

A. Something on the order of 10 per cent. That is a rough estimate.

Q. From what type of sources did you get your other 90 per cent?

A. From mines; from Alaska, from similar mines all over Alaska and British Columbia and the Western United States.

Q. By "similar mines", do you mean gold mines?

A. Gold mines, or lower-grade copper producers.

Q. What effect, if any, did the closure of the Alaska [fol. 188] Pacific mines have on your production?

A. We didn't let it have any effect on that production because we went out and purchased barren pyrites for use, to be used as flux.

Q. In other words, you went out and purchased it?

A. Yes.

Q. In other words, then, you made up the loss by getting another supply?

A. Yes, an unsatisfactory supply.

By the Commissioner:

Q. Unsatisfactory in what sense?

A. Well, if we had to go all the way to that class of material for fluxing purposes, we would not produce any copper, we would be out of business.

Q. You mean it was not as profitable; is that the idea?

A. This material is gold concentrate, and it was profitable. We have to smelt profitable material, or else we don't operate.

By Mr. Harrison:

Q. Well, did your company operate at a loss, at any time?

A. No; we don't operate at a loss; we shut down.

By the Commissioner:

Q. Did your operations increase in scope, during the war period?

[fols. 189-191] A. No, they did not. The main reason shall I explain why?

Q. Yes.

A. The Tacoma Plant is largely a maritime plant. We have a ship at the dock now from the Philippine Islands. We have a ship on the island of Malta, in the Mediterranean, and Newfoundland, and the west coast of South America; and during the war, much shipping was shut off, and a lot of our receipts were stopped. The Philippine Islands, who are our biggest shippers, now,—they were sizeable shipments before the war, and naturally they were out, like that:

So we did lose tonnage, did not produce as much as in normal times, due to that fact of being reduced by reason of the war conditions—due to the fact that our business was reduced by reason of the war conditions in shipping.

Q. Of course, the production of copper increased materially throughout the war years, did it not?

A. Yes.

Q. So that copper was one of the critical materials?

A. Yes; the big domestic mines, like Utah Copper, Anaconda, and Phelps-Dodge, greatly increased their production during the war.

[fol. 192] In The United States Court of Claims

[Title omitted]

Transcript of Testimony

Washington, D. C.,
Monday, January 26, 1953,
at 10 o'clock, a.m.

Testimony For Plaintiffs

The parties met, pursuant to notice of the Commissioner, at the time above stated, in Hearing Room, Court of Claims Building, Washington, D. C.

Appearances

Present: Hon. William E. Day, Commissioner; Ralph D. Pittman, Esq., Phillip Barnett, Esq., George H. Herrington, Esq., William H. Orrick, Jr., Esq., James D. Ewing, Esq.,

Edward E. Rigney, Esq., Carlton S. Connor, Esq. and Donald M. Dunn, Esq., counsel for plaintiffs; and Kendall M. Barnes, Esq., and Thomas H. McGrail, Esq., counsel for defendant.

[fol. 193] Mr. Charles C. Dudley, a reporter, was thereupon sworn by the Commissioner to well and truly take down and transcribe the questions propounded to and the answers given by the witnesses, and to do all other things required of the reporter.

Pursuant to the order of reference by the honorable the United States Court of Claims, in the above-entitled cause, testimony on behalf of the plaintiffs was taken, as follows:

COLLOQUY

The Commissioner: Are there any stipulations to be entered at this time?

Mr. Barnes: Your Honor, in connection with the allegations respecting the ownership of real estate, I have examined papers that have been submitted by the Homestake Mining Company and by Idaho Maryland Mines Corporation, and I am ready to agree, for the purposes only of the present aspect of the litigation, which relates to the question of liability, that those two concerns own approximately the quantities of land used in connection with their mining operations as alleged in the petition.

I am limiting the stipulation to the question of liability with the thought in mind that if it becomes necessary to take testimony on the question of damages, for example, there will have to be much more detailed testimony as to possible liens on that land, possible limitations on its potential use, on the fact that is is goid-bearng land, things of that type.

With respect to Central Eureka—I have just been handed an additional documet. Just a minute.

[fols. 194-200] (Here followed discussion off the record.)

Mr. Barnes: I am now prepared to make the same stipulation with respect to the Central Eureka Mining Company. I had a discussion with Mr. Pittman and Mrs. Barnett about that on Friday. There was some question as to whether the document they submitted to me had established ownership as of October 8, 1942. They now have submitted an additional document which does satisfactorily carry their

proof of title which they submitted back to that date. So I am willing to include them in that same stipulation.

With respect to the other plaintiffs who are parties to this litigation, no approach has been made to the Government whatsoever with respect to stipulation of title or any other stipulation.

There are certain other additional stipulations that we have agreed on in similar cases, when I think we reach the proper point, but with respect to Alaska-Pacific other than the stipulations we made at Seattle, with respect to Oro Fina and with respect to the various plaintiffs listed in the petition, no approach has been made to defendant whatsoever with a request for stipulation, or data to support a proposed stipulation.

Mr. Herrington: On behalf of Idaho Maryland, the stipulation with respect to our title is quite satisfactory to us, and we understand it is limited solely to the question of liability.

[fol. 201] Mr. Ewing: Up to the present, Your Honor, Order L-208, which is the basis of this controversy, is not in evidence. A copy of it is attached to Plaintiffs' Exhibit 8 for identification. I have also here a mimeographed copy, with some extraneous marking on it. I propose to offer either one or the other, as you perfer, in evidence at this time.

The Commissioner: We certainly ought to have that in evidence.

Mr. Ewing: Why don't I offer this copy.

The Commissioner: Are the exhibits which have been introduced in Court?

Mr. Herrington: It was introduced as an exhibit at the pre-trial——

The Commissioner: The question I asked is: Are the exhibits which were offered at the pre trial hearing here?

Mr. Rigney: They are here, Your Honor. We have our set.

[fol. 202] The Commissioner: I mean the Court exhibits.

Mr. Rigney: I don't know about that.

The Commissioner: I think they should be here.

Mr. Draper, will you get those?

With all these attorneys and all the papers we are going to have, we will have to exercise a little bit more care in

keeping track of the exhibits at this hearing than when fewer attorneys are present.

OFFER IN EVIDENCE

Mr. Ewing: I offer that as Plaintiffs' Exhibit next in order.

Mr. Barnes: Subject to verification, I have no objection, Your Honor.

The Commissioner: It may be admitted as Plaintiffs' Exhibit next in order.

Mr. Herrington: In Seattle, the exhibits were marked "AP-1, 2, 3, 4." I don't know whether you want to mark these "Homestake 1, 2, 3, 4," or just pick up from the pre-trial stipulation.

The Commissioner: Plaintiffs' next in order.

Mr. Rigney: 53 for identification was the last number, Your Honor, of those exhibits which were introduced at the time of the pre-trial hearing. So if we pick up there, I believe that this would be Exhibit 54.

(Said Order L-208, marked "Plaintiffs' Exhibit No. 54," admitted in evidence and made a part of this record.)

[fol. 203] The Commissioner: I want to state for the record that I have had my secretary talk to Mr. Guy Martin, who is counsel of record for the Bald Mountain Mining Company and the other plaintiffs in that case, and also Oro Fina, and he is going to send someone over immediately.

Mr. Nugent is not in his office and is unavailable, apparently.

Mr. Ewing: I will ask Dr. McLaughlin to take the witness stand.

DONALD MCLAUGHLIN, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct Examination.

By Mr. Ewing:

Q. Dr. McLaughlin, will you give us your address?

A. My address is 100 Bush Street, San Francisco.

Q. You are President of the Homestake Mining Company?

A. Yes, I am.

Q. How long have you been connected with the company?

A. I became consulting geologist for the company in 1926, and in 1944 I was appointed President.

Q. Are you a director?

A. I am a director.

Q. Will you tell us what your duties were when you were [fol. 204] employed as consulting geologist?

A. My duties at that time were to direct the geological studies of the mine, working out the distribution of the ore bodies, everything that pertained to the nature of the ore bodies, problems of development was part of the assignment, estimation of ore reserves, and at certain times evaluations for the purposes of taxation; and other needs.

Q. Will you give us a statement with respect to your education and professional background, Doctor?

A. I was educated in the public schools of California and graduated from the University of California in 1914, from the College of Mining, with a degree of B.S.

I took graduate work at Harvard in geology, where I received the degrees of A.M. and Ph.D.

After the war, I was in Peru for about six years with Cerro de Passeo Copper Corporation.

Q. You mean the First World War?

A. After the First World War.

I left there in 1925 as Chief Geologist of the corporation. I accepted a professorship at Harvard, where I was from 1925 until 1941.

As I previously mentioned, I was consulting geologist for Homestake in 1926 until 1944, and for various other mining companies at that time.

From 1941 until 1943, I was Professor of Mining Engi- [fol. 205] neering at the University of California, and Dean of the College of Engineering. I left there in 1943 to accept the vice presidency and director of the Cerro de Passeo Copper Corporation, and in 1944 and 1945 I was General Manager of the company in Peru.

I returned at that time when I accepted the Presidency of the Homestake Mining Company.

I think that covers the major points.

Mr. Ewing: Mr. Barnes, my recollection is that your

Answer denies, or at least denies information and belief, with respect to Homestake Mining Company's existence as a corporation. Are you prepared to make any concession as to that at this time?

Mr. Barnes: Yes, sir. With respect to Homestake, Idaho Maryland and Central Eureka, I am willing to agree that they were corporations prior to October 8, 1942, and have continued their corporate status since that date.

By Mr. Ewing:

Q. Dr. McLaughlin, will you tell us where the Homestake gold mine is located?

A. It is situated in the Black Hills of South Dakota.

Q. What is the town?

A. The town of Lead.

Q. Are you familiar with the history of the Homestake mine?

[fol. 206] A. Yes.

Q. When was the Homestake lode first discovered?

A. The first claims were staked in 1876, and they were acquired by the group that developed the Homestake Mining Company the following summer; and in November, 1877, the company was incorporated.

Q. When the group that later organized the Homestake Mine Company acquired the original claim, were those claims being operated as a mine?

A. They were hardly being operated as a mine. It is the story that the three men who staked the claim took out a little gold ore the first winter and the following spring, and built a small arasstere, and extracted a few thousand dollars worth of gold.

Q. From the historical standpoint, if that is the right word, what was the situation at Lead, South Dakota, at that time, in 1876 or 1877?

Mr. Barnes: I object, Your Honor. It is very interesting, but I don't see any relevance or materiality to any issues involved in the litigation.

Mr. Ewing: I want to show, Your Honor, the general history of the mine, the nature of the operation.

The Commissioner: I will allow it.

The Witness: The question was, what was the situation at that time?

[fol. 207] By Mr. Ewing:

Q. Yes.

A. It was a very isolated part of the United States at that time. The nearest railroad was the Union Pacific, about 270 miles away across the plains. At that time, remember, it was just after the Custer massacre, and the plains were rather dangerous for traveling.

Mr. Barnes: I object and move to strike, on the grounds it is irrelevant.

The Commissioner: Overruled. Go ahead.

By Mr. Ewing:

Q. When the Homestake interests acquired the mining properties, what did they have to do to get into operation?

A. They immediately placed orders for machinery, and in a surprisingly short time had a mill erected on the property.

Mr. Barnes: May it be understood that my two objections to this entire line of examination continue?

The Commissioner: Yes.

By Mr. Ewing:

Q. What machinery, in addition to the 80-stamp mill?

A. Boilers for steam power, cars for transportation, the usual small machinery of that day, and some of the heavy machinery of that day.

Mr. Barnes: A further objection, on the ground that this is not the best evidence. If it is material, the records of [fol. 208] that date showing it was acquired would be the best evidence.

The Commissioner: Overruled.

By Mr. Ewing:

Q. How was all this equipment taken into the mine from the railroad?

A. By oxcart over the plains.

Q. When did the Homestake Company get into production?

A. It got into production when the first stamp mill was operating, which was in 1878.

Q. Now, will you tell us what effect the isolation of the mine, of which you have spoken, had on the development of the company and its facilities?

A. I think the isolation really started the policy of endeavoring to be as self-contained as possible at the mine. Throughout the history of the mine, every effort has been made to do as much of our own work as possible, having rather more extensive shops that the average mine has. They are equipped to do maintenance work, providing lumber and timber operations for the mine, developing a coal mine for our own power, and for maintaining larger inventories, also, than is, I think, customary in most mining enterprises where you are near cities.

Q. To what extent would you say the Homestake unit was self-sustaining by October, 1942?

Mr. Barnes: Your Honor, I object to this on the ground no qualification has been shown; that at that date the witness was only the consulting geologist for the company. [fol. 209] The Commissioner: I think he was in 1941.

The Witness: I was.

Mr. Ewing: He has been consulting geologist since 1924.

Mr. Barnes: That doesn't qualify him in that aspect of the company's operations.

By Mr. Ewing:

Q. You are a mining engineer, aren't you, Dr. McLaughlin?

A. Yes, I am.

The Commissioner: Overruled.

And you were then?

The Witness: I was then.

What was the question?

(The question referred to was read by the reporter.)

The Witness: It had an ample inventory of supplies at that time.

Mr. Barnes: I object and move to strike this, on the ground it is not the best evidence.

Mr. Ewing: We are going to connect it up later. I just want to get the general picture, Your Honor.

The Commissioner: Then I will overrule the objection.

with the understanding that if better evidence of inventory does not come in, it may be later stricken.

The Witness: The mine in 1942 was really in a most [fol. 210] peculiarly and unusually favorable situation. We had just completed two new deep shafts equipped with large, modern hoists. We had then a relatively new steam power plant. The mills were in excellent shape. We had scrapped practically all the old plant of the mine and had all the mining operations concentrated in one compact unit, a part of which was quite new. We had built a new lumber mill. In spite of the mine being 65 years old at that time, as far as the equipment at that time, it was a most surprisingly new plant, as it so happened.

By Mr. Ewing:

Q. I believe you testified that the company had its own coal mine.

A. Yes.

Q. From whom did the company obtain its power?

A. The company obtained its power from its own hydro-electric plant and from a steam plant which was operated with boilers fired with coal from the coal mine.

Q. Will you describe for us the nature of the ore bodies which support the Homestake mining operations?

A. The Homestake ore bodies might be called quartz stringer lodes. They are masses of mineralized rock with many short veins and irregular bodies of white quartz, with sulphides in the walls of those quartz bodies and disseminated gold throughout the rock, so that a rather broad mass of rock contains enough gold to be mined as ore. [fol. 211] These ore bodies occur as long pod-like masses that not only are inclined or have a dip, to use the technical term, but have a plunge or a rig into the earth. You have to think of them as a long pod extending down into the earth, both with an inclination and rake. On a given horizontal plane or a level, the ore bodies would vary from narrow widths up to, at a maximum, around 300 feet; and along the long axis of the ore bodies, 700 or more feet in length. The larger ones would be that way. Along the long direction of the pod, the dimensions are very much greater, sometimes running up to four or five or more thousand feet long for individual pods.

This mine really has developed a series of such pods. Some of them disappear in depth, and others pick up. These ore-bearing bodies are closely related to one particular band of rock in the district, which technically we call the Summingtonite schist, which was originally a flat layer in a great collection of muddy sediment. That was formed into most complex folds which are tilted down into the earth in this way (indicating).

The ore to a most extraordinary degree is confined to one particular layer of this rock, which as geologists we map with very great care. This rock has an unusual mineral in it called Cummingtonite, which occurs in little needles and rosettes which bind the rocks together into a most unusually strong rock, which enables us to use some [fol. 212] of the mining methods that we do.

I don't want to go on too long with geology. I might top there. That gives you some idea.

Q. You will have to be the judge of when your description is over.

Mr. Ewing: I ask that this diagram be marked Plaintiffs' Exhibit for identification next in order.

(Said document was marked for identification as Plaintiffs' Exhibit No. 55.)

By Mr. Ewing:

Q. Dr. McLaughlin, I show you this diagram, which has been marked Plaintiffs' Exhibit for identification 55, and ask you to tell us what it is?

A. This is simply a diagram to illustrate the succession of operations that take place at the Homstake mine. It is not in any sense an exact cross-section of the mine or an engineering drawing. I might say it is a diagram which you might use to instruct an elementary class.

The diagram shows the location of a shaft with the hoisting works and three levels of the mine which reach out to the ore body. The diagram really is of, I think, considerable interest in showing the mining method that is used for actually breaking the ore. That is shown on the left side of the shaft where you can see that certain layers of the ore are taken up in a type of stope that we call shrinkage stopes, leaving pillars in between. The shrinkage stopes [fol. 213] are about 60 feet wide and carry across the ore

body. If the ore body happens to be 200 feet wide, they would be 200 feet across the ore body.

They are started at the bottom of the ore body and carried through to the top. The ore is broken from overhead, and enough of the broken material is drawn off to enable the miners to have room to stand to break the ground that is over them.

After this stope has been carried up to the top of the ore in a vertical section, the broken ore is entirely pulled out and the ground is filled with sand, in the early days filled with broken rock. Then after a succession of those stopes has been mined, these stopes 60 feet wide, the intervening 40-foot pillars would be mined subsequently by a more costly and slower method, which would involve the use of timbering, the method known as square-setting. The ore then is moved to the shaft and hoisted and is transported to the mills where it goes through, in 1942, through stamps, through rod mills and ball mills, and the first portion of the gold is removed by amalgamation.

The material tailings from that operation then go to a cyanide plant, where the ore is treated by cyanidation and the remaining fraction, the last fraction, is obtained.

[fol 214] By Mr. Barnes:

Q. Would you explain what you mean by amalgamation and cyanidation?

A. Amalgamation is the process of extracting gold from ore by the use of mercury. By the use of mercury, the gold is caught by the mercury, forming a mixture called amalgam, a mixture of gold and mercury. The gold is very easily recovered from that, simply by distilling the mercury which leaves the free gold behind. That was the process used at the Homestake up until about the turn of the century. It unfortunately doesn't get as large a percentage of the gold as we would like in good practice.

The residues from that process are then treated by separating them into the sand fraction and into what we call the slime fraction. The sand fraction is just a term we apply. The slime fraction is a very fine, mud-like material. The sands are washed into large vats and then treated with dilute cyanide solution, which dissolves the gold and the silver in the ore and does not touch much else.

The slime fraction has to go to another plant, and the cyanide solution is forced through the slime in filter presses to extract the cyanide. Chemically the two plants are the same. They differ in the mechanical treatment of the ore. These solutions then become gold-bearing, carrying gold in the form of a cyanide, and they are precipitated with zinc [fol. 215] dust. The gold precipated on the zinc dust then goes to a refinery, and by a very simple operation is transformed into free gold.

We also refine the gold which we obtain by amalgamation and by cyanidation in a small refinery, and that gold is shipped to the mint.

There is one other thing that is done. The tailings, the final tailings from the sand plant go back into the mine down another shaft and are used for filling the stopes. I don't think anybody is ever going to re-mine them.

The Commissioner: The witness' explanation has called to mind something that I wanted to place on the record. When I was out on the West Coast this past fall, I was asked by the counsel for Central Eureka whether I felt it would be desirable to see a gold mine in operation, and in company with counsel for the Government I did see Central Eureka's in operation. I thought it might be helpful. I just wanted to place that statement on the record.

Mr. Barnes: I would like to have the record clear it was not the present counsel for the Government. I am completely uneducated in this field.

The Witness: I take great pleasure, after the trial, to invite you to the Homestake.

OFFERS IN EVIDENCE

Mr. Ewing: I will offer that chart in evidence.

Mr. Barnes: There is no objection.

[fol. 216] The Commissioner: It may be received.

(Said diagrammatic layout of Homestake operation, marked "Plaintiffs' Exhibit 55," admitted in evidence and made a part of this record.)

By Mr. Ewing:

Q. Dr. McLaughlin, Paragraph 11 of the petition filed on behalf of the Homestake Mining Company in this case

alleges that on October 8, 1942, the life of operations of the plaintiff's gold mining properties, based on ore bodies indicated by reserves of ore in sight and all that could be expected from development, was estimated to be 20 years at the then current rate of mining.

Did you yourself make any estimate with respect to the life of Homestake's mine as of October 8, 1942?

A. The geological department of the Homestake mine had the responsibility at all times of preparing the estimates of ore and directing the development work for additional ore, and studying all possible evidence that would bear on the problem of persistence of ore in depth or finding new ore in adjacent structures. So I was very familiar with all aspects of the problem concerning ore reserves.

Mr. Ewing: I will ask that this chart, headed "Annual Reserve and Production Comparison Chart," be marked Plaintiffs' Exhibit for identification next in order.

(Said document was marked for identification as Plaintiffs' Exhibit No. 56.)

[fol. 217] By Mr. Ewing:

Q. I now hand you Plaintiffs' Exhibit 56 for identification, the chart in question, and ask you to tell us what it shows?

First, I will ask you whether that was prepared under your direction in the geological department?

A. The actual chart was prepared very recently, so as President of the company I can't say it was prepared under my immediate direction, but much of the evidence that is on this chart was prepared by the Department of Mines, with which I have been most closely associated since 1926. The chart is simply a curve showing the ore reserves of these specific years, from 1933 to 1952.

By the ore reserves, we mean the ore at any given time, let us say at the end of the year, which we could measure in the mine from the exposures at different levels and the work that is done between the levels. As cross-cuts, which are the openings made across the ore body, go through the ore, the ground is sampled very carefully, and then the ground is also cut by numerous short diamond drill holes which are sampled. So we get a picture of the distribution

of the ore as we go down in the mine, and evidence from which we can distinguish ore in place and can make estimates of the quality and quantity of the ore.

You might say that that is the ore which at the end of [fol. 218] the year we could measure definitely in the mine. It would be highly probable, almost a certainty, that that ore exists. The risk involved with regard to that ore between those exposures is relatively small.

By the Commissioner:

Q. Is there a difference in the quality of the ore?

A. Yes, there would be a certain point at which profits would cease.

Q. How is that reflected here?

A. All ore above a certain grade would be included in this. If, let us say, we mine gold down to 50 cents a ton, there would be very much more ore than mining gold to the limits that we can mine it today.

In 1942, for the preceding—let's see, how many years is that—that would be 69 years, 65 years since the founding of the company, it has been possible to develop or to block out additional ore each year. We have mined so much, and we have gone ahead and opened up so much. So at any given time, the ore reserves simply shows the ore that we have measured, but it is in no sense a limitation on the life of the mine.

The chart I think shows the ore reserve for 1942 as 19,400,000 tons, which would give a life of that particular ore reserve of about 14 years, but we would anticipate going on with further development as we mined the ore in 1943, if we had been allowed to, and we would have added [fol. 219] more life to it. So in addition to the amount which is indicated by the measured ore, there would be the life that you would expect that you would get from future development.

We have a record of 65 years, each year finding about as much ore as we mined. There is no indication that that situation is going to change in 1942. As a matter of fact, we have gone on mining for some eight years, and you can see it happens that the last ore reserve here is still some 20 million tons of ore.

So the estimate that there are six years of ore still to be

developed in addition to the 14 years in the actual estimate was a very conservative one. In fact, in 1942, I would certainly have hesitated to put just where the limit was on the long-range future of the mine. It is based on geological inference to some extent, but we still see nothing that would lead us to say that the ore bodies are going to disappear in depth or that we are not going to find new ones as certain ones are exhausted.

So I would regard the estimate of 20 years as a minimum estimate, which I am quite sure any competent mining man would have agreed to as a very conservative estimate for the life of the mine, and with very good probability indeed that the mine would live over 20 years.

[fol. 220] By Mr. Ewing:

Q. That is, as of October, 1942?

A. Yes. I should certainly have said the expectancy of life of the mine was much better than my own expectancy.

Q. I don't think you said so directly, so I will ask you the question: It is your opinion that as of October, 1942, the mine had at least an expectancy of 20 years?

A. Yes. I regard that as a very conservative estimate.

Mr. Ewing: I offer the exhibit marked for identification in evidence.

Mr. Barnes: No objection to this document.

The Commissioner: It may be received.

(Said chart, marked "Plaintiffs' Exhibit No. 56," admitted in evidence and made a part of this record.)

By the Commissioner:

Q. Wouldn't the cost of removing the gold be included in that estimate?

A. No. That estimate is really the estimate of our supply of material. The cost of removing would come into consideration in determining where we would draw our limit. Let us say if we have an ore that is worth $20 a ton here, and it ends with a sharp boundary, that is the boundary of the ore. But if it grades off gradually down through perhaps 50 feet to lower grade material, we would set [fol. 221] the boundary at the point where the costs were such that profits disappeared.

Q. What I had in mind was, during the 20 years if the cost of labor and materials increased to the point where your cut-off would have taken place, that would have reduced the life expectancy by some amount, anyway, would it not?

A. Yes. For example, if the price of gold had stayed at $20 an ounce and the cost had gone up to our present costs in paper money, we would be shut down. That is, there would be no ore produced.

Q. By that same comparison, if your cost of operations had increased during that 20-year period that you spoke of as the estimate, that is based upon the costs in 1942?

A. Yes. It is conceivable that, let us say, if we had extreme inflation and a 5-cent dollar, and we still had $35 gold, we would be shut down along with every other gold mine in the world, probably. That is, your costs measured in depreciated money would go up.

Q. To that extent, then, the 20-year estimate that you have given is tied to the cost of operation?

A. Oh, yes, to that extent, yes.

The Commissioner: I just wanted to get that point straight.

By Mr. Ewing:

Q. Doctor, can you tell us offhand how many shares of [fol. 222] Homestake stock were issued and outstanding on October 1, 1942?

A. 2,009,280, I believe.

Mr. Barnes: I object. The witness' recollection is not the best evidence.

The Commissioner: Sustained.

Mr. Ewing: I offer in evidence the transcript of the record of the Secretary of State of California covering the Homestake corporation, commencing with the Articles of Incorporation——

The Commissioner: Can't you show that to counsel and save the trouble of introducing that?

Mr. Ewing: I shall be glad to do that.

Mr. Connor: We didn't show you anything. We asked you to read Moody's:

Mr. Barnes: I am perfectly willing to agree, Your Honor,

that the amended Articles of Incorporation of Homestake of November 5, 1877, states that the capital stock is $25,146,000 divided into 2,009,280 shares with a par value of $12.50 each.

By Mr. Ewing:

Q. As of October 1, 1942, do you know the approximate number of people who held the capital stock of Homestake?

Mr. Barnes: I object on the grounds it is not the best evidence.

[fol. 223] The Commissioner: Sustained.

Mr. Ewing: You are not going to permit him to answer if he knows?

The Commissioner: He can answer if he knows.

Mr. Ewing: I thought for the record he should at least be permitted to answer whether he knows or not.

The Commissioner: He may answer whether he knows or not. I will overrule the objection to the question: Does he know something?

Mr. Ewing: That is what I asked, as I understood.

The Commissioner: All right.

By Mr. Ewing:

Q. Will you tell us, do you know?

A. I know.

Q. How many?

Mr. Barnes: I object on the grounds it is not the best evidence.

The Commissioner: Sustained.

Mr. Ewing: Exception.

By Mr. Ewing:

Q. Do you know the number of stockholders who own from one to 99 shares, approximately?

A. We have records to that effect.

Q. Can you tell us how many?

Mr. Barnes: I object on the grounds it is not the best [fol. 224] evidence.

The Commissioner: Sustained.

Mr. Ewing: Exception.

By Mr. Ewing:

Q. Do you know the approximate number of stockholders holding from 100 to 999 shares?

A. We have a record of that.

Q. Will you tell us?

Mr. Barnes: Objection.

The Commissioner: Sustained.

Mr. Ewing: Exception.

By Mr. Ewing:

Q. Do you know the number of stockholders holding 1,000 shares or more?

A. We have a record to that effect.

Q. Will you tell us?

Mr. Barnes: I object.

The Commissioner: Sustained.

Mr. Ewing: Exception.

By Mr. Ewing:

Q. Do you remember the number of fiduciary holders of Homestake capital stock?

A. Again, we have a record to that effect.

Q. Will you tell us?

Mr. Barnes: Objection.

[fol. 225] The Commissioner: Sustained.

Mr. Ewing: Exception.

I would like to ask Your Honor if we are required to bring the transfer agent here with all the records to prove this. Is there some way——

The Commissioner: There must be some better way to do it.

Mr. Ewing: We have a certificate, not in formal shape, but in the form of a letter from the transfer agent, giving us the information.

Mr. Barnes: Who is the transfer agent?

Mr. Ewing: Irving Trust.

Mr. Barnes: Let me see the letter.

(Letter shown to Mr. Barnes.)

Mr. Barnes: Your Honor, I would be perfectly willing to agree that if Mr. McCoach, the Assistant Secretary of Irving Trust Company, were called, he would testify as set forth in this letter, but I object on the ground that it is irrelevant and immaterial and has absolutely no bearing on the issues involved in this case.

The Commissioner: He wants to go further than just to establish that the person would so testify. He wants the substance of the testimony.

Mr. Ewing: I want the substance of the testimony.

Mr. Barnes: If I stipulate he would testify as set forth [fol. 226] in the letter, that establishes the fact on the record, does it not?

The Commissioner: It does so to your satisfaction.

Mr. Barnes: I am not stipulating the fact. I am stipulating he would so testify. I have had no opportunity to audit these figures at all.

Mr. Ewing: I will accept that stipulation and, subject to that condition, suppose I offer the letter.

The Commissioner: All right.

Mr. Ewing: As Plaintiffs' Exhibit 57.

(Said document was marked for identification as Plaintiffs' Exhibit No. 57.)

Mr. Barnes: What about a ruling on my objection to relevancy and materiality, Your Honor?

The Commissioner: I overrule that.

Mr. Barnes: I fail to see how the question of the ownership of plaintiff's stock has any bearing whatsoever on the issue here, which is whether we are taking by L-208——

The Commissioner: It may not, but I feel that is the kind of testimony that I had better admit than hear argument about its admissibility.

Mr. Ewing: Also, the allegation of the petition makes it relevant.

The Commissioner: The exhibit is received in evidence. [fol. 227] (Said letter, marked "Plaintiffs' Exhibit No. 57," admitted in evidence and made a part of this record.)

The Commissioner: I will amend my statement, then, to "hear extended argument." (Laughter)

Mr. Barnes: You notice, Your Honor, that I sat down very promptly.

By Mr. Ewing:

Q. In Paragraph 3 of the petition filed by Homestake Mining Company in this case, Doctor, there is an allegation that for many years immediately prior to October 8, 1942, plaintiff had operated its gold mining properties and continuously made substantial profits therefrom. Has Homestake Company always operated at a profit?

Mr. Barnes: I object, Your Honor, on the grounds it is not the best evidence.

The Commissioner: I sustain the objection.

Mr. Ewing: I take an exception.

The Commissioner: Counsel, of course, can always make an offer of proof, as you are aware.

Mr. Ewing: I will prove it in another way.

By Mr. Ewing:

Q. Doctor, have you any opinion as to whether the Homestake Mining Company as of October 8, 1942, had a reasonable expectation of profitable operation during the years following 1942?

[fol. 228] A. I have.

Q. Will you tell us your opinion?

A. It was operating at a profit in the year 1942.

Q. And after that, do you believe it would operate at a profit?

A. It certainly could have.

Q. For its presumably expected life?

A. We saw no reason why the profits would have discontinued.

Q. Dr. McLaughlin, will you name for us the largest producers of gold in the United States in 1942 in order of output?

Mr. Barnes: I object, unless the source of the witness' knowledge is shown.

The Commissioner: Just a minute. I will have to sustain that objection, I think.

Mr. Ewing: I am going to have him give the source.

The Commissioner: Very well.

By Mr. Ewing:

Q. Will you tell us what that document is?

A. This is a photostat of a sheet from the Bureau of Mines report for the year 1942 on the production and the standing of the various mines of the country. It does not give the production, but it lists the largest gold producers in order of production, with Homestake as the largest producer [fol. 229] in the country; the Utah Copper Company as the second largest producer; the United States Smelting, Refining & Mining Company, from their Alaska dredging operations, third; the Phelps Dodge Corporation, from its mines in Ajo, Copper Mountain, Verde and Warren, as fourth; the Golden Cycle Corporation, which is to a large extent a custom mill, at that time at Colorado Springs, working on ores from Cripple Creek, as the fifth; the Yuba Consolidated Gold Company, working various dredging fields in California, as the sixth; the Alaska Juneau Gold Mining Company at Juneau, Alaska, as seventh; the Natomas Company, another California dredging company, eighth; the Empire Star Mines Company, from their mines in Grass Valley, ninth; the Idaho Maryland Mines Corporation of Grass Valley, tenth; the Howe Sound Company of Bates Metal Company, working the mine at Chelan Lake in Washington, eleventh; the Getchell Mines in Nevada, twelfth; the Nevada Consolidated Copper Corporation, mining copper ore at Robinson, Nevada, thirteenth; the Lava Cap Gold Mining Corporation, of California, at Grass Valley, fourteenth; Consolidated Coppermines, also working in Nevada, fifteenth; United States Smelting, Refining & Mining Company, near West Mountain, which is near Bingham Canyon, sixteenth; the Alaska-Pacific Consolidated Mining Company, of Willow Creek, Alaska, seventeenth; Mammoth-St. Anthony mine of Arizona, eighteenth; Manhattan Gold Dredging Company of Manhattan, Nevada, nineteenth; the [fol. 230] Talache Mines of Idaho, near Boise, twentieth; the Capital Dredging——

Mr. Barnes: I object, Your Honor, and move to strike on the grounds it has no relevance or materiality whatsoever, and also on the grounds it is going away beyond the scope of the question and ceases being responsive.

The Witness: I am simply answering the question.

Mr. Ewing: I asked him to list them in order of size.

Mr. Barnes: The first four, I believe.

The Commissioner: Overruled.

How many more do you have?

The Witness: There are 29; the first 29 mines are listed.

Mr. Barnes: Then I object on the grounds it is not the best evidence. The witness is just reading from a document issued by the Bureau of Mines. That is the best evidence.

Mr. Ewing: Do you want us to bring that? This is a photostat of it.

The Commissioner: Will you stipulate that he has a document taken from the Bureau of Mines?

Mr. Barnes: I have never seen the document.

The Commissioner: I will have to sustain the objection.

Mr. Ewing: We can bring it in.

The Commissioner: All right.

Mr. Ewing: I just don't want to have to bring documents. There isn't any doubt about the fact. Mr. Barnes knows that.

[fol. 231] The Commissioner: But his objection that it is not the best evidence is good.

Mr. Ewing: Will you take it, subject to my producing it?

The Commissioner: Surely.

Mr. Ewing: That is my point.

By Mr. Ewing:

Q. Will you finish the list?

A. The Bald Mountain Mining Company, twenty-second; Daryton Dredging Company, twenty-third; another mine of United States Smelting, Refining & Mining Company in Arizona, the San Francisco district, twenty-fourth; twenty-fifth, Golden Queen Mining Company, California; twenty-sixth, Telluride Mines, Colorado; twenty-seventh, Knob Hill Mines, Inc.; twenty-eighth, Anaconda Copper Mining Company's operations at Butte; and twenty-ninth, the Cactus Mines Company of California.

Mr. Barnett: We have been neglected.

The Commissioner: I will strike his testimony, unless the objection of counsel that it is not the best evidence is taken care of, and you can come in with the best evidence. You have his testimony.

Mr. Barnes: May I point out it is obviously unreliable if it leaves out Central Eureka.

By Mr. Ewing:

Q. Which of the companies that you have listed were lode [fol. 232] mines?

A. There are 14 of those which were lode mines.

Q. Would you give those?

Mr. Barnes: Is this something shown there?

Mr. Ewing: It is shown on the same exhibit.

Mr. Barnes: I will make the same objection.

The Witness: I think I could testify from my own experience as to which ones of these were lode mines.

The Homestake; the Golden Cycle; the Alaska Juneau; the Empire Star; the Idaho Maryland; the Getchell; Lava Cap; the Alaska-Pacific Consolidated—the gold lode mines, that was your question?

By Mr. Ewing:

Q. Yes.

A. The Talache Mines; the Bald Mountain; the mines in the San Francisco district of United States Smelting; Golden Queen; the Telluride Mines, Telluride, Colorado; Knob Hill; and the Cactus. That is 14 in all.

Mr. Barnes: I object and move to strike, on the ground the witness is merely reading from the document.

The Commissioner: All right.

Mr. Ewing: The book will be produced.

The Commissioner: I would like at this point to have the Doctor explain what is meant by the expression "lode mines."

[fol. 233] Mr. Ewing: That is just what we were coming to.

The Witness: The distinction between these mines listed here are lode mines, dredging companies, and base metal companies. The lode mines are mines that are developed in solid rock, mines like the Homestake which I have described, or mines such as the Central Eureka, which work on a quartz vein going down into the ground. The operation is sinking into the earth, hoisting the earth out.

The dredging companies are working on gold, they are working on gravel of the stream. They are simply washing the fragments of the gold out of the dust.

Then the other group of mines, the nine base metal mines that are included here, are the copper, lead and zinc

companies which operate ores that have a small amount of gold in them. Their main production is from copper, lead or zinc.

For example, by far the largest gold mine in this country, after the Homestake, is the Utah Copper Company, which is the Kennecott Copper Corporation operation, but they mine such an enormous tonnage of ore a day that the small amount of gold in that ore puts them in second place.

By Mr. Ewing:

Q. You described these dredging operations. Are they what are commonly described as placer mining operations?

A. Yes, they would be placer mining operations.

[fol. 234] Q. As between lode gold mines in different localities, are there differences in the operation?

A. Very great differences.

Q. Would you illustrate that?

A. I could illustrate that by comparing, for example, the operations of the Homestake with the operations on other lodes. At Homestake the ore bodies are very large and wide, and the rock is extremely strong, which enables us to open very large chambers without timbering and with a high degree of safety; whereas in other lode mines where the ore is crushed or where the walls are weak, it is necessary to mine with much greater care and caution, and taking out small parts of the ore body and filling carefuly and maintaining those openings with timber. It is with much greater expenditures.

There are, of course, a great variety of those mines but I don't think it is necessary to try to go into that.

Q. Just for the record, in connection with Order L-208, the Homestake Mining Company filed an appeal, did it not?

A. Yes.

Q. In connection with that appeal, there was a hearing?

A. Yes.

Q. Did you testify at the hearing, which I believe took place on November 12, 1942?

[fols. 235-236] A. Yes, I was present and testified at that hearing.

[fol. 237] Cross-examination.

By Mr. Barnes:

Q. You referred to the isolation of the Homestake Mine that existed in 1876 or 1877. What was its situation with respect to access to the outside world in 1942, Doctor?

A. In 1942 we had access with the Burlington Railroad and the Chicago & Northwestern Railroad to Lead and Denver. We had railroad communication right to the mine.

Q. Those were both through transcontinental lines?

A. No, they are branch lines and the nearest large city to the south would be Cheyenne, if you would call that a large city, about 270 miles away, and Denver some further distance to the south. In the other direction there is a town, Rapid City, that is a growing town, but the nearest large cities are the cities to the east on the Missouri and Mississippi Rivers.

Q. Is Lead what is popularly referred to sometimes as a company town?

A. There is no reason to call it a company town; it is mostly owned by the local people.

Q. Does it have any business or industrial activity other than the mine connected with it?

A. We have the water company. We sell water to the town. Of course we own quite a bit of property in the town. We rather pointedly refrain from trying to become involved in the business of the town or trying to become [fol. 238] involved even in the renting business, although we do have some—we have a couple of apartment houses which we have had to build in the last few years to relieve the shortage of housing.

Q. Where is the town located in relation to the mine itself?

A. The town is very close to the mine. It lies on the west side of the ore body. In fact, some of the old town of the early days was damaged by the subsidence of the ore body. The new town has moved up the hill a little bit farther.

Q. You referred to certain business results that have resulted from the original isolation. Does that also affect your labor relations?

A. No. It does to this extent: that I think we have a very stable community in ordinary times.

Q. Are you unionized at all?

A. No, we have no union.

Q. You say that in your opinion the Homestake Company had an expectation of profitable operations subsequent to 1942. As I recall, you arrived at this opinion because it operated profitably in 1942, is that correct?

A. I believe that is what I said. I could amend that to say that it had operated profitably for sixty-five years.

Q. But your prospects for the future depend on two things, do they not, Doctor? They depend on the price of gold, over which you have no control, is that correct?

[fol. 239] A. I am afraid that is correct.

Q. And the cost of operation, again over which you might have little or no control?

A. Oh, no. We have partial control over the cost of operation. As the dollar depreciates, naturally, costs will go up, but we have control to the extent that we can make technical improvements, as we are constantly trying to do all the time.

Q. But if there is an increase in the cost of material, you would have no control over that, except to the extent that you can substitute other materials, is that correct?

A. That is correct, yes.

Q. Incidentally, in connection with I suppose you would call it the refining operation by which you remove the gold from the ore, do you recover the mercury?

A. Yes.

Q. One hundred per cent or is there loss?

A. There is loss of mercury.

Q. What per cent is the loss?

A. I haven't the exact figures in mind.

Q. What about cyanide? Is that recovered at all?

A. No, the cyanide is consumed.

Q. Is the zinc dust consumed?

A. The zinc dust is consumed.

Q. You referred to the fact that just prior to October, [fol. 240] 1942, the company had installed certain new or additional facilities.

A. Yes.

Q. Would you mind repeating again what those were, Doctor?

A. My statement was not complete. I doubt if from memory I could describe all the new facilities, but the major ones were the sinking of two shafts to the 4100 level,

about 4100 feet deep, which were equipped with hoisting engines and were regarded as among the most modern shafts, I suppose, in the world. That put us in a very favorable condition to continue exploration in depth and also to extract the ore that was——

By the Commissioner:

Q. How much of that was new?

A. Those shafts were entirely new within the last—in 1942—within the last ten years. Over the period of subsidence, which I mentioned in answer to your other question, it had been necessary to scrap practically all the old mills of the mine and also to remove the shafts to firm the ground. You may recall the old pictures of the works, there was a most elaborate set of surface works very close to the ore bodies which had to be scrapped entirely.

By Mr. Barnes:

Q. Will you explain what you refer to when you use the [fol. 241] word "subsidence," Doctor?

A. Yes. When you remove a mass of ore or rock from the earth, even though you fill the ground, you can't fill it completely, and the pressure of the walls causes the walls to move in and the surface to go down. It happens very frequently in coal mining where you mine horizontal levels, where you drop the surface very easily. In the case of a mine going down in depth, such as the Homestake, in the superficial parts of the ore body where filling was not done with the care we use today, in the early days when that ground compacted and subsided, broke over the years, so that it went down.

Q. When you refer to a shaft that had been put down to the 4100-foot level, does that mean that you were then following at that depth or did that give you access to all intermediate?

A. That gave us access to intermediate depths. Most of the mining was above that depth at the time the shafts were put down. All the mining, I should say, was well above those depths at that time.

Q. Isn't it true that the standard operation of a mine would require periodic sinking of new shafts when you have an area as long as Homestake has?

A. Yes. As an inclined ore body runs away from your initial opening, you have to put down further shafts. It so happened that from subsidence one of our major shafts [fol. 242] before that time was in danger of becoming damaged by the subsidence, and as a matter of precaution we hurried up the sinking of these two additional shafts.

Q. Where were those located on your site, Doctor? Can you identify them, for example, by the claim names or something of that kind?

A. I am afraid I can't identify them by claim names because we pay so little attention to claim names out there, we own such a large area.

Q. I have here a plan furnished to me by counsel for the plaintiff entitled "Part of Homestake Property Showing Ore Reserves Claimed as of January 1, 1942." Would it be possible on that to indicate the location at all?

A. (Witness examining document) Yes, I think so.

Q. I think Mr. Connor may have a larger map which may help you orient that smaller one.

A. Would you show me the larger one?

Mr. Barnes: I think you would prefer to give him the larger one.

Mr. Connor: Why don't you offer this in evidence if you wish to pursue this line of questions?

Mr. Barnes: If that is satisfactory.

Will you mark this Defendant's Exhibit No. 1 for identification?

(Said document was marked for identification as Defendant's Exhibit No. 1.)

[fol. 243] By Mr. Barnes:

Q. Looking at this entitled "Map of Mineral Survey Claims Owned by Homestake Mining Company," can you indicate the location of those shafts?

A. Yes. They are not only indicated, they are marked. There is the Ross Shaft, and the Yates Shaft is there, standing on that claim.

Q. The Ross Shaft, so that we can identify it easily, is just north of the township line that goes through the area here, and the Yates Shaft is somewhat farther to the north of that, is that correct?

A. That is correct, yes.

Q. Those replace what shafts?

A. They replaced the Ellison Shaft, which was the one which was being slightly damaged by the subsidence, which there (indicating), and then there were older shafts which are not even marked on this map because they have been obsolete for many years, which stand over in this part (indicating).

Q. Farther to the north, you mean, of the Ellison Shaft?

A. Farther to the north, in the area close to the outcrop of the ore body.

Q. Where are your mills and other facilities located in relation to the general area shown on this map?

A. The mill stands about in there (indicating).

[fol. 244] Q. By that you mean just north?

A. Just north of the Yates Shaft, on the slope down the hill from the Yates Shaft.

OFFER IN EVIDENCE

Mr. Barnes: Your Honor, I would like to offer Defendant's Exhibit No. 1 in evidence.

Mr. Ewing: No objection.

The Commissioner: It may be received.

[fol. 245] Redirect examination.

By Mr. Ewing:

Q. Dr. McLaughlin, Mr. Barnes asked you as to whether the employees of Homestake were members of a union, and you answered no, as I recall. Were union elections ever held at Homestake among the Homestake employees?

A. Yes. We have had two union elections. The United Mine Workers District 50 endeavored to organize the camp, and we had an election in which the employees voted not to accept the union as their bargaining agent. We had——

Q. When was that?

A. That was about——

Q. Approximately?

A. Five years ago. We had an election with the United Steelworkers about two years ago in which again the employees voted against accepting the union as their bargaining agents.

The United Steelworkers have representatives in the district, and I believe there is a nucleus of a union there, but it has no representation.

Q. In answer to my question, a little while ago in answer to the questions by Mr. Barnes you described the new improvements that had just been put in, the two new shafts, shortly prior to October, 1942. Could you give us some idea as to the cost to the company of those improvements?

Mr. Barnes: I object on the ground it is not the best [fol. 246] evidence.

By Mr. Ewing:

Q. If you know. After all, he is president.

The Commissioner: I think the objection is sound. I sustain it.

Mr. Ewing: Exception.

By Mr. Ewing:

Q. Now I show you Plaintiff's Exhibit No. 56 in evidence, about which you testified before the recess, and direct your attention in particular to the last column which gives an estimate of the reserve in the year 1952 at 20,500,000 tons and ask you the basis for that estimate from the standpoint of cost.

Mr. Barnes: Your Honor, I object on the ground that this is immaterial and irrelevant to the issue involved in this case which relates to a claim taken in 1942.

Mr. Ewing: He went into the question of costs as affecting the gold reserves, and I think it is proper for me to go into it a little further.

The Commissioner: Overruled.

The Witness: In 1942 the cost that we would use as a cutoff in estimating the limits of the ore was about five dollars a ton; that is, anything below five dollars a ton it would have been wise to have left in the mine.

In 1952 the cutoff was about seven dollars a ton, which [fol. 247] if there had been no changes in other conditions of the mine, you would have expected to have decreased the ore reserve, but as a result of developments in that time

the ore reserve did not decrease. It was maintained about the same, slightly greater.

Mr. Ewing: And the 1952 estimate of the reserve is based on the 1952 cost?

The Witness: The 1952 estimate is based, yes, on 1952 costs.

Mr. Ewing: That is all.

Recross-examination.

By Mr. Barnes:

Q. I understood you to say you used a cost of five dollars a ton as your cutoff base. What do you mean by the cost of five dollars a ton?

A. That is the amount of money that is required to break the ore, to place the ore, to grind it, to run it through the mills, and all the proper accounting charges against that ore, and taxes.

Q. You compute that cost regardless of the amount of gold per ton, is that right?

A. Yes; the amount of gold per ton would have little bearing on that cost. It would have a great deal of bearing on the profit.

Q. Does Homestake have any company union?

[fol. 248] A. No.

Q. Any association of its employees?

A. It has a group known as the Homestake Veterans, for which if you worked for the company for twenty-one years you are eligible. I am now a member of it. It is an organization which is a semi-social organization.

Q. Basically, Doctor, what is gold? We have been talking about it at great length. Can you tell us what it is?

A. Gold is a metallic element which throughout history has been prized for its beauty and its durability, its permanence of value. It derives its great significance from being used as a monetary base.

Q. Aside from being used as monetary base, what utilitarian value does it have, if any?

A. It has enough utilitarian value to cause the consumption of gold in what is known as industrial consumption of gold in the United States to be far greater than the total production of gold in the United States.

Q. Could you give us some idea of what kind of applications it is used in?

A. It is used in jewelry, it is used in gold leaf as coverings, it is used in many scientific instruments. Dentists use gold.

Q. Gold leaf is generally used for personal adornment or decoration, is it not?

[fola249] A. It has some scientific use as gold leaf, but I suppose the covering on the State House in Boston would be regarded as utilitarian. I am not sure that it is still gold; it was at one time. There have been many administrations up there. (Laughter).

Q. Do you know of any military applications it might have?

A. I think its most important military application is preserving the soundness of the money of the country.

Q. There is quite a lot of gold at Fort Knox for that purpose, is there not?

A. We have quite a lot of gold at Fort Knox, but you also remember that in those years there were a great many people engaged in selling bonds to the American public, and I think the quantity of gold, say a million dollars worth of gold, produced at that time would have been of a lot more value to the country than a million dollars worth of additional bonds.

Mr. Barnes: That is all.

(Witness excused.)

Mr. Rigney: Plaintiff, Homestake Mining Company, will now call Mr. Shaw Livermore.

Shaw Livermore, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commis- [fol. 250] sioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Rigney:

Q. Mr. Livermore, you are appearing here pursuant to subpoena, is that correct?

A. That is right.

Q. Let me ask you now whether at any time in your life you have had any interest in any mining enterprises.

A. No, I have never had any.

Q. What is your present official position, sir?

A. I am one of the assistants to the Director of Defense Mobilization, across the street here in the Executive Office Building.

Q. How long have you been in that position?

A. Since March 15 last year.

Q. By profession you are an economist, is that correct?

A. That is correct.

Q. Would you give the Court something of the background of your formal education?

A. Yes. I was born in Massachusetts, in Wellesley Hills, educated there and in Chicago, graduated from Dartmouth College in 1922 with an A.B. Degree and then from Harvard University with MBA, Master of Business Administration, in 1924. I subsequently received a Ph.D. Degree from Columbia University in 1929.

[fol. 251] Q. Following your graduation from the Harvard School of Business Administration in 1924, what did you then do?

A. I was there a year as one of the assistant deans in the administrative office of the school for the following year.

Q. And after that?

A. Then I was in two business jobs, one of them in the wholesale hardware business in the Northwest, and another one in investment research business in Boston through 1928. At that time I went to the University of Buffalo, Buffalo, New York.

Q. To join the faculty there?

A. Yes. I subsequently became Professor of Economics and Business Organization and assistant dean of the School of Business and was also on the faculty of the Liberal Arts and Sciences College up to the spring of 1941.

Q. So the period of your service at the University of Buffalo was from 1928, do I understand, until 1941?

A. Yes. It was interrupted by doing work at Columbia for my Ph.D. for about a year and a half.

Q. I see. Have you written any books or articles in your particular fields?

A. Yes. I have written a number of periodical articles in the field of business administration and economics generally, and business history; a text book on business or- [fol. 252] ganization and the control of business, which includes a discussion of various kinds of government regulations; a history of early corporations, early land companies around 1800, which was my thesis at Columbia, which was published by the Commonwealth Fund.

Q. When did you first enter government service, Mr. Livermore?

A. I came to Washington the first time early in April, 1941, with the Office of Production Management, as it was called then.

Q. Did you serve with the Office of Production Management and its successor, the WPB, for several years?

A. Yes, I served right through until July of 1945, just prior to V-J Day.

Q. Then was there a period from 1945 onward when you were again in private industry or business?

A. Yes. I went to New York in the late summer of 1945 with Dun & Bradstreet Corporation, a large credit and business research firm, and was director of research in the division of that company which does private business research projects for fees on a competitive basis for a great variety of business clients.

Q. When did you again return to government service?

A. I was brought back in Economic Cooperation Administration, ECA, in February of 1949, to go directly to the [fol. 253] Paris headquarters with American Ambassador Harriman in what was called Special Representative in Europe of the ECA. I was their deputy director and afterward director of the program division for Europe of the ECA.

Q. What was the period of service in that position, sir?

A. I was in Paris two years, then back here six months with the administrator, Mr. Foster, until September, 1951.

Q. Then did you go from that assignment to your present assignment?

A. I didn't go directly because I did some work for the United States Air Force through what is called their Research and Development Corporation, which is war planning work. That is about as much as you can say about

it. Then partly because I had been working with the Defense Mobilization Office in ECA when I was here, I shifted over there. I had served there on the National Security Council as the representative of the Defense Mobilizer on the Security Council.

Q. When you first came with the Federal Government in 1941 with OPM, could you give us a brief description of what your duties were?

A. That is a difficult period to describe. The organization through the spring and summer and even the fall of 1941 was changing rapidly. It was, of course, before Pearl Harbor, before the outbreak of war, and work was being [fol. 254] done on a defense basis rather than a war basis. But in general there was a thread through there of what was called priority action, sometimes called the Division of Priorities. It had various names through that period. In all that period I was working for what could best be described, I think, as the administration of priorities for the economy.

Q. What particular materials or subjects were you dealing with in so far as priority orders go?

A. Mr. Stettinius, who was then director of the operations in this area of priorities, had a number of assistants. I was assigned to work with one or several of those assistants to him, and in the course of the spring and summer we dealt with the electronics industry, the railroad equipment industry, I remember lift trucks, even streetcar makers—all of whom came in puzzled and uncertain as to where to go for assistance, because in that period the Army and Navy—there was not then a separate Air Force—were giving priority ratings, as they were called, to manufacturers on orders for the Army and Navy, which were being extended all through the economy, and other manufacturers were running up against these preferences, you might say, on the books of mills and other suppliers and wanted to know how they could secure some similar assistance. So they came in asking for the grant or the right to use some kind of rating so that they could secure a place on the delivery books of steel mills and other sources.

[fol. 255] Q. During this period you were concerned in your official duties with what was known as "M" orders?

A. Yes.

Q. First, if you will, please, will you tell us what an "M" order is?

A. Yes. Really in that period there were two ideas in the development of the priority concept for industries. One idea was to give to the buyer of materials the right to put on his order a certain letter or symbol which would give him a preferred position. That is generally what we mean by a priority, something that a buyer puts on his order. It may be an order for just one thing from one supplier one time, which was the original idea. Then it may be given so that the same man can use it repetitively on successive orders without having to come back for authority each time. Those were generally known as the "P" order idea. In fact, a little form that was used to get a single priority for a single item was named P-1, the "P" meaning priority.

The other concept was one of working with the manufacturers or distributors of materials and controlling their sales; that is, working at the other side of the relationship, on the seller's side, and that series took the name "M" for materials and was a series directed to the manufacturers, producers, or sellers, telling them how to manage their business, that is, how to handle incoming orders and re- [fol. 256] quiring them to get approval, usually, before they could fill orders, approval of some one of the defense or afterwards wartime agencies.

Q. Among the "M" orders which you had some familiarity with from working on them at that time would be included nickel?

A. Yes, sir. The two that were most bothersome in the spring, in that period, were the nickel and tungsten orders because we were largely experimenting with methods and were using quite a lot of questionnaires, collecting a lot of information. So there was a great deal of pioneer work being done, and I was engaged in that.

Q. Toward the end of 1941 or the first of 1942 did your job change in any respect? Did you take on new duties, in other words?

A. I was always associated with the materials priorities throughout that year, but from September of 1941 I was able to secure permission to spend a good deal of my time with the mining branch which had then been set up. From

then until the end of 1941 I spent the major portion of my time in that division or branch.

Q. Did there come a time when you became connected with the Combined Raw Materials Board?

A. Yes. Right after Pearl Harbor, the declaration of war, this country and Great Britain formed the Combined [fol. 257] Raw Materials Board.

Q. What was the purpose of that board?

A. It was one of those personal agreements between Roosevelt and Churchill, certainly, and the idea was to eliminate quarrelling or competition between the two great allies in securing materials around the world, and of amicably dividing up the scarcities, the shortages. We had a staff on our side and a staff of British people. The board itself consisted only of two men, one for each side, legally, but each one had a staff behind him.

Q. You were on that staff for the United States' representative?

A. Yes.

Q. Then do I understand that the function of the board was to reach an agreement between the United States and Great Britain with respect to the division of the world's supply of materials needed for the war?

A. Yes. We were also interested in anything that could be done to increase supplies or to cut down consumption, and that occupied most of our energies in both directions, urging the other side to increase its efforts to get more supply and reduce demands, and criticizing one another's efforts.

Q. During your service with the WPB did you serve on what was known as the Requirements Committee of the War Production Board?

[fol. 258] A. Yes. The same group of people who had begun with the materials priority problems and then were assigned to the CRMB, Combined Raw Materials Board, also stayed together as a staff unit to assist the chairman of the Requirements Committee in WPB, which came into being early in 1942, also, and lasted right through to the end.

Q. Will you tell us briefly the function or the duty of the Requirements Committee?

A. That was to divide up the pie, as was used to be said

in slang. It listened to the demands of what were called claimant agencies, beginning with the Army, the Navy, the Foreign Economic Administration, and so on down.

Q. Claimant agencies?

A. Claimants, people who wanted a portion of the supply. It then listened to the forecasts of the supply division of the War Production Board, such as the steel, alloy metals, copper, aluminum and so on, leather later on, and lumber, and it argued with them as to how much the supply was going to be in the coming quarter. Then with those two sets of informations, the chairman was charged with the duty of bringing the two into balance.

Q. Would it be a fair statement then to say its function was to bring demand and supply as closely together as possible?

A. That is right.

Q. You came directly to the Review and Analysis Staff [fol. 259] of the Requirements Committee sometime in 1944, is that correct?

A. Yes. This staff that I speak of served both the Raw Materials Board and the Requirements Committee, and came to be known as the Review and Analysis Staff. It embodied people who dealt with certain end products later on as well as materials. Edwin B. George was the director of it. I succeeded him in June, 1944 and served for a little over a year.

I was also in that same period, 1944-1945, chairman of some of the working committees that served the Program Vice Chairman of the board, the so-called "B" Products Committee, the Program Adjustment Committee, which were lower courts, so to speak, and then I was finally vice chairman of the Requirements Committee itself in the spring of 1945.

Q. When you were director of the Review and Analysis Staff, how many people did you have serving under you at that time?

A. It had grown by then to be about ten people.

Q. Mr. Livermore, I show you Plaintiff's Exhibit No. 3 for identification, which purports to be a copy of Preference Rating Order No. 23, and ask you to look at that and tell us if that is a copy of that Order No. P-23.

A. Yes.

Q. Were you familiar with the preparation of that order [fol. 260] in 1941?

A. Yes, I was active in drafting this order.

Q. You took a leading part in the preparation of it, sir?

A. Yes. The manufacturers of mining machinery were one of these groups that I mentioned earlier who came in looking for guidance, particularly guidance as to whether they should abandon the manufacture of machinery and take war contracts for the Army and Navy, because they were slowly being squeezed out of their supply of specialty steels. It was as a result of discussion of this with my superiors, particularly Mr. Whiteside, that we drew up this order and proposed it for issuance.

Q. What was the date of its issuance?

A. July 29, 1941.

OFFERS IN EVIDENCE

Mr. Rigney: Plaintiff offers this in evidence. It is Exhibit No. 3 for identification.

Mr. Barnes: Subject to verification, I have no objection.

The Commissioner: It will be received in evidence.

(Said document, marked "Plaintiff's Exhibit No. 3," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Mr. Livermore, so that we will understand how this [fol. 261] order operated, could you tell us a little bit on that as to whom it was directed and its purpose in that respect?

A. It was one of the "P" orders that I mentioned, and by nature they were directed to certain buyers of a certain type or group. That remained true all through the series which later grew to a very large number.

The Commissioner: Just a minute. Is that document which you last offered a different document than the one which was marked for identification at pre-trial?

Mr. Rigney: No, this was the same document which was marked Exhibit No. 3 for identification.

The Commissioner: I didn't want a couple of sets.

Mr. Barnes: Here is the document which was physically marked at pre-trial. That is the one you were referring to.

Mr. Rigney: This is a copy of the document.

The Commissioner: We are going to get into trouble if you have copies marked one time and we have an original already marked for identification.

Mr. Rigney: I am sorry, Your Honor. Whatever your custom is here with respect to handling documents, I will follow.

The Commissioner: Since it is already offered for identification, you ought to stick to the original exhibit which was so offered.

Mr. Rigney: This copy which I showed to the witness is a true photostat, I can assure you, Your Honor, of the [fol. 262] document which was marked here last fall, Exhibit No. 3 for identification. So may the record reflect that I am showing the witness now the original which was marked Exhibit No. 3 for identification and I would like to ask the witness if that is the copy of Order No. P-23 issued in July of 1942.

Would you look at that, Mr. Livermore, and tell us if that is it?

The Witness: Yes, that is the same.

The Commissioner: I would suggest that you withdraw the other paper and have the reporter mark this in evidence. That was the reason I asked whether the original exhibits were here, so that they might be used.

Mr. Rigney: Yes; I am sorry. I misunderstood, Your Honor.

By Mr. Rigney:

Q. I think I was about to ask you, sir, to whom, to what class this particular order was addressed, the manufacturers, consumers or to whom?

A. It was addressed to the manufacturers of mining machinery as a class and then each one in that class would receive a copy of this from the OPM, as it then was, which entitled him to repetitively use this rate.

Q. Will you tell us what rating it assigned?

A. I believe it was an A-3, as they were then called. A-1 to A-10 was then the sequence.

[fol. 263] Q. So an A-3 would be a relatively high rating at that time?

A. That is right.

By Mr. Barnes:

Q. The A-1 ratings were further subdivided, were they not?

A. That is right.

By Mr. Rigney:

Q. Did the order make any distinction between the types of mining machinery which were to be produced?

A. No.

By the Commissioner:

Q. Just a minute. Getting back to that question about whether it was a relatively high rating, would you further explain your answer to that question relative to what?

A. That would be a matter of very elaborate discussion, I would say.

The Commissioner: I thought if counsel was going to make a point of the fact that it was a high rating, I want an explanation in here. I was with one of the government procuring agencies during the war.

Mr. Barnes: I was with WPB. I was going to raise the question if you hadn't, sir.

Mr. Rigney: You have that advantage over us, then, Mr. Barnes.

[fol. 264] The Witness: If I may be allowed to comment on this——

By the Commissioner:

Q. I have asked you a question.

A. I think this question would be, what was the relative position of ratings on July 29, 1941, or August 1 or some date, and that would be a question it would be impossible for anybody to answer. How many dollars worth of material were rated A-1 and how much A-10 and how much A-6 no one knows.

By Mr. Rigney:

Q. I wasn't seeking to establish that. What was the lowest rating provided at that time in "P" orders, if you know?

A. Oh, the basic arrangement at that period, the summer of 1941, was A-1 through A-10. The A-1's could be given additional letters by the Army and Navy.

Q. Do you recall how long this order was——

By the Commissioner:

Q. Is that what you meant when you said in answer to the question by counsel that it was a relatively high rating? You meant it was just high in relation, that it was closer to 1 than it was to 10?

A. That is right.

The Commissioner: All right.

By Mr. Rigney:

Q. Do you recall when this order P-23 expired or went [fol. 265] out of existence?

A. I believe it was at the end of the year 1941.

Q. Sometime in December of 1941?

A. It was replaced by an order known as P-56-A, as I remember.

Mr. Rigney: Plaintiff Homestake now offers in evidence Order No. P-56-A, Your Honor, which was Exhibit No. 5 for identification.

Mr. Barnes: The Defendant raises no objection.

The Commissioner: Admitted.

(Said document, marked "Plaintiffs' Exhibit No. 5," admitted in evidence and made a part of this record.)

Mr. Rigney: May this exhibit now be marked as a new exhibit, the next in numerical order?

(Said document was marked for identification as Plaintiffs' Exhibit No. 58.)

By Mr. Rigney:

Q. Mr. Livermore, I show you Plaintiffs' Exhibit No. 58 for identification and ask you what that document is.

A. This is Order No. P-22.

Q. Do you recall when that was issued?

A. I believe it was issued—as I remember it, it was issued after P-23 in spite of the numbering.

Q. If I suggest to you it was issued on September 9, 1941, [fol. 266] would you agree that that was correct?

A. Yes. Here it is, the ninth of September.

Mr. Rigney: Plaintiff Homestake will offer this in evidence.

Mr. Barnes: No objection.

The Commissioner: Admitted.

(Said document was marked for identification as Plaintiffs' Exhibit No. 58.)

Mr. Barnes: I might state parenthetically that I fail to see the materiality or relevance, but in view of your prior indication I am not going to raise that objection.

Mr. Rigney: I take it you don't want to hear me on that, Your Honor.

By Mr. Rigney:

Q. Mr. Livermore, was Exhibit No. 58, which is Order No. P-22, known as the General Repair Order?

A. Yes, I believe that was the title of it.

Q. To whom, generally speaking, did this order apply?

A. This was the first order, and it was the subject of very lengthy discussion at the time, addressed to a very wide class of buyers of materials. It has a long list of definition of recipients, those who were entitled to use the rating. This was the first effort to develop some system of providing generally or widely through the economy for assistance to enterprises in getting what you might call [fol. 267] their normal day-to-day needs of maintenance materials, repair, necessary repairs, and operating supplies. It was in connection with this order that we first began.

I remember the talk about the famous letters MRO, which mean Maintenance Repair and Operating supplies, which became one of the standard alphabetical terms later on. This was the first effort to establish a system of granting priority assistance to a very, very large group of people on a repetitive basis throughout the economy, so that they

could have help in getting what I have called or described those MRO items.

Q. Were mine operators included in those various occupations or businesses or industries covered by that order?

Mr. Barnes: Your Honor, the document speaks for itself. I object to it.

The Commissioner: The objection is sustained.

By Mr. Rigney:

Q. How long was P-22 in effect?

A. I don't remember the exact date, but it was succeeded by perhaps the most famous "P" order of all, P-100, which I believe came out right after Pearl Harbor, somewhere in there, the end of 1941.

Q. Sometime in December of 1941?

A. Yes.

Mr. Rigney: In order that these exhibits may go in in proper chronology, Your Honor, I would like to offer at this [fol. 268] time Plaintiffs' Exhibit No. 4 for identification, a copy of Preference Rating Order No. P-56.

Mr. Barnes: Subject to verification, no objection.

The Commissioner Admitted.

(Said document, marked "Plaintiffs' Exhibit No. 4," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Can you tell us whether or not P-56 was issued in September, 1941, Mr. Livermore?

A. Yes, I believe that is the date.

Mr. Rigney: May this be marked the next numerical number as a new exhibit?

(Said document was marked for identification as Plaintiffs' Exhibit No. 59.)

By Mr. Rigney:

Q. Mr. Livermore, I show you Plaintiffs' Exhibit No. 59 for identification and ask you if you will look at that, please, and tell us if that is a copy of Preference Rating Order No. 100.

A. Yes, I believe it is.

Q. Did I understand you to testify a moment ago that this Order P-100 was a successor order to P-22?

A. That is correct. I notice the date is December 18, 1941.

[fol. 269] Q. Thank you.

Mr. Rigney: Plaintiff offers this exhibit is evidence, Your Honor.

Mr. Barnes: Aside from the possible objection of relevancy, I have no objection.

The Commissioner: It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 59," admitted in evidence and made a part of this record.)

The Commissioner: We will recess until two o'clock.

(Thereupon, at 12:30 o'clock p.m., a recess was taken in the hearing until 2:00 o'clock p.m.)

[fol. 270] AFTERNOON SESSION

(The hearing was resumed, at the time above-mentioned, pursuant to the recess previously taken.)

SHAW LIVERMORE resumed the witness stand and was examined and testified as follows:

Direct examination (Resumed):

Mr. Rigney: With Your Honor's permission, may I read a short paragraph in Exhibit 59, Paragraph (a), on the first page, which starts, "Statement of Policy."

"It is the purpose of this order to effectuate the policy of the Supply Priorities and Allocations Board in maintaining governmental, charitable and industrial property located in the United States, its Territories and possessions, including the Philippine Islands, upon an adequate operating basis without expansion or improvement of facilities. Except where duly authorized or approved, the terms and conditions of this order are to be interpreted in conformity with this express policy."

By Mr. Rigney:

Q. Before the recess, Mr. Livermore, I had asked you about the issuance of Order P-56 in September of 1941, and I would like to ask you now if you can tell us if it is not the fact that that order, P-56, related solely and exclusively to mines?

[fol. 271] A. Yes, I believe it did.

Mr. Rigney: May this be marked in the next numerical order?

(Said document was marked for identification as Plaintiffs' Exhibit No. 60.)

Mr. Rigney: At this time, Your Honor, Plaintiff would like to offer Plaintiffs' Exhibit 60, it being the Revocation of Order FP-22, issued the 18th day of December, 1941.

Mr. Barnes: No objection.

The Commissioner: Admitted.

(Said Order FP-22, marked "Plaintiffs' Exhibit No. 60," admitted in evidence and made a part of this record.)

Mr. Barnes: The only question in my mind at the time was that I thought P-22 expired by its own terms.

No, I am sorry. It expired February 20, 1942.

Mr. Rigney: Unless sooner revoked.

Mr. Barnes: Right.

By Mr. Rigney:

Q. Mr. Livermore, I show you Plaintiffs' Exhibit 50 for identification, and ask you to look at that and tell us if that is a copy of a memorandum which you sent to Mr. E. B. George on October 20, 1941?

A. Yes, it is.

Mr. Rigney: Plaintiff offers this exhibit in evidence.

[fol. 272] (Document handed to Mr. Barnes.)

Mr. Rigney: I think we had better get straight with respect to what we are trying to do with these documents as they go in, because evidently we haven't made it clear to other counsel.

The Commissioner: We will go off the record a minute so you can get straightened out among yourselves, unless you want this on the record.

Mr. Rigney: I don't think there is any need to, no.

(Here followed discussion off the record.)

Mr. Barnes: No objection.

The Commissioner: It may be received.

(Said memorandum, dated 10-20-41, Livermore to George, marked "Plaintiffs' Exhibit No. 50," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Could you tell us, Mr. Livermore, what the occasion was for your writing this October 20 memo? Mr. George, I believe, was your superior, is that correct?

A. Yes, he was. He was my superior. But in addition to that, at the time this memo was written, he was the direct personal adviser to Donald Nelson on materials problems. Donald Nelson was at that time Director of the so-called SPAB, the Supply Priorities and Allocations Board, which was at that time the top policy body on matters of this nature.

[fol. 273] I wrote to him with the purpose of having it brought to the attention of Nelson. It sets out the confusion that existed——

Mr. Barnes: I object. The document is in evidence and speaks for itself.

Mr. Rigney: That is true, Your Honor. All that I sought to do was to establish by the man who wrote the document the situation out of which this document arose.

The Commissioner: I gather that the objection went to just the last couple of words.

Mr. Barnes: Yes.

The Commissioner: To what he was about to say.

Mr. Rigney: May I be permitted to ask him what his purpose was in sending this memo to Mr. George? I merely want to show what the situation was that this memo was directed toward.

The Commissioner: The best way to answer that is for you to ask the question, and we will see.

Mr. Rigney: Very well.

Will you read the question to him?

(The question referred to was read by the reporter.)

The Commissioner: Do you adopt that as your next question?

By Mr. Rigney:

Q. What was your purpose, Mr. Livermore, in sending [fol. 274] this memo to Mr. George?

Mr. Barnes: I object to that, Your Honor. The mental state of mind of the witness is in no way material, out of which the memo grew. The memorandum can have bearing only as it communicated his mental state to other people.

The Commissioner: I overrule the objection, and the question may be answered.

The Witness: I wanted Mr. George to bring before the Supply Priorities and Allocations Board the situation affecting gold mines. The picture was an entirely confused one due to the successive issuance of the orders that we have previously talked about. Machinery could be made by manufacturers using an A-3 rating. Mines, as such, were given an A-8 rating under P-56 to buy things from the other side, as distinct from the ability of manufacturers of machinery to get their materials.

Lastly, there had been the P-22 order, which gave a general A-10 rating to concerns in the United States who had no other particular rating under some other order. In other words, as far as the OPM administering its priority powers, there was quite a tangle existing.

I felt we couldn't untangle that until we had had a discussion of policy by the SPAB, the Supply Priorities and Allocations Board.

Mr. Rigney: Plaintiff now offers in evidence Exhibit 10 [fol. 275] for identification, the minutes of SPAB of November 18, 1941.

Mr. Barnes: No objection.

The Commissioner: Admitted.

(Said Minutes of SPAB of 11-18-41, marked "Plaintiffs' Exhibit No. 10," admitted in evidence and made a part of this record.)

Mr. Barnes: I would like to add a word of explanatory comment here, Your Honor.

I feel that a great many of these are possibly irrelevant and immaterial. However, in view of the nature of the

statement you made this morning on one of my objections, I am not going to raise that point each time when it seems to be in the same general category as the objection on which you ruled this morning. If I find that it becomes definitely less material in my mind, I will raise the objection.

The Commissioner: All right.

Mr. Rigney: With Your Honor's permission, I should like to read two paragraphs in this document.

Mr. Barnes: If Your Honor please, the document is in evidence. There is no need in cluttering up the record and taking time to read portions of it.

The Commissioner: I think that is generally true. I don't mind having emphasis drawn that way, if counsel wants to do that without reading too much of it.

Mr. Rigney: Yes. That is a problem that we are faced [fol. 276] with, as to how that could be handled. We thought that perhaps in some instances we could merely invite Your Honor's attention to the particular thing in the document, and there might be other occasions when we could read short excerpts from the document which were particularly pertinent.

The Commissioner: I might explain to counsel that I am going to read every word of this record at the proper time.

Mr. Rigney: I am sure you are, Your Honor.

I shall read, then, from page 6 of the document under Paragraph III, "Considerations":

"A general announcement of policy toward gold-mining is needed. Otherwise, specific administrative actions will be questioned by the mines as unfairly discriminatory. This is particularly necessary if the purchase of new machinery for gold production is to be virtually prohibited after November 30. A necessary preliminary to such a declaration would be a request to the Treasury for an immediate formal opinion on the significance of new gold production to monetary policy. It is to be emphasized that from a consumption of scarce materials standpoint, this whole issue is a minor one. Only about $7,000,000 of equipment, not including a lesser amount for repairs and maintenance, is involved annually at a maximum. Such importance as the issue possesses is largely political. It is

political from two opposing standpoints—that of popular [fol. 277] reaction to the continuation of an industry widely regarded as unnecessary (to the point of jocularity), and contrari-wise, that of the regional interests delineated in the report."

And a shorter paragraph:

"3. An alternative, and more drastic, policy would be to eliminate all domestic gold mines, whether lode or placer, from Order P-56, and also from the general repair Order, P-22. Gold mine operators would thus be forced to buy repairs and supplies without A-ratings, but could apply for special help on form PD-1. It is quite possible that only very gradual declines in output and employment would result, because of managerial ingenuity. Here again, exceptions could be made for mines producing other metals."

The Commissioner: Just one minute. At this point I am going to suggest that if counsel for the Government wants to have any other portion of any exhibit that is partially read, he may do it, and now would be the better time, it would seem to me.

Mr. Rigney: Surely.

(Mr. Barnes examining Plaintiffs' Exhibit 10.)

Mr. Barnes: I may take advantage of that at some later date, Your Honor. Certainly with respect to this document I have no intention at the moment of reading any additional portion.

[fol. 278] The Commissioner: All right.

By Mr. Rigney:

Q. Mr. Livermore, can you tell us what the significance was of Order P-100 about which you testified before lunch?

A. That was an order that was subject to a great deal of argument back and forth. On the one hand, I was interested in it, along with many other people, from the effect there would be on the supply of scarce and strategic materials. If all enterprises, all going business enterprises in the United States during the war—this was after Pearl Harbor—should be given the right to secure automatically, that is, without review, their needed maintenance, repair

and operating supplies, that concept that I mentioned this morning; there was one group of people in what was then the War Production Board by that time, who felt that this would be an unknown drain on the supply of alloy steel, alloy metals, rubber, and so forth. On the other hand, there was another group who felt that the amount needed under a strict definition of maintenance, repair and operating supplies, would be very small, and the difficulty of reviewing thousands or hundreds of thousands of pieces of paper, requests by business enterprises of all kinds, would be wasteful and unnecessary because the total, if all of them were approved, or if 5 per cent of them were rejected, would be so infinitesimal that it wouldn't be worth the burden on manpower and clerk time and on manpower [fol. 279] in all the companies scattered all through the United States making out applications, to warrant the effort. So the latter group prevailed, you might say, in terms, and subsequently in regulations under the Controlled Materials Plan later in the war whereby, with the exception of very few things, businesses in the United States during the war, during the entire period of the war, could, self-certify or automatically secure their needed maintenance, repair and operating supplies, each one of which was defined, of course, and usually a base period was specified by which they could measure the quantities.

That system operated all during the war, despite periodic concern about it.

Later in the war, when we had the Controlled Materials Plan, it was possible to find out how much steel and copper, for instance, and aluminum—those are the three big materials under the plant—how much of those went out under this automatic, self-certifying system. It was at the most slightly over 3 per cent of the ordinary steel, less than 2 per cent of the alloy steel, as I remember, and around 3 per cent or a little over of copper products, less than one-half of one per cent of brass and aluminum.

So when there were statistical returns available later on, long after this order had been first issued, P-100, it was clear that the danger to the economy was not nearly as [fol. 280] great as some people had feared that by establishing this power to self-certify a rating under the order, great damage was going to be done. There was another

factor in that order, and that is that at this time, that is, at the beginning of 1942, it was clear that for many types of metals, particularly, rubber, and some other things, the ordinary firm needing this maintenance and repair material would not be able to get anything at all without some rating, that is, whatever the lowest rating would be. It eventually turned out to be AA-5 under CMP, but I think at that time it was A-10. Anyway, whatever the lowest rating was. Everybody had to have some rating to get allotted materials, possibly because of the way our "M" orders operated. In many cases our "M" orders forbade suppliers or distributors to sell anything any part of their output, without some rating. They couldn't sell anything unrated.

So we had erected this mechanism of "M" orders which forbade people to sell unless the buyer had a rating, and therefore had to do something about legitimatizing or authorizing people to self-rate their orders so they would have some standing with the suppliers.

It was that concept of authenticity or self-rating which which lay behind this P-100, and it was to be applied to a very wide range of ordinary businesses on a sort of universal grant.

[fol. 281] Q. Was the possession of a rating, whether it be A-10 or AA-5, confining it to P-100—was the possession of a rating of A-10, which was the rating under P-100, dependent upon the business being essential to the war effort?

A. That requires careful consideration of what it is that is essential to the war effort in the country. I believe most people would agree that there was a very wide range of essentially underlying any total war.

Q. Let me ask you this? Was it limited to war industries?

A. Oh, no.

Q. The possession of this rating?

A. No. P-100 was quite definitely aimed at bringing in people who were not in the front rank of the munition industries.

Mr. Rigney: I should like to offer now, Your Honor, as the next exhibit in numerical sequence, a new exhibit, which

will be Plaintiffs' Exhibit No. 61, an Amended P-100, so that the record will be complete on that.

Mr. Barnes: Subject to verification, no objection.

(Said document was marked for identification as Plaintiffs' Exhibit No. 61.)

The Commissioner: Admitted.

(Said document, marked "Plaintiffs' Exhibit No. 61," admitted in evidence and made a part of this record.)

[fol. 282] Mr. Rigney: Plaintiff would like to offer as Exhibit No. 62, Your Honor, the revocation of Order P-100, which occurred on the 2nd day of April, 1943.

(Said document was marked for identification as Plaintiffs' Exhibit No. 62.)

Mr. Barnes: Subject to verification, no objection.

The Commissioner: Admitted.

(Said document, marked "Plaintiffs' Exhibit No. 62," admitted in evidence and made a part of this record.)

Mr. Barnes: We are in chronological order, I take it.

Mr. Rigney: Momentarily, yes.

By Mr. Rigney:

Q. You have referred, Mr. Livermore, to the Controlled Materials Plan, Regulation No. 5. When did that come into being?

A. The Controlled Materials Plan was the ultimate method of controlling the major materials of war. It came in partly in the second quarter of 1943, and was in full force in the third quarter of 1943.

Q. Was it the successor to P-100?

A. Yes. Well, if there were going to be a complete system, it required the inclusion within itself of methods by which everyone, every business operation, you might say, could obtain materials, because the plan purported to be, [fol. 283] under the direction of the Requirements Committee, the total distribution of the supply of steel, alloy steel, copper, brass, aluminum. Therefore, to fulfill that purpose it would be necessary for the plan to include regulations for all methods of obtaining steel, including this

automatic method that we were just discussing, the self-rating method.

Q. Will you tell us what the philosophy was behind CMP Regulation No. 5?

A. That was essentially the continuation of the idea that we discussed, of P-100, and I believe it replaced P-100. It was one of the major basic regulations of the Controlled Materials Plan, and it set forth how enterprises in general, of all types, would be enabled to get their maintenance, repair and operating needs of steel, alloy steel, and so on, under the CMP.

Q. Was CMP Regulation No. 5 in any way limited to essential war industries?

A. No. Hardly.

Q. Would you tell us a little bit about the scope of it in that respect?

A. By its nature, it was addressed to and intended to aid all businesses that were operating in the United States during the war. That was the intent of it, to be a blanket to cover everyone that was in business. The famous exceptions, of course, were households, if you could say that [fol. 284] a householder was a business. He was provided for in another way, and certain retailers were provided for in another regulation. But basically, it was the wholesaling, manufacturing, processing, and so forth, fields. There was a special provision for Government, as I remember it, another regulation for Government hospitals, and that sort of thing.

Q. Did this CMP No. 5 assign low priorities to many non-essential businesses and industries in so far as the war effort was concerned?

Mr. Barnes: I object unless we have a definition of essentiality, Your Honor.

Mr. Rigney: Your Honor, it seems to me that it is a rather general concept, a loose concept, and I don't know that any definition has ever been given of industries essential to the war effort as distinguished from all other industries. I think with this witness' background he could testify as to the scope of the various priority ratings that were assigned to various businesses generally.

The Commissioner: Let me hear that question again.

(The pending question was read by the reporter.)

The Commissioner: I am going to sustain the objection. You can ask him what kinds of businesses obtained priorities.

Mr. Rigney: I should like to offer at this time as our next exhibit, Plaintiffs' Exhibit 63, in evidence, this document. [fol. 285] (Said document was marked for identification as Plaintiffs' Exhibit No. 63.)

By Mr. Rigney:

Q. I show you Exhibit 63, Mr. Livermore, and ask you what that is? Is that a copy of the CMP Regulation No. 5?

A. Yes, it appears to be. It is a CCH publication.

Mr. Rigney: Your Honor, we will offer this in evidence now.

Mr. Barnes: Your Honor, the problem we face with the document Plaintiff has offered is that it contains the regulation as amended up to July 12, 1945. That, I might say, is the difficulty I have always run into. They do not retain the print of the regulation as originally issued.

The Commissioner: Are you willing to admit it subject to verification?

Mr. Barnes: It is obvious on the face of it, Your Honor, that unless Plaintiff is now talking about the regulation effective July, 1945, this has no bearing or application. It includes amendments, supplements, and everything else, issued prior to that date. It shows on its face, Your Honor, that the original regulation was issued February 9, 1943. Amendment No. 1 was issued April 6, 1943.

The Commissioner: Do you have the amendments there?

Mr. Barnes: We have the final text as of July, 1945, [fol. 286] here. We don't have the text of either the original regulation or the amended one. Revised regulation was issued May 14, 1943. Amendment No. 1 to that, June 8, 1943. Amendment No. 2, July 10, 1943. I can go on. I have only scratched the surface of the list of amendments.

Mr. Rigney: Your Honor, may I say that we would like to have this received, and we will endeavor to obtain the original and all amendments. We will make every effort to do that, and we intend to offer them.

Mr. Barnes: I point out to counsel that all the regulations and amendments are published in the Federal Regis-

ter and are available there. Under the Federal Register Act, the Court is required to take judicial notice of them.

Mr. Rigney: I would still like to put them in.

The Commissioner: It is convenient to have them in, but I have an objection with respect to the present form, unless you are willing to limit your offer to the regulation as it was in existence sometime in 1945, whenever that indicates on its face.

Mr. Rigney: I wouldn't want to be precluded by this offer from making an offer of the original and all amendments. I don't know whether I correctly understand what Your Honor just said.

The Commissioner: What I meant was, under the objection as I understood it, Mr. Barnes does not object if you [fol. 287] are offering it to show that this is the regulation, its text, at that time.

Mr. Rigney: At that time.

The Commissioner: Is that correct?

Mr. Barnes: That is right. If that is the purpose of his offer, however, I would like to point out that that is as of a date subsequent to the revocation of L-208, and therefore is immaterial.

Mr. Rigney: We wouldn't agree, of course, that because of its date it was immaterial. We would like to have it received as of the date that it carries, and we would like to ask Your Honor to take judicial notice of the original and all subsequent amendments in the Federal Register. I would like to show it to you.

The Commissioner: It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 63," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Would you look at the exhibit, Mr. Livermore, and tell us some of the businesses that were covered, so far as priority ratings are concerned, under that regulation?

Mr. Barnes: I object, Your Honor, unless the date to which the question relates is specified.

By Mr. Rigney:

Q. I will ask you this—I will withdraw the last question. [fol. 288] I direct your attention, Mr. Livermore, to Plaintiffs' Exhibit 63, and with that to refresh your recollection, can you testify as to what businesses and industries were covered in that original CMP No. 5 when it was issued in 1943 which are generally regarded as non-essential to the war effort?

Mr. Barnes: Your Honor, we are back at the same question of a definition of essentiality or non-essentiality. I make the same objection to this question. The witness has not been shown to have any qualifications to express what is generally considered to be non-essential to the war effort.

The Commissioner: I sustain that objection.

By Mr. Rigney:

Q. Let me ask you this, Mr. Livermore: When the original CMP regulation was issued in 1943, did it grant priority ratings available to vacation resorts?

A. We would have to read this through to find it. This gives a long list of operations. Incidentally, it indicates the dates in this copy when they were added.

Q. If that will assist you to fix the time, I think His Honor will permit you to do it.

A. I don't find that particular operation mentioned here.

Q. How about flower growers? Does it have any reference [fol. 289] to places of amusement?

A. I think they are all grouped in here together. I don't recall a separate designation. There is a long list of particular makers of products, such as lawnmowers, pens and pencils, and so on. It is more a product list than the nature of the business.

Q. They are all listed in the order, is that right?

A. Yes. There were purposely several pages of description.

Q. Can you tell us what the nature of the series of "L" orders was, which were issued by the WPB?

A. We haven't yet mentioned that. I believe we mentioned the "P" and "M" orders this morning.

Q. Right. You recall there was a series of "L" orders issued?

A. Yes.

Q. Can you tell us what their purpose was?

A. That series of orders began later than the "M" and "P," and were based on the concept of a third attack on saving materials. The word "L" meant "Limitation," and the idea was that in addition to forcing buyers to have ratings and sellers to be restricted in their rights to sell, subject to review under the "M" orders, that there would be another approach which would be to stop the incorporation of scarce materials into end products by limiting the [fol. 290] output of those end products so that, as a result, the demand would be killed off before it could get to the market place or get to the seller's books. In other words, you would go out and destroy the demand or limit it under a Limitation Order so that there would be less buying pressure from the buyers.

In other words, it was a third way of getting at the problem of shortage.

As I recall, in the fall of 1941 the idea was first addressed to the automobile industry, the idea being that in each automobile there was incorporated so much copper and steel, and even aluminum and a lot of scarce alloys, if we could only—this was prior to the war—if we could only induce or force a lower level of automobile production, there would be fewer of the product made and therefore less of the scarce materials would be used up or embodied in those products.

Q. Can you give us any other illustrations besides automobiles which were affected by the series of "L" orders?

A. There was a long, long series. Of course, the order that is under discussion here was in the series. I recall at the end of the war having to go through the whole list to propose those for revocation. It was an all-night job, running through the entire range of limitation orders.

Q. I think you testified that the "L" orders sought to achieve their purpose by limiting the end product which [fol. 291] embodied critical materials, is that correct.

A. That is right. That was the concept of the limitation order, to get at the products of industries, products which by their nature or by their method of construction

embodied the scarce things that we were trying to save during the war. It began with aluminum and went on down through rubber and steel, alloy steel, and copper.

The general idea was that, especially in the first two years, if a person could make a product out of wood or out of some product that was freely available, that he could get hold of, he could go ahead and make the product without the steel in it. There was a good deal of that element in it that we were going after products where, if not checked, the production would eat up in the end products a good deal of the scarce material.

Q. Are you familiar, Mr. Livermore, with Order L-208 which was issued October 8, 1942, and which closed down the gold mines in the United States?

A. Yes, I am.

Q. Can you tell us whether or not Order L-208 conformed to the purpose of the "L" order series?

Mr. Barnes: Your Honor, first may I have that question read? I am not sure I heard it correctly.

(The pending question was read by the reporter.)

Mr. Barnes: I object, Your Honor. No qualification of [fol. 292] the witness has been shown to answer that question. He wasn't asked whether he had the responsibility to assign numbers or classifications to these orders.

The Commissioner: I am going to sustain the objection to that question. I think it is not a proper question in any event.

Mr. Rigney: Very well, Your Honor.

By Mr. Rigney:

Q. Can you tell us, Mr. Livermore, whether or not any industry other than gold mining which did not consume critical materials in the production of its end product, as distinguished from consuming maintenance, repair and operating materials in its normal daily operations, was ordered closed down by WPB order?

Mr. Barnes: I object. The orders themselves would be the best evidence.

The Commissioner: Overruled.

The Witness: Not to my recollection, no.

By Mr. Rigney:

Q. Not to your knowledge?

A. Not to my knowledge.

Mr. Rigney: Very well, you may examine.

[fol. 293] Cross-examination.

By Mr. Barnes:

Q. Mr. Livermore, you referred to several people here that you were associated with. You mentioned the name of a Mr. Whiteside. Was that Arthur Whiteside?

A. Yes.

Q. Of Dun & Bradstreet?

A. That is right.

Q. What was his position in the War Production Board?

A. He was one of the several assistants to Mr. Stettinius.

Q. When?

A. In the spring of 1941, when I first came there.

Q. Did he sever his connection with the War Production Board shortly after that?

A. This was OPM at that time, Office of Production Management. He left the following November, then came back under the War Production Board to become director of civilian supply in, I think, early 1943. He had two terms down here, separated.

Q. You also referred to Mr. George. What was his position in 1941?

A. He was under a sort of civil service title, as director of the Materials Branch under Stacy May of the Statistics Bureau, as I remember.

Q. So he was in charge of the Statistics Bureau?

[fol. 294] A. That is right.

Q. And he was related to statistics relating to materials?

A. That is right.

Q. Harvey Anderson had the Materials Bureau from the operations standpoint?

A. I don't believe so. Pardon me; I think he was a member of the legal staff. In 1942 he may have become that.

Q. Who was in charge of the Combined Raw Materials Board?

A. Bill Batt, William L. Batt.

Q. Did he continue in that position? I don't mean actually chairman; was he an American representative?

A. Yes, he stayed in all through the war.

Q. What about the Requirements Committee? There were successive chairmen there, were there not?

A. That is right. Batt was the first chairman.

Q. When was the Requirements Committee set up, incidentally?

A. Either January or February, 1942. I forget which.

Q. How long did Mr. Batt remain chairman? It was a matter of only a few months, wasn't it?

A. Until May or June.

Q. Who succeeded him?

A. Mr. Knowlson, who was president of Stewart Warner.

[fol. 295] Q. He became director of industry operations, isn't that correct?

A. Not for that job.

Q. That was another title he had?

A. He was given that special designation.

Q. Who succeeded him, if you recall?

A. Ferdinand Eberstadt.

Q. You have drawn in your testimony a very clear line between "L" and "M" orders. Was there in practice as clear a line as that actually drawn between them? I am thinking of an order such as M-9, which related to copper, did it not?

A. Yes, I think even better is the one on steel.

Q. M-126?

A. That was the one that took so much work.

Q. What did those orders do in substance? Were those the same type of "M" orders you previously described?

A. Yes. They put into one order what would have been a whole tremendous series of little "L" orders; it named whole lists of products in which copper or steel should not be used. The "M" order was used as the vehicle for publicizing that prohibition rather than issuing a whole series of orders, which would have gone up into the hundreds of "L" orders.

Q. Did you have anything to do with M-126, for example?

A. Very much so.

[fol. 296] Q. Did you recall that the Sears Roebuck catalog was used as one of the bases for the list?

A. That is right. The effort to get completeness was thought to be very important. I never thought that it was myself because I thought amendments could have been issued to cover anything that they had forgotten.

Q. Wasn't there another form of "M" order? I am thinking particularly of M-1 relating to aluminum and one of its subsequent amendments, which listed the permissive uses of aluminum and saying it could be used in no other application. Do you recall such an order as that?

A. Yes, but I think you will find that the idea there was to put upon the seller, mostly the Aluminum Company of America in that period, the primary obligation of not letting its product go out into any of the uses or to any buyers not only who didn't have the right ratings but also who might be abusing the ratings. The idea was to get a double interest in endorsing the uses of aluminum or limiting the use of aluminum by making the seller as much legally interested in it as the buyer.

Q. Under many of these orders, whether "L" or "M," certain articles could not be made or, if made, could not be used in certain types of materials, regardless of priority ratings?

A. That was the concept of the "L" order, yes, to get [fol. 297] at the actual making of the things before anybody ever tried to get a rating for it or tried to sell it.

Q. It also was M-9 and copper M-126 and steel, was it not?

A. Yes, in the sense that those were aggregations of little "L" orders which it was convenient to put under that order.

Q. Wasn't one of the basic criticisms of the priority system, particularly in the early days, the fact that a priority was sometimes called a hunting license?

Mr. Rigney: If Your Honor, please, I think that is objectionable. Basic criticisms—I don't know by whom. I think he should specify.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Did you ever hear a priority described as a hunting license, Mr. Livermore?

A. Certainly. I have read it.

Q. Frequently?

A. No.

Q. Who did you ever hear describe it as a hunting license?

A. I couldn't recall anybody in particular.

Q. Did you ever describe it in those terms?

A. I never did, no.

[fol. 298] Q. Did a priority guarantee anybody materials?

A. It did, and it didn't depending upon the time and the material.

Q. And the priority?

A. Yes. You say at a certain time it was requested by the buyer, or the time that the seller proposed furnishing it. If there were enough time, I think the answer would be yes.

Q. If time were not a factor, you wouldn't need to worry about priorities because you could obtain your materials, is that correct?

Mr. Rigney: That is objectionable, as argumentative.

The Commissioner: I would like to ask a question.

By the Commissioner:

Q. How was it that this CMP program came along? What caused that?

A. It was precisely to get at the problem of the quantity of materials being given to somebody in a certain quarter, in a certain three months' period. CMP in a sense was not a priority system. In slang it was called a ticket system. I, as a buyer, would be given a ticket, so called, or form, entitling me to buy ten tons of steel in, let's say, January, February or March, the first quarter of 1953. That ticket could be cashed, as the slang term was, at the steel mill in that particular three months' period. That was the basic [fol. 299] concept of CMP, a time period, a number of tickets that was no greater than the supply that was to be available, so that all tickets would be good or cashable in the particular time period.

Q. Did it take the place or supplement what had been done with respect to priorities up to that time?

A. It took the place of priorities with respect to what was known as the three major materials, steel and alloy steel together, copper and brass together as copper, and aluminum. The suppliers of those three things really didn't have to bother about priorities after CMP came in because they knew that the number of tickets coming in would equal what they could produce, with of a course a few rough edges which the Requirements Committee didn't straighten out. Basically the supply met the demand so that everybody was the same. In other words, everybody was on a completely equal basis who had a ticket. All they needed was a ticket.

Q. Then the next question——

A. Pardon me. I want to finish. Other products than those things still utilized priorities. The grading of priorities for semi-fabricated products or products that were to be put through some manufacturing process were still necessary, because in order to arrange a delivery book and a timing and to have relative urgency, you had to have some priorities used even after CMP.

[fol. 300] Q. Even at the time CMP was proposed there must have been some shortcoming in the application of your priority system with respect to copper, steel and aluminum.

A. Yes. It was because there was no check through 1942, no statistical knowledge of the amount of material that was wanted by people who were in the buying position. There was no way to assemble statistically the knowledge of how much in quantity at certain times those people wanted. CMP was designed to cure that by forcing everybody to file ahead of time. CMP looked over the demand, then adjusted it down and issued valid tickets. It looked at the supply and used that as the basis for an adjustment of the tickets that were issued, and no more tickets were issued than could be met out of the supply after CMP was established.

Q. Then as I understand your testimony, to the extent that it applied to copper, steel, and aluminum, the CMP program took the place of the priority system that had been in effect?

A. That is essentially correct.

Q. But the priority system still applied to manufactured goods?

A. That is correct, and to many hundreds of other products that were manufactured.

By Mr. Barnes:

Q. There were throughout the period of the war inven-
[fol. 301] tory controls on all materials, were there not?

A. Inventory regulations.

Q. Limiting the size of inventory. To your knowledge do you know whether it was felt that the control under CMP of copper and brass, steel and aluminum would give indirect control of other materials?

Mr. Rigney: I think, Your Honor, that is objectionable.

The Commissioner: Yes.

By Mr. Barnes:

Q. You said you had a great deal to do with the drawing of P-23, Mr. Livermore. When was that?

A. During July of 1941.

Q. Were you working alone on that or were you working with other people?

A. I had an assistant, a young fellow. I don't recall that we had any particular person assigned to us from Mr. O'Brian, the general counsel's office.

Q. Was there any attorney who worked with you or consulted with you?

A. Not at that particular time. Later on I had contact with a great many of them, in the fall, but I couldn't say for sure. There must have been someone, of course.

Q. Was there anybody in any of the materials branches with whom you consulted?

A. Oh, yes.

[fol. 302] Q. Who?

A. The people who were concerned with nickel, particularly, nickel steel, and in the steel division.

Q. Who were they?

A. I would have to go back and sort out names by periods. I am not sure that I can do it.

I wouldn't be certain. There were many, many men in

that period that I worked with all through the following years of the war.

Q. Did you work with Harvey Anderson?

A. I don't recall.

Q. You referred to the fact that the A-3 rating that was assigned by that order was fairly high. The Army and Navy in that period of time in 1941 had the right to assign A-1 ratings to all their purchases, is that right?

A. Yes. I think I meant in terms of non-military. That was the way it came to my mind. This was an order in a group dealing with products that were not materiel as we called it, or munitions.

Q. Incidentally, there came a time, did there, when there was a shift made from the A-1 to A-10 series that you described to a different series of numbers?

A. Reform of currency, yes.

Q. When was that?

A. I don't remember. I would have to refresh my mem-
[fol. 303] ory.

Q. It was sometime in 1942?

A. Yes.

Q. After Pearl Harbor?

A. Right after Pearl Harbor, I believe.

Q. What caused that change?

A. That was to start over and keep some quantitative limit on the matter that I was just discussing with His Honor. The question of the volume of orders that were out with priorities attached could only be attacked by invalidating old sequences and then establishing a new one.

Q. Those bore double A designations and then numbers from 1 to 5, is that correct?

A. Yes. I believe that was the system that ran on through to the end, the AA-1, 2, 2X, 3, 4, and 5. I think AA-5 was substantially in the last two years of the war the lowest rating.

Q. I noticed that both P-22 and P-100 referred to an A-10 rating. That was the lowest rating?

A. I think it was intended to be the bottom.

By the Commissioner:

Q. Up until the CMP came along did you know how effective the rating system was with respect to keeping people from buying any particular material?

Before you answer it, I will tell you the reason I ask [fol. 304] the question. I wondered if you people in WPB knew whether a person with an A-10 rating was able to buy anything.

A. I see what you mean. I think I can answer it this way: The fundnamental flaw in the original priority system before CMP was the extensive privilege, the power of extending the rating back to the suppliers by a person who was given the authority to use the rating. He could extend it back with no particular check on the quantities that he applied in a given time period.

He might have in mind the idea of making so many anti-aircraft guns for the Army, and he would make a rough guess that he would be making so many during, say, the next summer. He would then make a rough calculation of how much steel he ought to have coming in to his plant. He would naturally err on the excessive side and would presumably, in order to protect his manufacturing operations, order perhaps a quarter or perhaps a third more than he really needed to have come in during that cycle of manufacture.

Then he would be placing other orders out for the number of tons he would be making in October, November and December. He was always on the safe side in terms of quantity and time on the steel mills. So you had a natural tendency of the system to inflate itself by the natural care and concern of businessmen that they wouldn't shut down on some very vital order for the Army and Navy.

[fol. 305] In other words, there was a higher volume of orders with high priorities on them flowing into the steel mills than was really needed to execute contracts. CMP substituted for that a careful contract time schedule, a careful translation of exactly how much steel, and then this ticket system which absolutely limited the amount that he could place.

Q. I wondered what was the effect of that inflation of orders that you spoke of on the person who was trying to get by with an A-10 rating.

A. It would tend, of course, to put orders on the books carrying very high ratings, A-1a's, A-1b's, and so on, so-called military ratings. Those tended to crowd up the books and make it difficult to get the lower 7, 8, 9 and 10 ratings into the delivery schedule.

Everyone recognized this difficulty, and very often what happened was that the man who put an order in with a very high rating would refuse to take it on the ground that he was violating inventory regulations. Then there would suddenly become steel available for the A-8, 9 and 10 at the last minute because the high-rated people refused to take any more deliveries, although they had the higher rating.

They would say, "No, thanks, don't send us any more because if we do accept it we will violate inventory regulations." Then would then say, "We can divert that down to the people with the lower ratings that we have been [fol. 306] holding off here and postponing month by month, pushing off into the future."

By Mr. Barnes:

Q. Incidentally, Mr. Livermore, did you have anything to do with the actual preparation of either P-22 or P-100?

A. Yes, I did, because Dave Novick was one of the chief workers in that and he happened to be an associate of mine in the same group that I spoke of. He afterwards was the Controller of the Board.

P-100—of course I think everybody had something to do with that because it was quite a basic step to be taken. The principle that it laid down never abandoned even during the whole rest of the war. Therefore it attracted a tremendous amount of interest.

Q. I take it from your description that you reported to your immediate superior in 1941, Mr. George, is that correct?

A. That is correct.

Q. Who was his superior?

A. Mr. May, Stacy May.

Q. Who was his superior?

A. I believe it is called the Bureau of Statistics or some such title. We would have to look it up. We could find it if you want to get it.

Q. Did Robert Nathan fit into that?

[fol. 307] A. Yes, Bob was there. One reason for this was that Stacy offered to provide staff at a period when we were building up very rapidly and it was impossible to get people. We were loaned—I was actually loaned, of course, to the Stettinius wing, subject to recall at any time. That was true of Dave Novick and several others.

Q. In this memorandum that you wrote to Mr. George, dated October 20, 1941, you referred to the fact that you felt that a decision as to the essential nature of gold mining operations should be made by the staff.

A. Yes, because they were obviously the body at that time.

Q. They were the top policy-making body at that time?

A. Yes.

Q. After you wrote that memorandum did you have any further contact with that particular subject?

A. Oh, yes. As I remember, I helped Mr. George prepare material for Nelson to use at the meeting.

Q. Did that include this report, Status of Gold Mining, which is Plaintiffs' Exhibit No. 10 for identification?

A. No. It dealt mostly with more detail of the situation than these orders mentioned in my memo.

Q. Have you ever seen that document before, Plaintiffs' Exhibit No. 10?

A. Yes.

[fol. 308] Q. Who prepared that, do you know?

A. No. I think it was a composite of the secretariat, a composite of a number of memos that were prepared on this at the time, as I remember.

Q. Do you know who edited it or compiled it?

A. I don't think so.

Q. When did you see it?

A. When I was reviewing the materials here, refreshing my memory.

Q. Did you see it at any time in 1941 or 1942, to your recollection?

A. I must have, because I read SPAB minutes quite regularly. I don't recall it specifically. I couldn't say absolutely. I used to read from September through Christmas. We would have these minutes of all the meetings

they dealt with materials. I remember reading the ones on nickel particularly, for instance, more than this.

Q. You said that after you wrote your original memorandum to Mr. George in October you did some more work on the question of the scope of orders, is that correct?

A. Yes, of P-23 and P-56, and P-22: that general subject of the memorandum. It was not a particularly praiseworthy situation for the orders to be in.

Q. Do you recall meeting with representatives of the Treasury Department and the Federal Reserve System, on [fol. 309] the question of gold mining in November of 1941?

A. I believe I went to one meeting with Mr. Burleigh in the State Department about foreign mining, but I don't recall particularly who was there from the Treasury.

Q. Do you recall anybody in OPM called L. A. Morrison?

A. No.

Q. Dennis Pickens?

A. Yes.

Q. What was his position?

A. Dennis worked with myself and under Dr. Wilbur Nelson in the Mining Branch beginning in September of 1941. I believe he left soon after Pearl Harbor.

Q. Do you know anybody in Treasury named Frank Coe?

A. I know him, but I don't recall his being at the meeting.

Q. Do you know anybody in the Federal Reserve named Walter Gardner?

A. I couldn't be sure.

Q. Charles Kindleberger?

A. I know Charley, yes.

Q. Did you ever attend a meeting with him?

A. I wouldn't know whether he was at that meeting or not. I have known him in subsequent years very well

Q. Did you ever receive any policy direction that came or purported to come from SPAB as to what was to be [fol. 310] done with respect to gold mining after you wrote that memorandum?

A. No.

Q. You never did?

A. Not that I ever saw.

The Commissioner: We will recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearing.)

By Mr. Barnes:

Q. Mr. Livermore, would it be correct to say that in some cases "L" orders were issued requiring the cessation of the production of certain items with a view to the facilities used for the production of those items in at least equal part with the materials consumed?

Mr. Rigney: If Your Honor please, I am sorry, I didn't catch that. May I have that read back?

The Commissioner: Yes.

(The pending question was read.)

Mr. Rigney: I have an objection to the form of the question. It is ambiguous, I think, Your Honor.

The Commissioner: I don't think it is.

You may answer.

The Witness: I don't think it would be correct in a strict legal sense, because I think the specific objectives, as I recall them, under the various acts empowering the War Production Board, and so on, to do things, were for the [fol. 311] purpose of saving the scarce materials.

By Mr. Barnes:

Q. If I told you the statute said materials or facilities, would that change your opinion?

A. What is that?

Q. If I told you the statute says materials or facilities, would that change your opinion?

A. Yes. I would want to read the statute.

Q. In other words, your hesitation now comes from a doubt in your mind as to the extent to which the statutory authority applies to facilities, is that right?

A. Yes. The reason is that I recall the statute gave the power of commandeering or seizing facilities.

Mr. Rigney: Which statute is that?

By Mr. Barnes:

Q. Which statute are you talking about now?

A. This is just layman's general knowledge, the War Powers Acts, the first or second.

Mr. Barnes: The Requisitions Act is the Act of October 16, 1941, 5 Statute 741, which is the one the witness is referring to now, I take it. I can't remember all the statutes, but that is one I happen to have had some litigation about. That is the Requisitions Act. Title IX is the Selective Service Act which is a different one, Your Honor.

[fol. 312] By Mr. Barnes:

Q. Mr. Livermore, did your contact continue primarily with the mining division after 1941?

A. Because of the work I was doing on the alloy metals with the Combined Raw Materials Board and the Requirements Committee, that is, on nickel, chromium, tungsten, molybdenum, and so on—there must have been about six—I was in contact with the divisions that were responsible for the supply or were worrying about the supply of those alloys, and with the portion of the steel division particularly that had charge of tool steels and alloy steels because they were the primary consumers.

It was with those people that I was working on this problem of supply versus demand. So I kept in personal touch with all those divisions, and because they had a relationship with the mining branch I maintained my contact there. I also maintained a quite constant relationship with the mining machinery manufacturers right through until 1945 because I was often asked to attend meetings.

Q. What direct contact, if any, did you have with the discussion leading up to the issuance of L-208 after, say, December 31, 1941?

A. In the first part of that period, right after Pearl Harbor, I was still very much concerned about the problem of the status of gold mining, for the simple reason that, which [fol. 313] I think is obvious here, that, potentially there was a use of materials in that industry which would contribute to shortage. My conclusion at that time was that the correct procedure would be to leave the gold mines in the general category of industries that were entitled to

minimum assistance under the MRO philosophy or MRO concept that we discussed this morning, and that that would bring them down to the minimum level that a great many other industries were operating on it.

Q. The period of time you are referring to was sometime after you were assigned to the staff of the Combined Raw Materials Board, is that right?

A. No, just at the time, during the first month or two, during the transition, at the time P-100 was issued. That brought out the problem of what could best be done with an industry of this nature.

Q. After the issuance of P-100 what contact, if any, did you have with the discussions relating to the possibility of closing the gold mines?

A. In volume it was a great deal, particularly with Dr. Wilbur Nelson, and with Mr. George with whom I worked all through that year, 1952. I was not in any official capacity, such as member of a clearance committee or anything like that. This was one of the subjects in which everyone engaged, incidentally, as we will see later, I guess.

Q. Incidentally, you referred a minute ago to the possible [fol. 314] use by the gold mines of critical materials. Did you make any study at that time of what that was in dollar volume?

A. I tried to, particularly in connection with the SPAB meetings and subsequent discussions, I tried to get an idea of the supplies that might be used by the industries.

Q. Do you recall what source you went to for that information?

A. We had contact with the Bureau of Mines; I did on nickel and tungsten matters. I remember discussing it with one or two men over there. I talked to some of the machinery figures. I remember we used to get into that discussion when we would have general talks about mining. It was a very unsatisfactory field, I might say.

Q. Do you know that the Bureau of the Census in 1939 made a study of the mineral industries?

A. Oh, yes.

Q. Did you study that?

A. I remember that we did, yes. Anything that was available to our people.

Q. What do you mean, "your people"? Did you have people working with you there?

A. There were a number of people who had been loaned. I can't recall their names. There were people who had been loaned over from the Bureau of Mines to OPM and WPB [fol. 315] who were spotted around.

Q. On direct examination you were asked a number of questions. You were asked one specific question, whether something was essential to the war effort, and you said that would lead to a very complicated discussion as to what you mean by essentiality to the war effort. Is that something broader in your mind than military production?

A. I will tell you, I can do it and make it as brief as possible. I believe our experience during the war showed that the correct way to approach this I am engaged in, incidentally now, in my own present activities—the correct way to approach the problem of war planning and the distribution of materials is not to take the military needs first, but to take the rest of the economy, the supporting economy first, and decide what the minimum needs for that are to support a war. Once that is determined, that leaves then a certain balance for the military.

That, I believe, is accepted by most of the so-called experts on war planning, both here and in Great Britain, as a result of our experience in the second war.

Q. Was that the view taken in 1941 and 1942?

A. It was in an inchoate form. That is, we were moving toward that all the time in our group of people who were worrying about the requirements, demand and supply problem. If that is true, of course, then what is es- [fol. 316] sential is the economy as a working mechanism. The total setup of your economy is going to lie underneath your military effort.

Q. That includes, then, what we sometimes call the essential civilian?

A. Yes, various words, yes. We tend to call it now war supporting economy, and including everything in that.

Q. When Mr. Whiteside, for example, returned to the War Production Board in charge of civilian supply, I take it that his function was to act as a claimant for that supporting economy, is that correct?

A. That is right, particularly against the Armed Services. The Armed Services, I don't believe, accepted this view at all. I am quite sure that many leaders of the Army and Navy took just the reverse position, that everything belonged to the military until it could be proven otherwise, which of course I certainly and I think most of my associates fall valiently against that conception.

Q. Incidentally, along with the Requirements Committee, wasn't there a committee called the Planning Committee?

A. Yes.

Q. What was its function?

A. It was a committee reporting personally to Donald Nelson as chairman of the War Production Board, to worry about future crises before they happened.

Q. Did you have any contact with that committee?

[fol. 317] A. I was interviewed by their staff on several subjects, yes. I knew the members quite well.

Q. Who was the chairman of that committee?

A. I guess Bob Nathan was.

Q. I think he was.

A. I think he was chairman. Tom Blaisdell was a member and Fred Searls at one time. I have forgotten the others.

Q. In your consideration of these various problems relating to gold mining, did you give any consideration to the essentiality of gold mining to the war economy, or of gold?

A. Yes, I remember considering it a good deal. Of course, there were many other items that had discussion, such as that we had great discussions about soft drinks. One of the greatest arguments in the war was about bobby pins for young ladies, whether they were essential or not. It was simply one of a series of products or activities that were always being argued back and forth regarding their essentiality. I don't think we gave it any more attention in the discussion, at least I didn't, than some of those others.

Q. Do you know of any uses to which gold could have been put in the war economy or to which it was put?

A. Oh, I think if we had been engaged in a very long war, gold would have been a very important thing to have.

[fol. 318] We were running an unfavorable trade balance all during the war. In other words, we were importing more than we were exporting. If the war had gone badly for the United States and had been prolonged for another five or seven years, a long world struggle, gold would certainly have been useful to us in acquiring raw materials.

Q. Aside from that, do you know of any other possible consideration or application of it?

A. I think obviously some of its so-called uses are essential.

Q. Do you have any idea how much it is used in industry?

A. Very little, very slight. The first consideration is the only one that I remember discussing at any length, that is, the position of the country in case of a long, drawn out exhausting war, in which we would need the ability to attract raw materials, something with which to buy raw materials from third countries or from our allies.

Q. I take it that during that period the more critical materials were the ones that eventually were used as controls by CMP, steel, copper, steel alloy, rubber, and aluminum.

A. They were the best means of adjusting the economy, let us say, to demand and supply. If you control a man's steel uses, you automatically control the amount of rubber and things that he uses in his product, steel being the [fol. 319] essential or main product.

Q. Did you in all your consideration of this gold problem make every attempt to secure the best informed information you could, whether statistical or anything else?

A. Oh, yes. I was one of a group of people working on this. I think I did my share to assemble all the information. I don't think at any time I was responsible for all of it.

Mr. Barnes: That is all.

The Commissioner: Are there any other questions by any of the other attorneys? (No response.)

Redirect examination.

By Mr. Rigney:

Q. Dr. Livermore, as far as you know, was there ever an official definition or declaration by Congress or by any

policy-making branch of the Executive Department as to what an essential war industry was or what was an industry essential to the war effort?

A. I don't think so. It would have stopped a lot of battle here if there ever had been.

Q. Can you tell us, Dr. Livermore, whether or not on October 8, 1942, critical materials for defense ordinarily used to operate and maintain gold mines were subject to allocation and restriction by virtue of priority regulations duly issued by the War Production Board under the War [fol. 320] Powers Acts and said regulations and effective orders? Would you like to have the question read?

A. I didn't quite get the point of that. Would you read the first part again?

Q. Yes. I am asking whether or not on October 8, 1942, critical materials for defense which were ordinarily used in the operation and maintenance of gold mines were subject to allocation and restriction under the WPB powers. Were those critical materials which in normal operations would be used in gold mining, subject to allocation?

A. Yes.

Mr. Barnes: I object, first on the ground it is improper redirect, and second on the ground the form of the question is leading.

Mr. Rigney: I submit the question is, Can he tell us whether or not these critical materials ordinarily used in gold mining were subject to WPB allocation. I don't think that is leading.

The Commissioner: Overruled.

The Witness: Yes, there must have been at least one material or several that were. I think zinc, for instance.

By Mr. Rigney:

Q. How about steel?

A. Tool steels, yes, of course.

Q. How about copper?

[fol. 321] A. Copper was under allocation at that time.

Q. In the course of your examination by counsel for the Government, you referred to this concept of the support which the civilian economy can maintain in time of war as being the concept that must first be determined before the

military capabilities can be arrived at. I want to ask you whether or not Order L-208 was consistent with that concept.

Mr. Barnes: Could I have the question read again?

(The question was read by the reporter.)

By Mr. Rigney:

Q. Was it consistent or was it contrary to that concept?

A. I don't think it was, as a matter of opinion.

Q. You don't think it was consistent with it or you don't think it was contrary to it?

A. I don't think it was consistent with the idea of a supporting economy running at minimum level during the war. There are a lot of reasons for it.

Q. Do you know, Dr. Livermore, whether the United States exported any gold during the period of World War II?

A. Oh, yes, we did, very much so.

Q. Do you know whether or not gold was used during World War II to procure articles for import into the United States during that period?

A. In technical jargon, we were running an unfavorable [fol. 322] balance. That is, we were buying more than we were selling. The settlement for that still is and was in those days with almost every country the settling of the balance by gold shipment. Some of it was merely transferred in New York from one owner to another, but essentially it was a shipment abroad to settle our accounts with other countries.

Q. Were there instances where in some parts of the world goods needed by the United States in the course of the war could be obtained in return for any other commodity or medium of exchange?

Mr. Barnes: I object, Your Honor, both to the form of the question being leading and to the fact that no qualification of the witness has been shown on that subject.

The Commissioner: Overruled.

The Witness: I don't think I can quite answer that question in a direct sense. Was there somebody who had something who wouldn't give it up for anything except

gold? I don't think anybody could answer that. I think what was true was that——

The Commissioner: If you can't answer that question, what are you answering?

The Witness: I was going to stop at that point.

By Mr. Rigney:

Q. Do you know whether or not there were any instances when the United States used gold during World War II to [fol. 323] procure commodities or goods which couldn't have been procured by any other means?

A. I only know by secondary knowledge. I think particularly——

Mr. Barnes: I object to any statements from secondary knowledge, Your Honor. It is hearsay.

Mr. Rigney: I don't know whether his reference to secondary knowledge really is hearsay. Maybe it isn't hearsay.

The Commissioner: Let's find out what it is.

Mr. Rigney: He is an economist. I think he might well be able to testify on the basis of his knowledge, the source of his knowledge, on this point.

Mr. Barnes: I object to any further examination along this line unless the source of the witness's knowledge is first disclosed.

The Commissioner: I think that objection is valid.

By Mr. Rigney:

Q. Will you tell us, Dr. Livermore, of such knowledge as you have on this subject and the source thereof?

A. I think it is general knowledge that economists, not only me, but others, would have that in a situation where this country desires to buy more from, let's say, Afghanistan or Nigeria or some there than we are selling them, the thing we offer successfully all the time, not only during war but now and for hundreds of years, is the shipment of gold. [fol. 324] Actually, today dollars are used interchangeably with gold, so we say we will give you dollars, and traders and governments and banks abroad know that they can convert dollars into gold freely, so the promise is equivalent.

In other words, it is a general attitude that where we

were trying to get more commodities than we were shipping in return, the universal method of settling the difference has been and was in the war and is still gold shipment.

Mr. Rigney: That is all.

Recross-examination.

By Mr. Barnes:

Q. Dr. Livermore, to your knowledge, what critical materials were used in the maintenance and operation of gold mines in 1941 and 1942?

A. In the maintenance, repair and operating supply category?

Q. You were asked about maintenance and operation of gold mines by counsel. You were asked whether critical materials used in the maintenance and operation of gold mines were under priority or other WPB control.

A. I know now and I happened to know we were considering then the use of zinc dust, the use of copper wire, the use of very small quantities of mercury, the use of various grades of steel.

Q. Including alloy steel?

[fol. 325] A. Yes, including some that would qualify as alloy steel. That would be particularly in repair parts. I have no knowledge about aluminum.

Q. What about drill steel? Would that be an alloy steel?

A. It is or isn't. It depends. It can be either plain carbon steel.

Q. Wouldn't it be correct to say, Dr. Livermore, that in almost every case of the issuance of an "L" order, the critical materials involved either in the manufacture of the item or in the maintenance and repair work in the industries were under WPB control?

A. I don't want to answer that with "maintenance and repair in" because the "L" orders were not directed to that.

[fol. 326] Q. All right. But they still had the effect of cutting out any maintenance, repair, and operating supplies from those industries, did they not?

A. Not necessarily.

Q. They did for that industry if it wanted to continue in that particular line of production, unless it converted to some other line?

A. The MRO goes with the plant operation, not with the particular product.

Q. If a plant was making a bicycle, let us say.

A. Oh, yes. With that distinction drawn, that is, where the product of the industry was restricted by an "L" order, it was because there was an effort being made to reduce the use of something that was under allocation.

Q. That same material was also under allocation?

A. Yes, that is right.

Q. Why is it your position that L-208 wasn't consistent with this theory you advance on a war-supporting economy?

A. I couldn't hear the first part.

Q. I say, why is it your position that L-208 was not consistent with this theory that you have advanced of the maintenance of a war-supporting economy?

A. Because L-208 was addressed to the case where the end product of the industry, as such, did not embody any of the scarce or strategic materials that we were interested [fol. 327] in saving, so the only effect, if that is true, except for some odd sideline that some mine might have, of making machinery or something, of which I am certainly not aware—anyway the product gold, as such, contains within itself none of the materials which were the general object of "L" orders. So what was being sought for was the maintenance, repair and operating supplies that might be used. In that context, I believe that the proper approach was, and will be in any future war, incidentally, to bring down activities of the economy to minimum levels such that any further upsetting of the economy, disturbance of the supporting economy, will do more harm than would be added to the military effort. I think there is what the mathematicians call the minimum-maximum relationship there if we bring down the civilian economy to the minimum operating rates all through it, down to the point where any further cutting would do more damage than it would add strength to our military effort. That is the essential concept that we have of this essential civilian point now. This is current 1953 thinking, I might say.

Q. Let me see if I follow this. Suppose I have a factory which is designed to manufacture 1,000 bicycles a month, and you decide that 100 is all I can produce. Do you take into account the break-even point of the individual plant?

Might it not be true that I wouldn't be able to make 100 bicycles profitably?

[fol. 328] A. Shall we get into a discussion of concentration of industry? We will be at it a long time.

Q. I am leading up to that. Is that another factor taken into account?

A. Yes. That would be taken into account. Any opportunities for combining operations.

Q. In other words, if there were ten producers of bicycles in the country of equal size, you might say to nine of them "You close up completely," and the tenth, "You operate to capacity and make bicycles"; is that correct?

Mr. Rigney: I object, if Your Honor please, to the form of the question, "You might say to so-and-so." I assume counsel is speaking now of a hypothetical situation, but the form of his question wasn't correct.

Mr. Barnes: He was the Director of the office.

The Commissioner: I will overrule the objection.

The Witness: I would have to answer that with a very lengthy answer.

By Mr. Barnes:

Q. I am trying to find out what your theory involves and why this view isn't consistent with it. If it has to be a lengthy answer——

A. The shortest answer I can make to that question is that offhand, I am also opposed to concentration of that nature, because I think it does more harm than it does good [fol. 329] to the economy. It is much better not to close down the other nine plants and concentrate; but even at the risk—I would agree, not in the bicycle instance, but in other cases, that we should pay some subsidies to firms during wartime just in order to keep them running at a certain rate. There is a long series of reasons for that.

Q. Do you recall in 1941, the summer of 1941, specifically I believe in August, that one of the burning questions in the Office of Production Management was how many civilian automobiles were to be manufactured, and that the so-called Division of Civilian Supply, Office of Civilian Supply at that time, were trying to cut down to a greater extent than the Industry Division was?

A. That is right. I remember that, yes.

Q. Is that or is that not consistent with your view as to essential or supporting civilian economy?

A. Which is consistent, which side?

Q. The view expressed by Leon Henderson, Director of the Office of Civilian Supply.

A. Oh, yes, I think the ultimate result amply justified his position. It must be remembered that that argument was being conducted not in a war. It was merely a national emergency. We did not literally have war with anyone at that time. So it was quite a different atmosphere, I think.

[fol. 330] By the Commissioner:

Q. Wasn't there a further question there, that efforts were directed toward getting some of these automobile plants to convert from automobiles to something else that was more in demand by the military?

A. I might add that one of the reasons, as I think I said this morning, that this whole matter of mining machinery spirorities came up, was because those plants were being pressed by the Army and Navy to abandon their own production and stop making mine machinery, just as the automobile makers were being importuned to abandon automobile production.

By Mr. Barnes:

Q. Was there always complete unanimity within the Office of Production Management, SPAB, and WPB, with regard to the orders that were issued?

A. No. That is why we had a chairman to rule.

Q. On this question of essential war-supporting economy, isn't it still necessary to measure the impact of individual units of that economy by their requirements of materials?

A. No. I don't think that is the ultimate test, by any means.

Q. Isn't it one of the possible tests?

A. Yes, but I think it is a terribly deceptive one.

Q. Why?

[fol. 331] A. The manufacture of bobby pins, which I mentioned this morning, people often tried to ground it on the amount of steel that was used. And so forth. I think it becomes ridiculous on the small side.

Q. Suppose you have an industry that uses 17 million

dollars worth of critical materials, do you consider that inconsequential?

A. I don't think there is any particular dividing line between consequential and inconsequential.

Q. Suppose the products of that industry in no way aided the prosecution of the war, did that make any difference in the amount of critical materials it could use?

A. I don't think you could make the first conclusion about any industry, unless after a long period of analysis and discussion of what is essential to the conduct of the war. We get less and less certain of that the more we study it.

Q. One determination that was sometimes made during the last war was that race horses couldn't be transported on the railroads as I recall, because of a shortage of railroad facilities. Assuming that to be a correct policy decision, don't you take into account, then, the amounts of fuel and other things that are expended in that transportation?

A. That isn't the only thing. It is the competing demands. What were the other demands, things to be moved besides the horses? I don't think it is the amount of fuel [fol. 332] that a shipment of horses used up. I wouldn't decide it on that ground alone.

Q. Isn't it true that at various times and at various locations during the war, electrical energy was a critical material?

A. Mostly in the Southeast, down in the Georgia area, yes.

Q. Wasn't that also true in the Pacific Northwest, for example?

A. Late in the war, yes, very little. There is more difficulty out there now.

Q. Is there ever a morale factor that has to be considered in the issuance of these orders?

A. Very much so, yes, in both directions, in both ways: the morale of the people affected, as well as the rest of the community. One of the arguments I heard about that during the war was about electric light bulbs, before we had these (indicating fluorescent lights). The proposal was made by a number of people that light bulbs should be rationed by tickets, such as we had for gasoline. By hind-

sight, it was good that we didn't do it and didn't have to. That was a nip and tuck decision.

The reason I mention it is because I was against it. Krug, the Program Vice Chairman, Chairman of the Board later, felt that all things considered, the effect on morale there of disturbing people about the flow of some common [fol. 333] commodity like that, would make them think we were losing the war, that "If the country was so bad off that it had to ration electric light bulbs, I had better go over the hill and quit." He didn't put it as strongly as that. You always have to consider the closing off of the flow of something or some activity. It may have a bad effect on the will to win. That is one of the toughest parts of this whole analysis.

Q. Periodically, I recall during the war I lost my secretarial staff because they heard a rumor that clothes would be rationed tomorrow and they rushed out to buy some. So, rationing didn't always work.

A. We were using up tungsten and molybdenum, which were two of the tighest materials we had, involved in the little filament in the bulbs, but it was worth spending those scarce materials to keep a flow of bulbs on the market. What was done was simply to starve the stores a little bit so there wouldn't be quite so many on hand. People would have a little trouble getting them, but we saw to it that there was never any real shortage. Hindsight, I think, has amply proved there that maintaining the flow of that article at the expense of what could not be called essential in many ways—there are many light bulbs in your house and mine that are not essential. People were given an ample supply during the war, largely for the morale reason, in the sense that the economy is keeping itself together, that [fol.334] it is a well-knit, working whole conducting the war, and all parts of it have a share in the sustaining of a strong military effort. It gives the people a little of a lift, the feeling that when the war is over the thing is not going to be a complete mess.

Q. If I understand this theory of yours, you say to each segment of the economy, depending on its relative essentiality, "You are going to operate at 80 per cent of your prior capacity, you at 70 per cent, you at 30 per cent"?

A. You don't say what percentages. You sweat them

down to minimum levels as much as you can keep pressing and pushing them, until you get to the point where you see that they are going too far, and then ideally you would let up a little bit and let a little more flow into that area.

Q. Do you mean to start at 100 per cent and just see how far you could push each one individually?

A. A bus line running out to a munitions factory has to run at 120 per cent. You need to put on more buses there. A bus line out in the hills of Tennessee, with no munitions plants——

Q. Special buses running to race tracks?

A. Yes. You push them down more, maybe down to once or twice a week, just enough for morale reasons. You take care of school children up to a certain point. One of the toughest things in this is the continuity of youth and [fol. 335] schools and all that; for example, doing things just for morale reasons, we undoubtedly used up a lot of scarce materials in maintaining school buildings.

Q. In fact, we prohibited the construction of theaters and other places of amusement throughout 1941, did we not?

A. New one. Nothing happened to the old ones.

Q. No, but we limited the expansion of them.

A. Yes. That would be done all through the economy, no new equipment, no new construction, no new opening up of anything. That would hit very heavily all through. That is where you make your greatest gains or savings, of course. There are tremendous savings there by the stoppage of new machinery, new equipment and construction.

Mr. Barnes: That is all.

Mr. Rigney: I have nothing further.

The Commissioner: Any further questions? If not, the witness may step down.

(Witness excused.)

Mr. Rigney: Shall we start with our next witness, Your Honor, or wait until tomorrow morning?

The Commissioner: We have fifteen minutes.

Mr. Rigney: Professor Nelson, will you take the stand?

[fol. 336] WILBUR A. NELSON, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Rigney:

Q. What is your full name, Professor Nelson?

A. Wilbur Armstead Nelson.

Q. Where do you live?

A. At the University of Virginia, Charlottesville, Virginia.

Q. What is your occupation, sir?

A. Geologist.

Q. What is your present professional position?

A. I am head of the Department of Geology, known as the Corcoran Rogers Department of Geology, and Corcoran Professor of Geology, at the University of Virginia.

Q. How long have you occupied that position, sir?

A. For twenty-seven years, since September 1925. At that time, when I came to Virginia, I came in the dual capacity as State Geologist and also in the position I have already enumerated, and I remained State Geologist for three years, at which time I reorganized the Virginia Survey. They became two full-time positions, and I retained the one at the University.

[fol. 337] Q. Will you tell us something about your educational background?

A. I went to the public schools and private schools and was tutored, then entered college. I received my B.A. Degree at Vanderbilt University, Nashville, Tennessee, in 1910. I received an M.A. Degree from Stanford University at Palo Alto, California, in 1915.

Q. What did you specialize in at Stanford?

A. Geology.

Q. Following the completion of your formal education, what did you then do?

A. In 1911, I started work on the Tennessee geological survey as an assistant geologist; stayed there until I received a leave of absence to go to Stanford to take graduate work. I returned to the survey, finished some uncompleted

projects, and then accepted a position with the Nashville, Chattanooga and St. Louis Railway as geologist in the office of the president.

Q. After that?

A. I resigned from that position in 1916. I, with a partner, opened a barite mine in Cartersville, Georgia. I operated that mine until 1918. At the same time, I operated numerous small manganese mines during World War I, which was part of this period.

I was appointed State Geologist of Tennessee in 1918. [fol. 338] We sold our properties in Georgia, and I accepted that position. I stayed as State Geologist of Tennessee until September, 1925, when I accepted the positions already outlined, in Virginia.

Q. In addition to these activities, have you on occasion done consulting work in your field?

A. Yes. I have done consulting work in about 25 States in the Union and in Canada, making reports on metallic and non-metallic mineral deposits and mines, and on numerous engineering geology projects.

Q. Have you written any articles for publication in scientific or professional journals?

A. I have written numerous bulletins which have been published by State surveys as well as many articles published in the scientific journals, and even in the National Geographic Magazine.

Q. Are you a member of any professional societies, Professor?

A. Yes, a considerable number of them.

Q. Would you give us those?

A. The Mining and Metallurgical Society, the Geological Society of America, the AAAS, and a number of others.

Q. Did there come a time when you entered Government service, the service of the United States?

A. I received leave of absence from the University in [fol. 339] May, 1941, when Edward Stettinius asked me to come to Washington to make a study of the ferro-alloy situation, which was very critical at that time. I thought I was coming up for three months. I stayed four and a half years.

Q. What was Mr. Stettinius' position at that time?

A. Director of Priorities, as I remember it.

Q. Was that within the Office of Production Management?

A. It was.

Q. How long did that task take that you originally came up to do?

A. I was asked to complete the ferro-alloy survey in 30 days because it was very critical. Mr. Stettinius wanted a complete report on the future needs of the ferro-alloy minerals by this country.

I did this work under Arthur Whiteside, and we called in the leaders of each ferro-alloy industry, and they responded one hundred per cent, and the report was completed in one month.

Q. What was your next assignment during this period?

A. I was then made a priorities specialist, first for one or two of the branches—they didn't have branches, but attached to men handling those particular minerals and metals.

I finally ended up by September acting as priorities specialist for about 20 different metals and minerals, all of them except iron, lead, and aluminum, as I remember. [fol. 340] Q. You speak of a priorities specialist. Could you give us a brief description of what your duties were in that connection?

A. My duties were to consult with the man in charge of a particular metal or non-metal, to find out what his priority needs were, and then with help from other specialists, to draw up a priority regulation.

Q. How long did this job last, as priorities specialist?

A. Until about the 10th of September.

Q. Then what was your next assignment?

A. Donald Nelson asked me to draw up a priority order covering the mining industry and to establish a branch to handle that priority.

Q. Did you do that?

A. I did. The first order was drawn on September 17.

Q. Is that known as Order P-56?

A. That is Order P-56.

Q. Could you tell us the distinguishing characteristic of Order P-56? I mean by that, as distinguished from the other "P" orders in the series up to that time.

A. It was the only "P" order that was issued covering an entire industry, and the only one, I believe, up to that

time that was issued without the request of the industry. We anticipated the needs.

Q. To whom did the order apply?

[fol. 341] A. It applied to metal mines, non-metallic mines, and coal mines in the United States and its territories.

Q. Its purpose was what?

A. To see that no mine in the United States essential to the war effort shut down due to lack of repair parts or supplies or to lack of new machinery when needed.

We handled the order in the following way: As soon as the order was issued, Donald Nelson wired the Governor of each State and asked him to appoint an emergency coordinator of mines, suggesting that it be the Chief Mine Inspector or State Geologist. This was done in practically all cases, except a few New England States who wired back they didn't have any mine problems, in which they were erroneously informed, because quarries came under this category.

The coordinators of mines all met in Washington a few days later, and they were addressed by Donald Nelson and were asked to go back to their States and to furnish us a list of all mines in their States which they considered essential for the war effort.

We then issued serial numbers to those mines. At a later date we established our own field men throughout the United States, and any subsequent mines or mine operators who wished their operation included in this order applied to us and we checked it with our field representative and if our field representative reported it was essential, [fol. 342] we then gave them their serial number.

Mr. Rigney: I will ask that this be marked the next exhibit number for identification.

(Said document was marked for identification as Plaintiffs' Exhibit No. 64.)

By Mr. Rigney:

Q. Do you recall the date of issuance of P-56?

A. September 17, 1941.

Q. Was that amended within a matter of a few days after that?

A. It was amended on September 22.

Q. I show you Plaintiffs' Exhibit 64 for identification, and ask you whether or not that is the amendment to Order P-56?

A. It is.

Q. That was issued on September 22, did you say?

A. Yes.

OFFER IN EVIDENCE

Mr. Rigney: I offer it in evidence.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said document, marked "Plaintiffs' Exhibit No. 64," admitted in evidence and made a part of this record.)

The Commissioner: We will adjourn at this point until 10 o'clock tomorrow morning.

[fol. 343] (Thereupon, at 4:30 o'clock p. m., a recess was taken in the hearing until 10:00 o'clock a.m., Tuesday, January 27, 1953.)

[fol. 344] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

Transcript of Testimony—January 27, 1953

TESTIMONY FOR PLAINTIFFS (Resumed)

The hearing was resumed, at the time above indicated, pursuant to the recess previously taken.

Present: (The same appearances as previously noted.)

WILBUR A. NELSON, a witness for the plaintiffs, resumed the witness stand, and was examined and testified as follows:

Direct examination.

Mr. Ewing: Before Mr. Rigney resumes with Professor Nelson, I would like to cover the situation that came up

yesterday with respect to the data read into the record by Dr. McLaughlin and objected to, and admission was restricted subject to the production of the original source [fol. 345] material. As I say, it was all read into the record. It all appears at page 93 of the Minerals Yearbook for 1942, the statistics being 1942 statistics, issued by the Department of the Interior, Bureau of Mines.

The Commissioner: In order to save time, it would seem to me that if Mr. Barnes would have an opportunity to compare that page with the page which I believe you put in evidence——

Mr. Barnes: They did not put it in evidence.

Mr. Ewing: He simply read it for the record.

Mr. Barnes: At page 228 of the transcript.

The Commissioner: If you want to put that page in evidence, if that is all you want, I presume you could get a stipulation.

Mr. Ewing: I thought it would be simpler and easier to let the testimony stand without having another exhibit, since it is in the record already, if it suits Mr. Barnes.

Mr. Barnes: I haven't seen the book or compared the data that appears in the transcript or anything else.

Mr. Ewing: If the transcript isn't correct, I would be glad to correct it.

Mr. Barnett: What about Central Eureka?

Mr. Ewing: Central Eureka didn't report.

Mr. Barnett: That is for the year 1942 when we closed down. Does it also have 1940 and 1941?

Mr. Ewing: It does not. You are in for 1941. Would [fol. 346] that suit you?

Mr. Barnes: Let me have the book and during some recess I will compare.

Mr. Ewing: I will compare it with you any time and make it right.

Mr. Rigney: Your Honor, Exhibit 4, which is P-56, one of the exhibits that was marked for identification at the pre-trial, was incomplete at that time. Pages 4 and 5 were missing from that exhibit at the time it was marked for identification. It went into evidence yesterday, Exhibit No. 4, without the pages 4 and 5 being added. So in order that the exhibit is complete, the last two pages, pages 4 and 5 of P-56, should be added to the exhibit.

Mr. Barnes: I see that I covered myself by agreeing subject to verification.

The Commissioner: We will just have the reporter physically add them to Exhibit No. 4.

Mr. Rigney: Mr. Barnes, I think, was aware at the time last fall that these exhibits went in that four or five of them had a page or two missing. We have obtained the missing items.

May this be marked the next exhibit number, which is No. 65 for identification, I believe?

(Said document was marked for identification as Plaintiffs' Exhibit No. 65.)

[fol. 347] The Commissioner: I want to make another statement for the record with respect to the absence of counsel for Oro Fina and Bald Mountain. Mr. Martin of course appeared yesterday morning and during either the midmorning recess or the luncheon recess absented himself. He apparently sent an associate, a Mr. Gould, who appeared during part of the afternoon session.

Mr. Barnes: He left at the afternoon recess.

The Commissioner: He left at the afternoon recess. Before we resumed after the luncheon recess Mr. George Nugent came and spoke to me and inquired as to whether or not it was necessary for him to appear. Of course I indicated that the trial was proceeding and all of the cases, including Bald Mountain and Oro Fina, were being tried, and that it would be necessary for all the Plaintiffs to prove the necessary allegations of their petition on the question of liability. I fully expected Mr. Nugent to appear. He did not. He is not here today. I note his absence.

All right.

Mr. Rigney: At this time, Your Honor, the Plaintiff Homestake offers in evidence Plaintiffs' Exhibit No. 65 for identification which is a memorandum of October 29, 1941, from Edwin B. George to Mr. Donald M. Nelson.

Mr. Barnes (examining document): I don't object to this. I don't see the relevance or materiality to any issue involved here, Your Honor. This appears on its face to [fol. 348] be an extremely tentative memorandum written more than a year before the issuance of L-208, referring to orders to grant priorities to gold mines rather than to any order which did or might shut them down.

The Commissioner: It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 65," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Professor Nelson, when Court recessed yesterday afternoon I think you had just testified with respect to the promulgation of Order P-56 on September 17 and its amendment five days later on September 22. You had described, I believe, the plan that was set up, the steps which you took to implement or to effectuate P-56. Would you tell us wherein the amendment to P-56 of September 22 differed from the September 17 original P-56?

A. In the original order of September 17 the was no mention of placer gold mining being excepted from P-56. In the original order there was a priority rating of A-3, repair parts, maintenance, and supplies. In the amended order the A-3 was changed to A-8 because it was felt from an over-all policy standpoint that the A-3 was out of line with other ratings being given and that we could get maintenance, repair and supplies under an A-8 rating at that [fol. 349] time without any diffculty. Also the September 22 amended order had a clause in it stating that this order does not apply to any placer gold operations.

Q. Can you tell us whether or not the original order of September 17 had actually been put into effect at the time the amendment of September 22 came out?

A. The original order of September 17 was never put into effect but was just held in the OPM until the amendments could be prepared. The first P-56 order that was used in giving any priorities was the September 22 amendment.

Mr. Rigney: May this be marked Plaintiff Homestake's Exhibit No. 66 for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 66.)

By Mr. Rigney:

Q. I show you Plaintiffs' Exhibit No. 66 for identification, Mr. Nelson, and ask you what that document is.

A. Under the setup in the OPM Donald M. Nelson, as

Director of Priorities, was the only person who had the authority to issue priorities. With the setup of P-56 in the Mining Division and the knowledge that probably eight thousand serial numbers would have to be given, Mr. Donald M. Nelson delegated to me or authorized me to sign and issue mine serial numbers under P-56, which was the same as authorizing me to have the right to issue priorities.

[fol. 350] Q. He did it by this letter?

A. He did it by this letter of September 22.

OFFERS IN EVIDENCE

Mr. Rigney: I offer it in evidence, Your Honor.

Mr. Barnes: I have no objection.

The Commissioner: It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 66," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Mr. Nelson, what was the priorities field service of the Office of Production Management?

A. There was no priority field service of the Office of Production Management on September 22.

Q. No; my question was more general. I was just asking you what the priorities field service was, whenever it was set up.

A. I will have to answer that in a lengthy way. The first priority field service was set up just for the Mining Division, and we appointed about fifteen or twenty field men, some covering several states, some where there were a great many mines in the state having only one state under their jurisdiction. These men were used by the Mining Division in checking on any mine with the serial number after the first batch were given under the state coordinators.

The method was that when they received a request for a serial number, which authorized blanket priorities, to [fol. 351] immediately refer that request to the field representative in whose district the mine occurred. He then made a thorough examination of the mine by visiting it and reported back to us whether he considered the mine essential

to the war effort. If he said yes, we then issued them a serial number. If he said no, we gave them the reasons for not issuing a serial number.

I suppose that the War Production Board, knowing we had this system and how it worked, felt that they should have a similar service——

Mr. Barnes: I object to that statement on the part of the witness.

Mr. Rigney: I think you have answered the question, Mr. Nelson.

May this be marked Plaintiffs' Exhibit No. 67 for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 67.)

[fol. 352] By Mr. Rigney:

Q. I show you Plaintiffs' Exhibit 67 for identification, and ask you to tell us what that exhibit is.

A. This is a copy of an address which I gave before the training group of the priorities field service which was set up by the War Production Board for all of the divisions or branches of the War Production Board.

Q. Did you deliver that address in your capacity as Chief of the Mining Division?

A. I delivered it in that capacity. It happens that my title at that particular moment was Administrator of Mine Priorities.

Q. Very well, sir.

Mr. Rigney: Your Honor, Plaintiff will offer Exhibit 67 for identification. I might say——

The Witness: May I say something off the record?

The Commissioner: No, you are on the record.

The Witness: They have a "Ph.D." after my name, and it is not correct.

Mr. Rigney: You are not responsible for that.

The Witness: I would like to have that deleted.

Mr. Rigney: Might I say parenthetically, Your Honor, that this is a discussion of Order P-56 and the administration of it. We offer it because we think it might be helpful in that connection.

[fol. 353] The Commissioner: Very well.

Mr. Barnes: May I ask a couple of questions in regard to that?

The Commissioner: Yes.

By Mr. Barnes:

Q. Did you prepare the text of this speech, Dr. Nelson?

A. I think I did. It sounds like my language.

Q. Do you recall now whether you prepared the text before you gave the speech, or whether this was based on stenographic notes made at the time?

A. We were required in the War Production Board to prepare our speeches before they were given.

Q. Do you know whether in giving it you read it verbatim as it is shown here?

A. I doubt seriously if I read it; because I am accustomed to talking without notes.

Q. Do you know, then, whether you used exactly these words in delivering your speech?

A. I couldn't possibly have used all the exact words.

Mr. Barnes: I object on the grounds that there has been no showing of any possible competence, relevance or materiality. This is the same now as a memorandum that Dr. Nelson prepared for his own use and never communicated to anybody else.

By Mr. Rigney:

Q. Is this substantially the content of your instructions [fol. 354] and remarks to the priorities field service on the date in question?

Mr. Barnes: I object to the form of the question as being leading.

The Commissioner: Sustained.

By Mr. Rigney:

Q. Wherein did the remarks which you delivered on—what is the date of this meeting, November 10—wherein did your remarks to the priorities field service on November 10 differ in any substantial degree from this address here?

A. They did not differ at all in any of the facts given

in regard to priority ratings, the method of giving serial numbers, or any of the details relating to priorities.

Q. In preparation for your testimony in this trial, have you gone over that document carefully; have you read it carefully?

A. Yes, I have read it thoroughly, and there are no errors in it.

Q. Is it an accurate and correct discussion of the matters contained therein, namely, the administration of Order P-56?

Mr. Barnes: I object to the form of the question as being leading.

The Commissioner: Overruled.

The Witness: I consider that it is an excellent statement, [fol. 355] thoroughly correct, of how Order P-56 was administered.

Mr. Rigney: I should think it would be admissible, Your Honor.

Mr. Barnes: If that is the case, I will have to look at the document. I haven't examined the document at all. I have merely made a preliminary examination of the witness.

(Mr. Barnes examining Plaintiffs' Exhibit 67 for identification.)

(Here followed discussion off the record).

Mr. Barnes: On the record, Mr. Rigney, if you have any other documents that you intend to present here, I think it would save an awful lot of time if you presented them to me in advance of offering them, so I might have an opportunity to go over them.

Mr. Rigney: Frankly, Mr. Barnes, I though you were more familiar than we were with these documents. A great many of them were marked at pre-trial.

Mr. Barnes: The ones that we marked at pre-trial, I have no question about it. I have examined those. But you have gone through and made a selection of other documents from various sources, some of which I have seen, others of which I may not have seen. Certainly I am not able to carry the contents of them in my mind.

Mr. Rigney: We will see, Your Honor, what we can work out at the recess.

[fols. 356-376] Mr. Barnes: I am afraid they will keep on offering extensive documents of the type they have just offered, and we may run into protracted delay here.

Mr. Rigney: We will try to work out some way whereby we can resolve that problem.

The Commissioner: All right.

Mr. Rigney: May this be marked Plaintiffs' Exhibit 68 for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 68.)

Mr. Rigney: Plaintiff offers at this time Plaintiffs' Exhibit 68 for identification, being a resolution of the Joint Economic Committee for Canada and the United States, dated November 8, 1941, with a covering letter of transmittal from Mr. Currie, the Administrative Assistant to the President, to Mr. Donald M. Nelson, November 18, 1941.

(Mr. Barnes examining Plaintiffs' Exhibit 68 for identification.)

[fol. 377] Mr. Rigney: May I say now that I will offer Plaintiffs' Exhibit No. 12 for identification, in evidence.

Mr. Barnes: This is dated December 19, 1941, Your Honor, and I make the same objection as to relevance and materiality.

The Commissioner: It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 12," admitted in evidence and made a part of this record.)

Mr. Rigney: I would like to invite Your Honor's particular attention, with respect to this document, to the second full paragraph beginning on page 2 and continuing on page 3. I merely make that statement for the record for whatever assistance it may be.

May this be marked the next number in order?

(Said document was marked for identification as Plaintiffs' Exhibit No. 70.)

By Mr. Rigney:

Q. Mr. Nelson, I show you Plaintiffs' Exhibit 70 for identification, being a document of January 20, 1942, and [fol. 378] ask you what that is?

A. That is a nine-page memorandum written by me to Donald M. Nelson, Chairman of the War Production Board, discussing in rather detail the entire priority problems of the mining industry and the priority problems of the makers of mine machinery.

Mr. Rigney: Plaintiff offers it in evidence.

Mr. Barnes: There apparently has been a notation in ink placed on this photostat you secured from Archives.

Mr. Rigney: That is just the way we got it from Archives, Mr. Barnes.

Mr. Barnes: This appears to be ink that has been placed on the photostat rather than anything that has been copied.

Mr. Rigney: What page is it?

Mr. Barnes: Page 7.

Mr. Rigney: Would you take this one instead? There is a line drawn on there in pencil by me this morning just to call my attention to that paragraph. I was going to call the Commissioner's attention to it, anyway.

Mr. Barnes: That one is satisfactory to me, with the understanding that that is a notation that has been added by counsel.

Mr. Rigney: Suppose we give you one now which doesn't have anything on it except Plaintiffs' 70 at the top.

(Document handed to Mr. Barnes.)

[fol. 379] Mr. Barnes: Everybody has marked on one of these.

We are getting closer, Your Honor. This is January, 1942, and again it is a discussion largely of priorities for the mining industry generally. There is at page 7 some slight reference to gold mining.

The Commissioner: It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 70," admitted in evidence and made a part of this record.)

Mr. Rigney: May I say for the record that we would like to invite Your Honor's attention to the statement appear-

ing on page 7, toward the bottom, paragraph 6 thereof, which follows: "There are other types of mining besides gold which may also have to be given harsh treatment in future months."

By Mr. Rigney:

Q. Would you tell us what your purpose was in sending this memorandum to Mr. Donald Nelson?

A. The purpose of this lengthy memorandum was to acquaint Mr. Donald Nelson, who was with Sears Roebuck before he came to the War Production Board and naturally was not entirely familiar with the mining industry—to give him an over-all picture of the mining industry and its relation to other industries, to give him facts to permit him to evaluate which of these industries should have the [fol. 380] best priority ratings.

Q. Professor Nelson, could you tell us what position Mr. C. H. Matthiessen, Jr., held in the War Production Board in February of 1942?

A. Matthiessen?

Q. Perhaps that is the pronunciation.

A. He was Deputy Director to Donald Nelson, one of them.

Q. What was Mr. John P. Gregg's job at that time with the WPB?

A. It is my recollection that he was on the Clearance Committee.

Mr. Barnes: Wasn't he Chairman of the Program Committee at that time?

The Witness: He may have been. We changed titles every month or two, and it was very hard to keep up with the titles.

Mr. Rigney: May this be marked Plaintiffs' Exhibit 71 for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 71.)

Mr. Rigney: Plaintiff offers Exhibit 71 for identification, in evidence.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

[fol. 381] (Said document, marked "Plaintiffs' Exhibit No. 71," admitted in evidence and made a part of this record.)

Mr. Rigney: If Your Honor please, at the pre-trial marking of the exhibits, Nos. 6 and 7 were reserved, and I believe that No. 6 was to be the amendment to Order P-56 of March 2, 1942. I should like to offer that exhibit now.

Mr. Barnes: Subject to verification, no objection.

The Commissioner: It may be received as Exhibit 6.

(Said amendment to Order P-56, marked "Plaintiffs' Exhibit No. 6," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Mr. Nelson, can you tell us in what respect the amendment of March 2, 1942, to P-56, changed the existing P-56 in effect prior to that time?

Mr. Barnes: Your Honor, it seems to me the documents would speak for themselves, and you don't need testimony on this subject.

Mr. Rigney: That is true, Your Honor, of course, but that is a nine or ten-page document. The change can be expressed in almost one sentence by Mr. Nelson, and I thought it would help the continuity to have him point out to Your Honor what that change was.

The Commissioner: In the light of that objection, I don't think I will allow him to answer that.

[fol. 382] Mr. Rigney: Very well.

The Commissioner: At the proper time you can point out those differences in memorandum to the Commissioner when you are asking for findings.

Mr. Rigney: Yes, surely, Your Honor.

By Mr. Rigney:

Q. What happened following the March 2, 1942, amendment to Order P-56 in so far as the Mining Branch was concerned?

A. The amendment of March 2 required me to notify all gold mines that their serial numbers were taken away from them; which meant their priority assistance under P-56 was denied.

Q. Do you know from your official knowledge and your official capacity when the Homestake Mining Company lost its serial number under P-56?

A. A telegram was sent to Homestake on March 2, notifying them that their serial number had been taken away, and therefore their priorities under P-56 were no longer available to them.

Q. Was Homestake Mining Company ever assigned a serial number under P-56 at any time after March 2, 1942?

A. It was not, as long as I was in charge of administering P-56.

Q. That was up to what time?

A. Around in December 1942, at which time I was made [fol. 383] assistant to one of the Deputy Directors of the War Production Board.

Q. I am sorry.

A. I said I know that it was not reinstated as long as I was in charge of the Mining Division.

Q. And that was?

A. And that in December of that year, I was moved higher up in the War Production Board as an assistant to one of the Deputy Directors.

Q. So it never had a serial number between March 2, 1942, and the issuance of L-208 on October 8, 1942?

A. I will say even longer than that, up to December.

Q. Can you tell us what the fact was with respect to serial numbers of Idaho Maryland and Central Eureka following the March 2 amendment?

A. On March 2 and the following day, the Mining Division sent telegrams to every mine operator as to which 30 per cent or more of the value of their ores were gold and silver, stating that under the new amendment to P-56 their serial number was being withdrawn. However, those mine operators who were producing any appreciable amounts of any mineral necessary to the war effort were notified that their serial number would be reinstated immediately if they would wire us to that effect or notify us in any proper way.

Q. Does your state of knowledge enable you to testify [fol. 384] at this time what the fact was with respect to Central Eureka and Idaho Maryland, so far as the serial number is concerned, after March 2, 1942?

A. I know that Idaho Maryland had its serial number taken away. I do not remember Central Eureka.

The Commissioner: We will recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearing.)

[fol. 385] Mr. Barnes: There is just one brief statement I would like to add to the discussion we had this morning, and that is that frankly it has been the Defendant's position that what happened on the various "P" orders or priority orders during 1941 and the early part of 1942 was no part of its case.

We have looked at very few records pertaining to them. We have copies of very few records pertaining to that subject which has been in controversy here this morning. I don't think there is anything in our files that is going to help supply any of the deficiencies that have appeared in some of the exhibits that have been offered, parts missing or their incompleteness, and I wanted to make the explanation that we don't have documents here relating to those subjects.

Mr. Herrington: I think it might be well to recall to Your Honor's attention the language that appeared in the Idaho-Maryland decision of the Court of Claims. On page 14 of the Opinion: "It is alleged that the particular critical materials used in gold mining were, at the time the order was issued and thereafter, subject to allocation and restriction by virtue of duty issued War Production Board priority regulations."

That is part of the Opinion.

The Commissioner: Yes.

[fol. 386] Mr. Barnes: It is also an allegation.

Mr. Rigney: May this be marked as our next exhibit number?

(Said document was marked for identification as Plaintiffs' Exhibit No. 72.)

By Mr. Rigney:

Q. Mr. Nelson, I show you Plaintiffs' Exhibit No. 72 for identification and ask you what that document is.

A. This is a memorandum written by me to my superior,

Mr. A. I. Henderson, Deputy Director of the Minerals Division, under which the mining branch operated.

Q. Is this a report of meetings held at Reno, Nevada, on March 12 and at Denver, Colorado, on March 14, 1942, attended by you?

A. This is my report to Mr. Henderson of the details of what happened at these two meetings and what part I took in these two meetings. The memorandum is signed by me personally.

Mr. Rigney: Plaintiff offers this in evidence.

Mr. Barnes: May I ask the purpose of this offer, Your Honor?

Mr. Rigney: Perhaps I should ask the witness preliminarily to answering counsel's question what this meeting was about, what the purpose of these two meetings was as a matter of fact.

The Witness: After the March 2 amendment to P-56 there [fol 387] was a great furor raised in all of the western mining states due to the 30 per cent clause. So I was requested by Mr. Batt to attend this meeting in Reno and explain that we were not going through this clause to shut down any mine producing appreciable amounts of any strategic mineral, even though they produced over 30 per cent of their value in gold and silver. So I attended this meeting in Reno where there were five governors present, a number of Congressmen, and many interesting people. It was held in the Mackay Auditorium, and we had an overflow crowd.

By Mr. Rigney:

Q. Were there representatives of mining industries there?

A. Yes. At Denver the meeting was held in the chamber of the House of Representatives, and Governor Carr presided and again we had an overflow crowd.

Q. This is your report to your superior of what transpired at these two meetings?

A. At which I made that statement. Of course I was asked a great many questions, and I was extremely unpopular.

Mr. Rigney: This is a report of his discussion to Mr. Henderson of what did happen at this meeting, the discussion of Order P-56 and how it was being and would be administered at that time. I think it is admissible.

Mr. Barnes: Your Honor, we have here a document which [fol. 388] says that the witness spoke to the governors of certain states, the state geologist of New Mexico and some mining operators from California, who stated they represented the governor of California. I fail to see how communications between the witness and the governor of a state in any way affect the issues that are involved here.

The Commissioner: It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 72," admitted in evidence and made a part of this record.)

Mr. Rigney: May this be marked Plaintiffs' Exhibit No. 73 for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 73.)

Mr. Rigney: Plaintiff offers Exhibit No. 73 for identification, Your Honor, being the minutes of the meeting of the Requirements Committee of the War Production Board of April 3, 1942.

Mr. Barnes: Your Honor, this gives the appearance of being an incomplete document. We have some six pages of material, ending in the fourth or fifth line of the sixth page; the seventh page which is unnumbered starts with the heading "The Following Items are Excerpts from the Minutes of the Requirements Committee Meeting Held on April 3, 1942," and someone has pencilled in a number 6-A. [fol. 389] However, the pages following that are pencilled number 8 and pencilled number 9. There is no closing of the meeting or anything of that type noted here.

Mr. Rigney: That is just the way we got it from Archives, Your Honor. It came in in just this fashion.

Mr. Barnes: I think we should have some testimony to the extent to which it is complete, Your Honor.

The Commissioner: Your observation makes it very awkward to come up with a ruling. Is there an objection?

Mr. Barnes: Yes, sir, I have an objection. The document is incomplete.

The Commissioner: It is sustained. It may be marked for identification.

Mr. Rigney: I think we will be able to verify this later, Your Honor, so we will leave it marked for identification as No. 73.

The Commissioner: Very well.

By Mr. Rigney:

Q. Do you recall, Mr. Nelson, attending a meeting of the Requirements Committee of April 3, 1942? Perhaps this will help you to refresh your recollection on that if you do not have an independent recollection of it. I show you Plaintiffs' Exhibit No. 73 for identification and ask you whether that enables you to refresh your recollection and tell us whether or not you did attend a meeting of the [fol. 390] Requirements Committee on April 3, 1942.

A. I remember very distinctly attending the meeting; it was on mining machinery.

Q. What was your function or purpose at that meeting?

A. I was invited to attend to present to the committee the entire picture of the mining machinery industry and the difficulties which they were having in obtaining priorities for that part of their plant production which was still engaged in the making of mining machinery.

In every case, every one of the large mining machinery companies that converted 20 or 30 per cent of their plant capacity to the making of parts for battleships or parts for other things needed in the war effort, because of the priorities which they obtained for their government contracts, they never lacked all of the raw materials they needed to complete those projects.

Therefore they were able to complete promptly, as a rule ahead of time, each one of their government contracts while 70 or 80 per cent of their plant capacity still set aside for the making of mining machinery was bogged down by having incomplete undercutting machines, incomplete mining machines of all kinds, which were probably 75 per cent to 90 per cent completed. That was due to the fact that they got the highest "A" ratings for materials on their Army contracts and the highest they could get for [fol. 391] their own materials was sometimes an A-3.

The question then arose, How could we keep the mining machinery companies making mining machinery? It was a very serious proposition because some of them felt, Why worry about all these priorities? Why not reconvert entirely to government contracts?

Q. You are speaking now in the last portion of your answer of the makers of mining machinery generally?

A. The makers of mining machinery who were operating under Order P-56-A.

Q. Do I understand it was they who were expressing this sentiment that you just referred to, Why not convert completely to government contracts?

A. The representatives——

Q. I just want to be clear about that.

A. Yes. The representatives of those companies, their officials.

Mr. Rigney: May this be marked Plaintiffs' Exhibit No. 74 for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 74.)

By Mr. Rigney:

Q. Mr. Nelson, I show you Plaintiffs' Exhibit No. 74 for identification and ask you what that paper is.

A. This was the issuance sheet which carried the signa- [fol. 392] tures of the necessary people holding the necessary positions in the War Production Board which had to be filled out whenever an amendment was made to a "P" order or to any order, and this particular cover sheet is on removing the 30 per cent clause from P-56 and amending it on May 15.

Q. Would it be a fair statement to say that this was the recommendation for the amendment of P-56 which took place on May 15?

A. This was the recommendation which had to start in the mining branch, and this recommendation carries my signature.

Mr. Rigney: Plaintiff offers it in evidence, sir.

Mr. Barnes: Mr. Nelson, can you tell us what these other names or initials on here represent and who they are, what their positions were?

The Witness: Each branch had attached to it a priorities specialist. When an amendment was requested on any order the chief of the branch first signed on the first line. Then it had to be approved by the priorities specialist assigned to that branch, in this case Mr. Alexander Falconer who was the priorities specialist assigned to sign for the mining branch. It then had to be approved by the lawyer assigned to the mining branch who in this case was James Cooley; then by the assistant general counsel, F. M.——

Mr. Barnes: Is that F. M. or M. F.?

[fol. 393] The Witness: I mean M. F.

Mr. Barnes: Was that Manly Fleischmann, probably, at that time?

The Witness: Was he on the legal staff?

Mr. Barnes: Yes.

The Witness: I suspect it was, yes. That is probably Manly Fleischmann.

You did not always have to have the Division of Statistics approve, or the Office of Procedural Consultant. Then it went to the chief deputy of the Branch of Priorities, and those initials are Mr. C. H. Matthiessen, Jr.'s, initials.

Mr. Barnes: Above your name is the name of somebody else named Nelson.

The Witness: P. H. Nelson. He came in about that time and was one of the men connected with Donald Nelson's office. I don't remember his exact title. I remember Mr. Nelson very well, however.

Mr. Barnes: Your Honor, in view of your having overruled objections to previous documents along this same line, I am not going to object here, but I do want to note that I think it is subject to the same objection as to materiality and relevance.

The Commissioner: It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 74," admitted in evidence and made a part of this record.)

[fol. 394] Mr. Rigney: Now, Your Honor, I come to what was designated as Exhibit 7 for identification at the pretrial, the amendment of 15, 1942, amending P-56, and I offer that in evidence as Exhibit 7.

Mr. Barnes: My only objection again would be on relevance and materiality, and since you have let in the basic

document to which this is an amendment, Your Honor, I am not going to urge that.

The Commissioner: All right. It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 7," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Professor Nelson, what was the effect of the May 15, 1942, amendment to P-56?

Mr. Barnes: Your Honor, the documents speak for themselves. I object to oral testimony.

The Commissioner: Sustained.

By Mr. Rigney:

Q. Will you tell us, Dr. Nelson, what the situation or position of a gold mine possessing no serial number after the May 15 amendment would be in so far as obtaining MRO supplies, maintenance, repair and operating supplies?

A. A gold mine at that time having no serial number could obtain MRO supplies under P-100 with an A-10 rating. [fol. 395] Q. Who was Mr. H. O. King in the War Production Board in July of 1942?

A. He was director of the copper branch or Copper Division.

Mr. Rigney: Plaintiff offers the next exhibit in numerical order. This document is dated July 3, 1942, memorandum from H. O. King to A. I. Henderson.

(Said document was marked for identification as Plaintiffs' Exhibit No. 75.)

Mr. Barnes: Your Honor, I fail to see a word in this document that says anything about gold mines, gold mining, priorities for gold mines, any of the other numerous subjects that we have been dealing with. This is from the director of the Copper Division to the director of the Materials Division on the subject of Copper. I object on the grounds of irrelevancy and immateriality.

Mr. Rigney: If your Honor please, I would like to invite Your Honor's attention to the last paragraph of this memorandum which says: "All of the copper producers antici-

pate increased difficulty in the future. We have heard reports of labor scouts working all through the West employed by the airplane and shipbuilding plants of the West, working through the mountain states, offering higher wages and inducing men to leave the mines and go to the west coast. This is a very serious situation and the indications are that it will be much more serious in the months to come. Any- [fol. 396] thing that can be done to keep the men where they are and in fact bring other men into these mining camps will help production."

There is going to be very much more proof along that line dealing with the so-called shortage of copper miners. There is going to be proof here that the purpose, and our petition alleges, that the purpose of Order L-208, its true purpose, was to force or compel the gold miners to leave the gold mines and go into the copper mines. We want to show that that situation was and what caused the alleged shortage.

Mr. Barnes: Your Honor, the situation during the war, however, was that everybody was short of manpower. Every industry was trying to get more men and to keep the men that it had. It doesn't seem to me that the fact that there are listed here three mines that are allegedly having difficulty with respect to personnel proves anything, that the mining industry or copper mines are any different from any other industry during the war. The airplane plants needed more men, the aluminum plants and the shipyards needed more men, the scrapyards needed more men.

The Commissioner: I am going to let it in.

(Said document, marked "Plaintiffs' Exhibit No. 75," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Professor Nelson, could you give us the distinction [fol. 397] or the difference between the function of the division headed, whether it be called division or branch at a given time, Mining Division or the Mining Branch, the distinction or difference between that and a division such as the Copper Division or any other one of the named mineral divisions within the WPB?

A. The Mining Division gave priorities to metallic mines,

non-metallic mines, and coal mines; in the case of metallic mines irrespective of what metal they produced, in the case of non-metallic mines, irrespective of what they produced, in the case of coal mines irrespective of what kind of coal they produced.

The other sections under Mr. Henderson handled the priorities on the distributions of the finished products coming from the mines, such as metallic copper or alloys of copper, such as brass and bronze. The lead and zinc divisions handled the finished products there.

By the Commissioner:

Q. You call them all divisions. Were they in fact divisions?

A. They started out as branches, Your Honor, and then they were changed to divisions. I don't know the exact date at which the change was made. The functions did not change, the name changed.

Q. I gathered from some of your earlier testimony that there was a mining division and then these other groups, whatever they were, came underneath it, is that it?

[Vol. 398] A. No, sir. The mining branch or mining division reported directly to Mr. Henderson. The copper branch or copper division reported direct to Mr. Henderson. The lead and zinc branch reported to Mr. Henderson. The miscellaneous minerals branch reported to him.

We had branches which covered every metallic mineral. Some handled only one product, as the copper branch. Others carried several products. The miscellaneous minerals branch was the catch-all for all of the small minerals or metals that were not handled by any of the large branches.

Q. Then Mr. Henderson had all the minerals, is that it?

A. Yes, and the mining branch under his direction. I am sorry I was not clear on that.

By Mr. Rigney:

Q. What were some of the minerals which were in the miscellaneous division that you speak of?

A. They had mica, feldspar, graphite, mercury, non-metallic and metallic minerals of that type.

Mr. Rigney: Thank you, sir.

May this be marked Plaintiffs' Exhibit No. 76 for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 76.)

Mr. Rigney: Plaintiff offers in evidence now Plaintiffs' [fol. 399] Exhibit No. 76 for identification, being a document dated July 8, 1942, which says across the top, "Submitted By Services of Supply, War Department," and entitled "Committee Program for Increasing Production in the Copper Mining Industry."

Your Honor, would it be helpful—we have another pile of these exhibits and I could hand you a copy at the same time that I am handing counsel one. I am sorry, sir, that we didn't think to do that.

The Commissioner: Yes, that would be helpful.

Mr. Rigney: We will try to do that after lunch, if possible.

Mr. Barnes: Your Honor, I object to this on the basis of the inadequacy of the identification. It is called a committee report. We don't know who the committee was, who the members were, who appointed them, whom they were responsible to. We know nothing about it. It says, "Submitted by Services of Supply, War Department.". We don't know to whom it was submitted or anything else.

Mr. Rigney: Again, Your Honor, it comes from Archives. A great many millions, I suppose, have documents there and it is very difficult sometimes to find the documents that you want.

The Commissioner: That is enough. I am going to admit it. It came from Archives—

[fol. 400] Mr. Barnes: We can find a kitchen sink in Archives, but that doesn't make it admissible here.

The Commissioner: You can state any further objection you want to. I am going to admit it.

Mr. Barnes: I have stated my objection, Your Honor. Do I take it you are making a ruling now that any document that comes from Archives can be received in evidence in this case?

The Commissioner: I am making a ruling that the document which was offered is admissible.

Mr. Barnes: I took it you made it on the basis it took from Archives.

The Commissioner: That is correct.

Mr. Barnes: Regardless of any identification?

The Commissioner: On the basis of the exhibit which was offered, having in mind that it came from Archives, I have ruled and I still rule that it is admissible.

(Said document, marked "Plaintiffs' Exhibit No. 76," admitted in evidence and made a part of this record.)

The Commissioner: If counsel will recall, there are some documents which came from Archives as to which I sustained the objection of the Defendant.

Mr. Rigney: I should like for the record to invite Your Honor's attention particularly to the fifth full paragraph on page 1 of this document as well as to the document in its entirety.

[fol. 401] By Mr. Rigney:

Q. Professor Nelson, did there come a time when you became aware in the summer of 1942 of proposals advanced from sources within the WPB to order the complete close-down of gold mining in the United States.

A. Yes.

Q. Do you recall now who advanced such proposals and at what time?

A. The Labor Division of the War Production Board. I think the man's name was Lester; and also they were advanced by Mr. King, head of the Copper Division.

Q. Do you recall approximately when you learned of such proposals or when you had any discussion about them?

A. It was during August, 1942, to the best of my recollection.

By the Commissioner:

Q. Will you further identify the labor individual you spoke of?

A. He was the chief of the Labor Division of the War Production Board.

The Commissioner: All right.

By Mr. Rigney:

Q. Is that Mr. Richard Lester?

A. Mr. Richard Lester.

Mr. Rigney: Our next offer, Your Honor, will be Exhibit [fol. 402] No. 16 for identification, and while we are looking for the original document I will hand Your Honor that copy of it.

Plaintiff now offers Exhibit No. 16 for identification in evidence.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said document, marked "Plaintiffs' Exhibit No. 16," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Mr. Nelson, will you look at Exhibit No. 16, which has just been admitted in evidence, and tell us if you have seen the original of that document before?

A. I wrote this document to Mr. King, and I remember distinctly writing it, because we were very much alarmed because of the fact that the idea of closing the gold mines was gaining so much momentum on the top side of the War Production Board.

As the closing of the gold mines was primarily tied in to getting men for the copper mines, I wrote to Mr. King to see if something could be done to make certain that such men would be channeled into the copper mines, protesting that unless this was done we would lose or dissipate our last small reserve of miners.

Mr. Rigney: May this be marked the next numerical number for identification?

[fol. 403] (Said document was marked for identification as Plaintiffs' Exhibit No. 77.)

By Mr. Rigney:

Q. I show you Plaintiffs' Exhibit No. 77 for identification, Mr. Nelson, and ask you to look at that and tell us if you recall the formation in the WPB of what was known as the Inter-departmental Committee on Non-Ferrous Metals.

A. Yes. I remember this rather distinctly. This committee, the Inter-departmental Committee on Non-Ferrous Metals, was formed by Mr. H. O. King, in charge of the Copper Division. He acted as chairman of this committee, and it was a committee partially within the War Department where the members of the different metals branches or divisions as well as War Manpower men and the Services of Supply, U. S. Army, and the War Labor Board, and the Selective Service had representation. It was primarily dealing with manpower shortages. This first meeting was held on August 18. At the second meeting the committee was enlarged.

Q. Can you tell us if it was the regular practice—How often did this committee meet, by the way?

A. Once a week or more often.

Q. Was it the regular practice at these meetings for minutes to be kept of the proceedings of the committee?

A. It was the regular practice to keep minutes of the proceedings of all committees in the War Production Board [fol. 404] and also of this committee.

Mr. Rigney: Plaintiff offers Exhibit No. 77 for identification in evidence, Your Honor, purporting to be the minutes of the meeting of August 18, 1942, of the Inter-departmental Committee.

By Mr. Barnes:

Q. Professor Nelson, on page 3 of this document there is reference to the distribution by Mr. King to the members of the Committee of a statement to be prepared on the question of the issuance of a gold curtailment order. Do you know what memorandum or document that refers to?

A. It was one of the first memorandums that I presented to Mr. King. I think it was probably the exhibit preceding this, the memorandum that I have just discussed.

Q. You don't know, though?

A. I am rather certain it is.

Q. Were you at that meeting?

A. I was not a member of that committee until the second meeting.

Mr. Barnes: I think my objection goes to the weight, Your Honor. I have no objection.

The Commissioner: The exhibit will be received.

(Said document, marked "Plaintiffs' Exhibit No. 77," admitted in evidence and made a part of this record.)

[fol. 405] Mr. Rigney: Plaintiff next offers in evidence, Your Honor, Plaintiffs' Exhibit No. 45 for identification, and I hand Your Honor a copy of that.

Mr. Barnes: May I ask the purpose of this offer, Your Honor?

Mr. Rigney: The purpose, Your Honor, is to show that the statements contained therein were brought to the attention of the War Production Board and to Mr. Donald Nelson as chairman of the War Production Board on or about August 26, 1942. We expect to offer in a little while Mr. Donald Nelson's reply to this letter.

Mr. Barnes: I am still uncertain from the statement made by counsel as to whether this is being offered as proof of the statements made by Senator McCarran in his letter or not.

Mr. Rigney: No, we do not offer it as proof of the statements contained therein, but only that the statements contained in this document were made and that the document itself came to the attention of Mr. Donald Nelson.

Mr. Barnes: On that basis, I have no objection.

The Commissioner: It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 45," admitted in evidence and made a part of this record.)

Mr. Rigney: May this exhibit be marked the next number in order?

[fol. 406] (Said document was marked for identification as Plaintiffs' Exhibit No. 78.)

Mr. Rigney: Plaintiff offers in evidence now Plaintiffs' Exhibit No. 78 for identification, Your Honor, a telegram from Senator Burton K. Wheeler to President Roosevelt discussing the copper situation so far as labor was concerned.

Mr. Barnes: Again, Your Honor, I fail to see the relevance or materiality of this document. Certainly there is no question of notice to the War Production Board of any of the statements contained here.

Mr. Rigney: The covering sheet shows that it was evi-

dently sent by the White House to Mr. Paul V. McNutt, who I think we all know was War Manpower Commissioner, at least there will be *rp*oof that he was at this time, and there will be proof at the appropriate time of Mr. McNutt's participation in connection with the issuance of L-209; the conferences immediately preceeding its issuance, which certainly brings knowledge home to many of the conditions in the copper mines and the cause of the shortage of labor in the copper mines.

Again, we offer this not for the truth of the contents of it but to show that the statements contained therein came to the attention of Mr. McNutt in his official capacity in the War Manpower Commission.

Mr. Barnes: There is no showing that they came to Mr. McNutt's personal attention whatsoever. It is addressed to [fol. 407] him, but that doesn't mean it came to his personal attention.

Mr. Rigney: Here is a telegram to the President of the United States and a covering sheet, "Memorandum for Honorable Paul V. McNutt," with the initials of the President of the United States at the bottom. We got it out of Archives. That would seem to be sufficient to make it admissible, Your Honor.

The Commissioner: I think that you are going to have to tie up the substance of the communication with other evidence before it is admissible. I think at this point it is not admissible.

Mr. Rigney: We will leave it, then, as carrying the identification number, Plaintiffs' Exhibit No. 78.

The Commissioner: Yes. It may be offered later on, if you are able to tie it up.

Mr. Rigney: Very well.

Plaintiff offers at this time Exhibit No. 33 for identification on the pre-trial, which is the reply of Mr. Donald Nelson to Senator McCarran's letter received a little while earlier.

Mr. Barnes: No objection.

The Commissioner: It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 33," admitted in evidence and made a part of this record.)

Mr. Rigney: I would like to invite Your Honor's atten- [fol. 408] tion to paragraph four of this letter reading:

"We quite agree that no legal power exists today by which workers may be forced to transfer to other mines. This accentuates the mine labor problem which faces us today."

May this be marked as the next Plaintiffs' Exhibit number in order?

(Said document was marked for identification as Plaintiffs' Exhibit No. 79.)

Mr. Rigney: I offer in evidence now Plaintiffs' Exhibit No. 79 for identification, being a copy of the minutes of the War Production Board meeting of September 1, 1942. We have the minutes here from which they were photostated.

Mr. Barnes: We have them, too.

No objection.

The Commissioner: Admitted.

(Said document, marked "Plaintiffs' Exhibit No. 79," admitted in evidence and made a part of this record.)

Mr. Rigney: The particular significance of this document is found in Section I, headed "Labor Supply for Copper, Lead, and Zinc Industries," Your Honor.

Plaintiff offers at this time Exhibit No. 17 for identification, being a letter of September 1, 1942, from H. O. King to Wilbur A. Nelson.

Mr. Barnes: No objection.

[fol. 409] The Commissioner: Admitted.

(Said document, marked "Plaintiffs' Exhibit No. 17," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Mr. Nelson, will you look, please, at Plaintiffs' Exhibit No. 17 and tell us if you recall having seen the original of that document?

A. Yes, I remember this memorandum because the statement which Mr. King made called for an answer, and an answer was given.

Mr. Rigney: May this be given the next numerical number?

(Said document was marked for identification as Plaintiffs' Exhibit No. 80.)

By Mr. Rigney:

Q. Would you look, please, at Plaintiffs' Exhibit No. 80 for identification and tell us if that is a copy of your reply to the previous exhibit, which is No. 17, the September 1 memo from King to you?

A. This is a copy of my reply in which I stated——

Mr. Barnes: I object to that, Your Honor. The document speaks for itself.

By Mr. Rigney:

Q. That is a copy of your reply?

A. Yes.

[fol. 410] Mr. Rigney: I offer it in evidence, Your Honor.

Mr. Barnes: No objection.

The Commissioner: Admitted.

(Said document, marked "Plaintiffs' Exhibit No. 80," admitted in evidence and made a part of this record.)

The Commissioner: We will recess until two o'clock.

(Thereupon, at 12:30 o'clock p.m., a recess was taken in the hearing until 2:00 o'clock p.m.)

[fol. 411] AFTERNOON SESSION

(The hearing was resumed at the time above mentioned, pursuant to the recess previously taken.)

(The reporter was duly sworn by the Commissioner.)

Mr. Rigney: May we have an informal word?

The Commissioner: Surely. You do not want this on the record, do you?

Mr. Rigney: I do not think it needs to be.

(Here followed discussion off the record.)

Mr. Barnes: On the record.

Your Honor, during the recess, I have examined plaintiffs' Exhibit 67, and other than the objection that was stated this morning, which I believe you overruled, I have no other objections to the receipt of that document.

The Commissioner: All right, then it may be received in evidence.

(Said document, copy of address by Wilbur A. Nelson, dated November 10, 1941, marked Plaintiffs' Exhibit No. 67, admitted in evidence and made a part of this record.)

Mr. Barnes: Also, I would like to state that Mr. Ewing has given me a document entitled "Minerals Yearbook, 1942" published by the Department of the Interior, Bureau of Mines, and I find on page 93 of that book the table from which Dr. McLaughlin was reading yesterday. I have com-
[fol. 412] pared it with the testimony and actually checked with the reporter and found the reporter had used a photostatic copy that Dr. McLaughlin had read from in preparing the transcript, so the testimony accurately reflects what is set forth in this book. I therefore withdraw the objection based on the best evidence rule.

The Commissioner: Very well.

Mr. Herrington: Could I ask which exhibits were just admitted?

The Commissioner: 67 only.

Wilbur A. Nelson, resumed the witness stand and was examined and testified as follows:

Direct examination (resumed).

By Mr. Rigney:

Q. Professor Nelson, would you look at Plaintiffs' Exhibit 17, which is the memo to you from Mr. King of September 1st, and you will note that in that memo he states that "It appears from this list—" referring to a list of mines "that a number of mines that produce practically nothing but gold have serial numbers, and I wonder if the definition in the gold curtailment order tying this to mines with serial numbers would be effective." Then your reply of September 3, of which this is a copy. Would you be able to state how many gold mines in the United States whose production of gold exceeded 75% of their total volume possessed serial numbers at this time?

[fol. 413] A. I can only think of one gold mine that the total value of its ore in gold is probably 90%. The remainder was arsenic. That was the Getchell Mine at Winne-

mucca, Nevada. And the Chemical Warfare Service required us to keep this mine open so that the arsenic dust could be shipped to the Garfield smelter for the recovery of arsenic for use by the Chemical Warfare Service. There may have been others.

There were a great many so-called gold mines that were given back their serial numbers, but only when the branch of the War Production Board requested us to do so, because they produced appreciable amounts of strategic minerals, or because they were necessary as fluxing ore in one of the western smelters. And in that case we received the entire list of mines supplying fluxing ores to the smelters from the different smelter companies, and we went over their list, and whenever they asked us to return a certain serial number to a certain mine as essential in the operation, we would check the tonnage they had gotten from that mine the previous month. If they had gotten 300 or 400 tons we reinstated the serial number; if they had gotten 5 or 10 tons we did not feel that that was proper procedure, and so we asked the smelter company if they could not increase their production from the 300-ton mine, and in most cases that was done.

Q. Would you explain to us what you mean by a fluxing ore?

[fol. 414] A. In all smelters they need a certain amount of silicious ore if they have too much sulphur in the ores smelted, and sometimes the reverse is true, they have to get pyritic ores to balance the smelter charge. And it is natural that a smelting company like the American Smelting & Refining Company has built up as their source of silicious ore, or fluxing ore I should say, to quartz containing small gold values, and that adds some value to their output, where quartz containing no gold might make it impossible to smelt some low grade ores.

Mr. Rigney: May we have this marked as the next exhibit in order?

(Said document was marked for identification as Plaintiffs' Exhibit No. 81.)

Mr. Rigney: I should like to offer in evidence Plaintiffs' Exhibit 81, being the minutes of the Interdepartmental Com-

mittee on Non-ferrous Metals, the meeting of September 3, 1942.

By Mr. Barnes:

Q. Were you present at this meeting, Mr. Nelson?

A. I was not.

Q. You were at this time a member of the Committee, were you not?

A. I became a member of the Committee on the second meeting, which was before September 3rd, as I recollect. For some reason, I had another commitment at that time and could not attend the meeting.

[fol. 415] Mr. Barnes: I have no objection.

The Commissioner: That will be received.

(Said document, minutes of meeting of September 3, 1942 of Interdepartmental Committee on Nonferrous Metals, marked Plaintiffs' Exhibit No. 81, admitted in evidence and made a part of this record.)

The Commissioner: In view of the statement that is in one of your exhibits, a question suggests itself to me of this witness, and that is: you were in charge of the Mining Branch, were you not?

The Witness: I was.

The Commissioner: And these minutes make a statement that "The mining branch which is responsible for the drafting of the proposed gold order" at the top of page 3.

The Witness: At that particular time in the War Production Board we had been told to draft an order. Then later on we were told not to draft an order, and then later on we drafted an order.

The Commissioner: All right. That seemed inconsistent with something I saw earlier in an earlier exhibit.

Mr. Rigney: May I read, briefly, your Honor, from near the bottom of page 2 of these minutes?

By Mr. Rigney:

Q. By the way, Mr. Nelson, did you know a man during your service with WPB by the name of Samuel Lipkowitz?

[fol. 416] A. I did.

Q. What branch was he in?

A. The labor division.

Q. That is the division that was under Mr. Lester that you testified about?

A. That is the division that was under Mr. Lester at that time.

Mr. Rigney: Reading now from the exhibit:

> "Mr. Lipkowitz reported that a fairly large number of mines whose gold production by volume exceeded 75% had received serial numbers entitling them to the use of mining equipment. These mines employed some 2,000 men. He pointed out that since the purpose of the order curtailing the gold mining industry was primarily to free manpower, continuation of this practice would defeat the purpose of the proposed order."

I offer now, if your Honor please, Exhibit No. 22 for identification, which are the minutes of the Interdepartmental Committee on Nonferrous Metals of September 8, 1942.

Mr. Barnes: Your Honor, I would like to point out that this is a document which, at the time of the pre-trial conference, was incomplete. The document was marked at the pre-trial conference consisting of pages 1, 3 and 5.

The Commissioner: Are the additional pages with it now?

Mr. Barnes: They are not.

[fol. 417] Mr. Rigney: We have them here, your Honor. Would you accept them now, subject to check, Mr. Barnes? (Handing).

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said minutes of September 8, 1942 of Interdepartmental Committee, marked Plaintiffs' Exhibit No. 22, admitted in evidence and made a part of this record.)

Mr. Rigney: I would like to read a portion from the top of page 4 of this document:

> "In a discussion of the proposed gold order it was the firm belief of the members of the Committee that gold mining was now an unessential industry and that even if the manpower released by the gold order was

not directly transferred to copper, lead or zinc mining, it still might help relieve the shortage of labor in other war industries, such as aircraft and shipbuilding. There was impatience among some members on the Committee with the length of time which was being taken to promulgate a gold order." May this be marked as the next exhibit?

(Said document was marked for identification as Plaintiffs' Exhibit No. 82.)

Mr. Rigney: Plaintiffs offer at this time, your Honor, Plaintiffs' Exhibit No. 82 for identification, being the Inter-
[fol. 418] departmental Committee minutes of September 15, 1942.

Mr. Barnes: There is no objection.

The Commissioner: It is admitted.

(Said minutes of meeting of September 15, 1942 of Interdepartmental Committee, marked Plaintiffs' Exhibit No. 82, admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Mr. Nelson, did you know a man in the WPB in 1942 by the name of Allen Buchanan?

A. I did.

Q. Do you recall what his position was, what division he was connected with?

A. He was in the Labor Division under Mr. Lester.

Q. Do you know if he and Mr. Lipkowitz were serving simultaneously at about that time in 1942?

A. They worked together very often.

Q. Do you remember a gentleman in the WPB by the name of M. Creditor?

A. Morris Creditor was a special assistant to Donald Nelson.

Q. And do you know how long he was there?

A. For a considerable length of time.

Mr. Rigney: Plaintiffs offer now, your Honor, Exhibit 21 for identification.

Mr. Barnes: No objection.

[fol. 419] The Commissioner: It is admitted.

(Said memorandum, dated September 15, 1942, from Mr. Creditor to Mr. Nelson, marked Plaintiffs' Exhibit 21, admitted in evidence and made a part of this record.)

Mr. Rigney: Your Honor, this is a one-and-one-half page document which we regarded as very important. May I read this document?

The Commissioner: Into the record?

Mr. Rigney: Yes.

The Commissioner: It is just a duplication because I am going to read it. It is just as much in the record in the form that you put it in as it would be in the transcript.

Mr. Rigney: I was anxious to have your Honor get the flavor of this particular document because it is a document close to the date on which the order was issued and deals, as it says, with a proposed draft of the gold closing order.

May this be marked as the next exhibit?

(Said document was marked for identification as Plaintiffs' exhibit No. 83.)

By Mr. Rigney:

Q. Who was Dr. M. H. Stow, Mr. Nelson?

A. Dr. Stow was my deputy director in the Mining Division, on leave of absence from Washington-Lee University, where he was head of the School of Geology. Washington-[fol. 420] Lee University is located at Lexington, Virginia.

Mr. Rigney: Plaintiffs offer Exhibit 83 for identification in evidence.

By Mr. Barnes:

Q. Who is J. M. Scribner?

A. He came in at that time—I do not know where he came from—as special assistant to Henderson.

Q. Alec Henderson?

A. Yes. I think he took Mr. Henderson's place when he was going to leave.

Mr. Barnes: I have no objection to that.

The Commissioner: That will be admitted.

(Said memorandum, dated September 17, 1942, from Mr. Scribner to Dr. Stow, marked Plaintiffs' Exhibit 83, admitted in evidence and made a part of this record.)

The Commissioner: Was Dr. Stow a subordinate of yours?

The Witness: Yes sir, he was my deputy director of the Mining Branch. He was next to me.

By Mr. Rigney:

Q. Do you remember a Mr. L. R. Boulware in the WPB in those days?

A. Yes, he appeared on the scene. I cannot tell you where he came from, but he came in as assistant to Mr. W. L. Batt.

[fol. 421] Q. Mr. Batt was vice-chairman, was he, of WPB at that time?

A. Yes.

Mr. Rigney: May this be marked the next plaintiffs' exhibit?

(Said document was marked for identification as Plaintiffs' Exhibit No. 84.)

Mr. Rigney: Plaintiff offers in evidence Plaintiffs' Exhibit No. 84 for identification.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said memorandum, dated September 19, 1942 from Mr. Boulware to Dr. Nelson, marked Plaintiffs' Exhibit No. 84, admitted in evidence and made a part of this record.)

By Mr. Barnes:

Q. I understand Mr. Kanzler, to whom a copy of this was sent, was then the Director of Industry Operations; is that correct?

A. I think so. That was changing rapidly at that time.

Mr. Rigney: May this be marked Plaintiffs' Exhibit 85 for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 85.)

By Mr. Rigney:

[fol. 422] Q. Mr. Nelson, do you recall the formation of a committee in the WPB called the Interdepartmental Group on Mineral Production?

A. I do.

Q. Now, would you tell us what that committee was? Describe it generally.

A. Well, it dealt with priorities as against the Nonferrous Alloy Committee which dealt with labor problems. This new committee met in the conference room adjoining my office and was composed of Mr. DeWitt Smith, representing Metals Reserve, which was the buying agency for strategic metals for the RFC. Also, I think there was a representative of ECA, the Bureau of Mines and the offices of Services and Supply, as well as two members from the War Production Board. It was our duty to each month set up the order in which priorities should be given due to the critical position of the different metals. And I remember very distinctly that we always put at the head of the list those items which the Services of Supply requested us to, because for many months the Manhattan Project headed that list without us knowing what it was.

Q. In the membership of the committee I believe you said was a representative of ECA. What agency was that?

A. Well, they were the agency that looked after economic buying in Europe and other countries.

Q. Oh, the Board of Economic Warfare?

[fol. 423] A. The Board of Economic Warfare. I remember Mr. William Wrather represented them at the meetings.

Mr. Rigney: Plaintiff offers Exhibit No. 85 for identification in evidence.

By Mr. Barnes:

Q. Who organized this group?

A. This group was organized after I left the position as Director of the Mining Division, and when I was assistant to one of the numerous deputy directors, particularly Mr. Howard Young, who was deputy director for an over-all picture of minerals.

Q. You left the Mining Division in December of 1942?

A. Yes sir.

Q. This group was organized after that?

A. That was to my recollection, but I would like to refresh my memory by looking at the date of the first meeting.

(Exhibit handed to the witness.)

The Witness: Well, I am entirely wrong. It was organized at the request of the top side of the War Producetion Board.

By Mr. Barnes:

Q. What do you mean by the top side? Who asked you to do it?

A. I suppose Mr. Batt or Mr. Boulware. They were in charge of it.

Q. Or Mr. Henderson?

[fol. 424] A. Well, if Mr. Henderson was there at that time it came down through Mr. Henderson to us.

Now, it continued on and then it later became under the direct control of Mr. Howard Young and myself.

Q. To your knowledge, was this the first meeting? Are these the minutes of the first meeting of that committee?

A. I cannot say. I thing they are.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said minutes of meeting of September 23, 1942 of Interdepartmental Group on Mineral Production, marked Plaintiffs' Exhibit No. 85, admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. You spoke, Mr. Nelson, of a time when you left the Mining Division. When was that, as near as you can recall?

A. Some time in December of '42.

Q. And where were you? What was your official position?

A. I was assistant to the deputy director that looked after the coordination of all mineral activities, who was Mr. Howard Young.

Q. How long did you hold that position?

A. I held that position until I resigned from the War

Production Board, but the title changed at various times [fol. 425] although the work remained the same.

Q. That was about the end of 1944?

A. I resigned on December 2, 1944, as soon as they lifted the ban on permitting you to resign.

Mr. Rigney: May this be marked the next number of identification, 86, I believe?

(Said document was marked for identification as Plaintiffs' Exhibit No. 86.)

By Mr. Rigney:

Q. I show you Plaintiffs' Exhibit 86 for identification, Mr. Nelson, and ask you if you recall sending that memorandum to Mr. W. L. Batt?

A. I remember sending this memorandum to Mr. Batt and it bears my signature.

Q. And this pertains to limitation order L-208?

A. There was a resolution passed by this committee composed of all of the branches dealing with mineral production requesting that L-208 not be issued until proper steps had been taken to funnel the labor to copper mines.

Mr. Rigney: Plaintiff offers Exhibit 86 for identification in evidence.

By Mr. Barnes:

Q. Mr. Nelson, I notice that in this document you are described as being the special assistant to the Deupty Director General for Industry Operations.

[fol. 426] A. Yes sir. I occupied that position for about two weeks. I was requested by Mr. Henderson to have Dr. Stow act as Acting Director of the Mining Division while I was assigned some special problems that they felt I could handle which needed handling. I came back to the Mining Division several weeks later.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said memorandum, dated September 25, 1942, from Dr. Nelson to Mr. Batt, marked Plaintiffs' Exhibit No. 86, admitted in evidence and made a part of this record.)

Mr. Rigney: May this be marked as the next plaintiffs' exhibit?

(Said document was marked for identification as Plaintiffs' Exhibit No. 87.)

Mr. Rigney: Plaintiff offers in evidence Exhibit No. 87; being a memorandum of September 25, 1942, from W. L. Batt to A. I. Henderson.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said memorandum, dated September 25, 1942, from Mr. Batt to Mr. Henderson, marked Plaintiffs' Exhibit No. 87, admitted in evidence and made a part of this record.)

[fol. 427] Mr. Rigney: May I call your Honor's attention to paragraph 2 of this exhibit, in which Mr. Batt directs Mr. Henderson to be certain that when the press release pertaining to L-208 is issued that they be careful to specify the purpose for which Order L-208 is being issued, namely, that of releasing less essential labor for more essential requirements.

At this time we offer Plaintiffs' Exhibit 37 for identification in evidence, being one of the pre-trial exhibits, and that was lacking a second page at the time that it was originally marked, and we have obtained that missing page now.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said minutes of meeting of September 25, 1942 of branches concerned with mineral production, marked Plaintiffs' Exhibit 37, admitted in evidence and made a part of this record.)

Mr. Rigney: I would like to call your Honor's attention to the paragraph in this document on page 2 which is headed "Gold Mining Limitation Order".

Mr. Barnes: And particularly the last sentence of that paragraph, your Honor.

Mr. Rigney: Yes.

By Mr. Rigney:

Q. This document, Mr. Nelson, Exhibit 37 for identification, which is now received in evidence, refers to a Mr.

[fol. 428] Henderson at this meeting. It says "Mr. Henderson replied that the conserving of materials rather than labor, was the main purpose of the order."

Would that be Mr. Alec Henderson that that refers to?

A. The only person it could refer to would be a Mr. A. I. Henderson.

Q. In the War Production Board?

A. Yes sir.

Q. Was he a lawyer, Mr. Nelson?

A. He was, but not acting in that capacity at that time.

Mr. Rigney: May this be marked the next exhibit?

(Said document was marked for identification as Plaintiffs' Exhibit No. 88.)

By the Commissioner:

Q. Who was the secretary at this meeting of September 25 at which, I believe, you presided, according to the exhibit?

A. Yes sir. When I was presiding over these meetings I either had a secretary of the Mining Division, which was a young man that handled the minutes of all our meetings in the Mining Division, or, if requested, I asked to have the stenographic service report the meeting. I think this meeting was handled by the secretary of the Mining Division.

Q. Does this exhibit reflect substantially what took place at the meeting?

A. It does to the best of my knowledge and belief.

[fol. 429] Q. Was there any resolution of the discussion here under this paragraph that was called to my attention? It seems that Mr. Hayes said that the issuance of the order had one purpose and that Mr. Henderson said there was another purpose.

A. Mr. Henderson was told by Mr. Batt to be very careful about how the release was to be given out, and he, I think, was following Mr. Batt's instructions.

Q. I did not ask you what was behind the statement here, I asked you about the discussion that took place at the meeting. Was there any resolution of what apparently was a head-on conflict?

A. There was no resolution, because Mr. Henderson had the final say.

The Commissioner: All right.

By Mr. Barnes:

Q. Mr. Henderson was Mr. Hayes' superior?

A. Yes sir.

Mr. Rigney: Plaintiff offers now Exhibit 88 for identification, being the minutes of the inter-branch meeting of September 28, 1942.

Mr. Barnes: No objection.

The Commisssioner: It is admitted.

(Said minutes of the inter-branch meeting of September 28, 1942, marked Plaintiffs' Exhibit No. 88, admitted in evidence and made a part of this record.)

[fol. 430] Mr. Rigney: I would like to call your Honor's attention to the first paragraph on page 2 of these minutes.

Plaintiff offers now, your Honor, Exhibit No. 49 for identification.

Mr. Barnes: Am I correct in assuming that this is offered for the same purpose as the previous letter?

Mr. Rigney: That is correct.

Mr. Barnes: Not as proof of the facts stated in the letter but merely notice of those facts, if they are proved to be facts?

Mr. Rigney: Notice of the facts contained in the letter to Mr. Donald Nelson as Chairman of the WPB.

Mr. Barnes: No objection.

The Commissioner: Very well, it may be received.

(Said telegram, dated September 29, 1942, from Senator McCarran to Mr. Donald Nelson, marked Plaintiffs' Exhibit 49, admitted in evidence and made a part of this record.)

Mr. Rigney: Now, your Honor, plaintiff offers Exhibit No. 23 for identification, being a memorandum from Mr. W. L. Batt to Mr. Donald Nelson.

Mr. Barnes: No objection.

The Commissioner: Is Mr. Batt going to be called as a witness?

Mr. Rigney: I don't know.

The Commissioner: By the plaintiff?

[fol. 431] Mr. Rigney: Not by the plaintiff.

The Commissioner: Do the plaintiffs know where he is?

Mr. Rigney: I understand that he is in Mexico, or at

least the information that I had as of the first of January was that he would be spending the winter in Mexico, put it that way. I do not know whether he is actually there now or not, but his plans were to be there for the winter until some time in March.

The Commissioner: All right.

Mr. Rigney: This is very short. I would like to read it to you.

"Memorandum for Mr. Nelson.

"The more I study the gold mining situation, the more uncertain I am as to the form which a restriction of operations should take. Complete closing without exceptions will produce very serious economic dislocations, and the total possible gain in men is a small figure. If the question comes up in your press conference, I would suggest that you refer to the need for miners and the lack of need for gold, and say that the matter is being studied from all angles."

And it carries the notation in handwriting "Noted by DMN, 10/1/42 before press conference."

By Mr. Rigney:

Q. Were Mr. Donald Nelson's initials DMN?

[fol. 432] A. Yes.

Mr. Barnes: I will so agree.

The Commissioner: I am not so sure that was admitted.

Mr. Rigney: I am not sure.

The Commissioner: Do you offer it?

Mr. Rigney: Yes.

Mr. Barnes: I say no objection.

The Commissioner: All right, it is received.

(Said memorandum from Mr. Batt to Mr. Nelson, marked Plaintiff's Exhibit 23, admitted in evidence and made a part of this record.)

Mr. Rigney: May this be given the next number in numerical sequence?

(Said document was marked for identification as Plaintiffs' Exhibit No. 89.)

Mr. Rigney: Plaintiff offers in evidence Exhibit No. 89 for identification, your Honor, the minutes of the inter-branch meeting of WPB of October 2, 1942.

[for. 433] Mr. Barnes: No objection.

The Commissioner: Admitted.

(Said document, marked "Plaintiffs' Exhibit No. 89," admitted in evidence and made a part of this record.)

Mr. Rigney: Plaintiff now offers Exhibit 25 for identification, Your Honor.

Mr. Barnes: No objection.

The Commissioner: Admitted.

(Said document, marked "Plaintiffs' Exhibit No. 25," admitted in evidence and made a part of this record.)

Mr. Rigney: May I call Your Honor's attention to the fact that in this letter of Under Secretary Patterson to Mr. Batt of October 2, he stresses the need for miners in the non-ferrous mines and makes no mention of critical materials as being a reason for closing down gold mines.

By Mr. Rigney:

Q. Mr. Nelson, would you look at Plaintiffs' Exhibit No. 88 in evidence, in the first paragraph of which reference is made to a resolution which was offered at this meeting of September 25 referred to there?

A. Yes.

Q. Can you tell us what the facts were with respect to this proposal that had been advanced, that a meeting be held with representatives of the gold mining industry before [fol. 434] the issuance of L-208?

A. That is a unanimous opinion of the inter-branch meeting, and I was authorized by the members of that meeting to present their petition to Mr. Batt.

Q. Did you do so?

A. I did.

Q. What did Mr. Batt say or do?

A. He said it could not be done; that there was no reason to bring the gold mining executives to Washington.

Q. Then what happened after that?

A. We held another meeting the next day, I think, or two days after that, and re-passed the same resolution.

I went with Mr. Eaton to Mr. Batt, and he changed his mind and agreed to let us have the meeting.

Q. Is that Mr. Frederick Eaton that you mentioned?

A. Mr. Frederick Eaton.

Q. Was he in the General Counsel's office of WPB?

A. He was in the General Counsel's office, and I think very close to John Lord O'Brian.

Mr. Barnes: He was one of the three Assistant General Counsel. I so stipulate.

By Mr. Rigney:

Q. What happened after you and Mr. Eaton talked to Mr. Batt?

A. He said to get in touch with the owners or operators [fol. 435] of the major gold mines and to bring them to Washington for a meeting on October 1st.

Q. What did you then do?

A. The time was so short, I contacted four or five of them on the long distance phone. They said they would be glad to come if I would get them travel priorities. So I got them travel priorities and they all arrived in Washington on the morning of October 1.

Q. Will you tell us specifically whom you contacted or called?

A. I called Mr. Guy Bjorge.

Q. Of Homestake?

A. Of Homestake. Mr. Merril Shoup, of the Golden Cycle, which is a Cripple Creek operation.

Q. Colorado?

A. Colorado. Searles, who owned Newmont. There were two or three of the brothers present. Mr. McCormick, I believe, who is a big dredge operator, and I think Errol McBoyle was either called or was present in Washington and was told.

Q. What company was Mr. McBoyle connected with?

A. Idaho Maryland.

Q. Was Mr. McCormick from California?

A. My recollection is that he was a dredge operator from California.

[fol. 436] Q. Can you tell us from your recollection, or if there are any papers that will assist you in refreshing your

recollection, when you called Mr. Bjorge of Homestake in connection with this meeting?

A. I think I called him on the 29th.

Q. That would be on or about September 29?

A. Yes. I called him—as soon as I left the meeting with Mr. Batt, I immediately got on the long distance telephone.

Q. That was at the direction of Mr. Batt?

A. At Mr. Batt's' personal direction.

Q. Do you recall what you said to Mr. Bjorge in connection with this proposed meeting?

A. I told him there was a meeting in Washington of the major gold operators at which Mr. Batt wished to discuss the pros and cons of the gold situation, and that he probably would like to develop some figures. Mr. Bjorge said he had another appointment and he couldn't come without air priorities. I told him I thought the meeting was of sufficient importance for him to make that his first order of business.

Q. He was in Lead, South Dakota?

A. He was in Lead, So h Dakota.

Q. Do you recall that ..e meeting did take place on October 1?

A. The meeting did take place on the afternoon of [fol. 437] October 1st.

Q. Do you recall who was there?

A. Mr. Batt presided until somewhere around 5 o'clock.

Q. What time did the meeting start?

A. I believe around 2:00 or 3:00 o'clock, early in the afternoon. General Clay was there, General McSherry was there. I think Allen Buchanan and Sam Lipkowitz were both there. The representatives, in most cases the director of each one of the mining branches was present. We had representatives of the Mining Branch. Several Senators and Representatives were there.

Q. Do you recall if Senator Gurney was there?

A. Senator Gurney was there, and Representative Case, who is now Senator Case. They were both present. I believe Senator McCarran was there, too.

Q. Do you recall whether or not another meeting occurred a day or two before this October 1st meeting, at which this subject was under discussion and which meeting was attended by you?

A. A very small meeting occurred in Mr. Batt's office

on September 30, at which I thing General McSherry was present, Senator McCarran, Senator Gurney, Representative Engelbright of California, who represented the Mother Lode District, and Representative Case of South Dakota, and Mr. Lipkowitz. It was a very stormy meeting.

[fol. 438] Mr. Barnes: I object to his characterization.

The Commissioner: The last phrase, that it was a stormy meeting, is stricken.

By Mr. Rigney:

Q. Who presided at this meeting of September 30, that you are speaking about?

A. Mr. Batt. It was in his office.

Q. Did you tell us whether or not I don't remember whether you said—Mr. McNutt was there or not?

A. No, I don't remember Mr. McNutt's being present.

Q. Was this gold closing order under discussion? Was that the subject matter of the meeting?

A. There was the reason for the meeting being called.

Q. Can you tell us what was said, as well as you recall, by the participants at this meeting of September 30?

A. The Senators and Representatives emphasized the hardships that would be imposed on the inhabitants of the gold mining towns and the dislocation that would affect the war effort by the lowering of morale of the people, and just the general bad condition. They emphasized that. Mr. Lipkowitz emphasized the release of labor and the need of labor by the copper mines, and made a statement at that meeting that there would be approxiately 20,000 people released.

[fol. 439] Q. Would be released by the closing of the gold mines, you mean?

A. By the closing of the gold mines.

Q. Did Mr. Batt have anything to say, so far as you recall?

A. Mr. Batt presided and adjourned the meeting without making any decision.

Mr. Barnes: Did he participate in the discussion at all? I think that was the question.

The Witness: I do not remember.

By Mr. Rigney:

Q. You don't remember anything in particular that Mr. Batt said, if he did say anything at this meeting other than preside?

A. I do not.

By the Commissioner:

Q. Do you remember anything that anybody said at that meeting besides the Senators and Congressmen?

A. Mr. Case and Mr. Engelbright——

Q. I said excepting the Senators and Representatives.

A. And Mr. Lipkowitz.

By Mr. Rigney:

Q. Was Mr. Lipkowitz the man you testified earlier was the representative of the Labor Division of WPB?

A. Yes.

[fol. 440] Q. I think it would be appropriate for you to tell us everything you recall that he said.

A. His whole thesis was that approximately 20,000 men would be released by the closing of the gold mines, and that they would increase copper production tremendously, and that gold was unessential in the war effort.

By the Commissioner:

Q. Who called that meeting?

A. Senator Gurney, it is my recollection, requested Mr. Batt to have this informal meeting.

By Mr. Barnes:

Q. Did you say anything at the meeting?

A. I challenged Mr. Lipkowitz's figures and said I didn't think they were correct, that they were too high, and Mr. Case and Mr. Engelbright had tentative figures and agreed that the figures were much too high.

By Mr. Rigney:

Q. That the figures of Mr. Lipkowitz were too high?

A. Yes.

By the Commissioner:

Q. Do you have any further answer to the question I asked you? Do you remember what anybody else said except the two Congressmen? You have mentioned something that you said and something that Lipkowitz said.

A. I know Senator McCarran talked a lot, and I know [fol. 441] that Senator Gurney talked, and they talked about the dislocation that would be brought about by closing down the gold mines in the communities.

By Mr. Rigney:

Q. Let us be sure we know how many representatives of WPB were at that meeting of September 30. There was Mr. Batt, who presided.

A. And I was there, and Mr. Lipkowitz was there. If you call General McSherry a part of the War Production Board, he was there.

By Mr. Barnes:

Q. Was he part of the War Production Board?

A. He was War Manpower. I don't know the exact relationship. They all had offices in the same building.

By Mr. Rigney:

Q. Is there anything else which occurred at this meeting of September 30 that you recall that you haven't testified to?

A. Nothing more.

Mr. Rigney: Would this be an appropriate time, Your Honor, to recess now? We have exhaused the documents that we have been able to confer about, and if Your Honor would be agreeable to recessing now, we can do what we told you we would do.

The Commissioner: Very well. The hearing is recessed [fol. 442] until 10:00 o'clock tomorrow.

Thereupon, at 3:20 o'clock p.m., a recess was taken in the hearing until 10:00 o'clock a.m., Wednesday, January 28, 1953.)

[fol. 443]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

Transcript of Testimony—January 28, 1953

TESTIMONY FOR PLAINTIFFS—Resumed

The hearing was resumed, at the time above indicated, pursuant to the recess previously taken.

WILBUR A. NELSON, a witness for the plaintiffs, resumed the witness stand, and was examined and testified further as follows:

Direct Examination.

By Mr. Rigney:

Q. Professor Nelson, I think just before the recess yesterday, you had told us of the persons in attendance at this meeting October 1st at which Mr. Batt presided, and to which several leaders of the gold mining industry were invited.

[fol. 444] Could you tell us now, to the best of your recollection, what was said at that meeting by the various people in attendance?

A. Might I say first that I did not expect it to be considered that the list I gave you was a complete list; it was just those that I remembered.

Q. I see. Well, it might be helpful, and it will only take a moment, to have you tell us now whom you recall as having been in attendance.

Take the government people first.

A. Mr. Batt, General McSherry, Mr. Lipkowitz with him, and Mr. Vogelsang.

Q. What was his position?

A. Tin and lead, sir.

Q. Head of the——

A. Head of the tin and lead division.

Mr. King, head of the copper division, a gentleman who was head of the ferro alloy division, whose name has escaped me; Mr. Lund of the miscellaneous minerals division.

Q. Was that R. J. Lund, because there were two?

A. Yes, not Wendell Lund, but R. J. Lund.

Senator Johnson, Senator McCarran, and Senator Gurney from three of the gold-producing states, Representative Englebright of the Mother Lode District of California, Representative Case of South Dakota, who is now Senator [fol. 445] Case, and I think I gave you the other time the complete list of representatives of gold mining companies.

Q. Yes, and I think you said yesterday that General Clay was there, and I don't remember if you mentioned him this morning.

A. General Clay was there, because I remember very distinctly a statement he made.

Q. All right.

Now, would you go ahead, if you have told us as many of the people in attendance as you remember, and tell us what was said?

A. I think I gave the opening remarks of Mr. Batt, that the War Production Board had brought them there to tell the gold operators that they were intended to close down the gold mines, but he felt it was proper they should be told at a personal meeting.

Immediately following that, it is my recollection that one of the Senators immediately received permission to talk, and each one of the Senators was given permission by the chairman in order to talk, and they insisted that it was discriminatory, it would dislocate communities, and serve an undue hardship on the people of these western states where gold mining towns occur.

That took some time.

[fol. 446] They were followed by the Representatives, who made similar statements. And I think it was about that time that General Clay made the statement: "Well, you can't shoot gold bullets," which was received in silence.

Somewhere in the morning session General McSherry stated that he felt he had set up the proper procedure to channel the men from the mines to the copper mines, which was challenged by some of the mine operators.

In the morning session, Mr. Lipkowitz made the statement that the number of workers in gold mines was between ten thousand and twelve thousand men, and this was challenged by the gold operators present.

Q. By the way, what time did this meeting start?

A. Somewhere between two and three o'clock.

Q. That was, as I recall, your testimony yesterday, I think you inadvertently referred to the morning session.

A. That was in error. It started in the early afternoon.

Q. And lasted until about what time?

A. The first half of the meeting lasted until five o'clock, at which time Mr. Batt stated that he had to leave, and he suggested that the meeting take a recess and that I preside over the meeting, due to the fact that just before the meeting closed it had been agreed that we would work up with the mine operators a set of figures as to how many mine [fol. 447] workers, miners and muckers, were actually in each one of the gold mines represented at the meeting, plus an estimate of how many people were employed in the other small mines throughout the west, with which someone in the meeting was rather familiar.

Q. Now, do you remember anything that anyone else had to say, for instance, Mr. Vogelsang? You said he was there.

A. Mr. Vogelsang brought up the question that it had been stated that there was a large tin deposit, I think, in the Black Hills, and that it might have been a possibility of transferring the entire Homestake miners to work in this tin deposit.

There was some tin in the Black Hills, but it was scattered, pockety and to date it has never been worked.

Q. Was any comment made by anybody there about that suggestion of Mr. Vogelsang's?

A. It is my recollection that Mr. Guy Bjorge made some remarks, but I would rather have him report for himself.

Q. Do you recall any other comments that were made there? Was Mr. Lipkowitz conversation limited to a discussion of the labor situation?

A. His discussions were always limited to the amount of men available, and how they could be transferred to the copper mines, and that there would be no difficulty in doing so.

[fol. 448] In the evening meeting, over which I presided,

I called upon each one of the operators in turn to present figures which they had with them; or their memory of the number of people working, and in each case we had a thorough discussion.

In each case Mr. Lipkowitz made a statement somewhat as follows: that he did not believe that the mine operators wished to deceive the government; but he thought that they thought the figures they were giving were correct, but that he also was very positive that they had been misinformed by their personnel who had given them those figures.

As a result of the meeting, which I think lasted until about seven-thirty or eight o'clock, we arrived at a rather complete set of figures for all of the miners and muckers employed at that time in the gold mining industry of the United States.

The Commissioner: Were minutes of the meeting kept?

The Witness: It is my recollection that the only minutes of that meeting that were kept were the figures that were worked up during the second half of the meeting.

OFFERS IN EVIDENCE

Mr. Rigney: Plaintiffs now offer in evidence, your Honor, Plaintiff's Exhibit No. 24 for identification.

I might show it to the witness.

[fol. 449] By Mr. Rigney:

Q. Mr. Nelson, would you look at Plaintiff's Exhibit 24 for identification and tell us if you prepared that memorandum on or about October 3, 1942?

A. I prepared this memorandum on October 3, after waiting one day in order to have the mine operators check by long distance phone with their mines the figures they had given us. These figures are figures that were slightly modified and are considered correct as to the exact number of miners and muckers working in the mines and an estimate of the number of men working in dredge operations in other states outside of California.

As we had the main California operator of dredges, he knew the California figures, and he was thoroughly familiar with the entire dredging industry, and so he, in discussion with the other mine operators, reached a figure of 225. That

is the only estimated figure, except the estimated number of men available from other lode mines, which was arrived at by discussion of the lode mine operators which was five hundred.

So we have two estimates of five hundred men from all the small lode mines and two hundred twenty-five men as the men from all of the small dredge operators.

The rest of the figures are considered accurate.

The total was 3,270, which was a long way from ten thousand or twelve thousand.

[fol. 450] And in addition to that, if I might make the statement, of those miners and muckers, they are only a part of the figures given on the first page.

So the total miners and muckers was slightly under nine hundred. They were the men that they really needed to be transferred.

It takes a certain percentage of this roughly nine hundred men to be kept by the mines shut down to keep them in standby condition, and so when you get through with all of those deductions you would probably get somewhere between three hundred and six hundred men available for transfer who are in the miners and muckers class.

By Mr. Rigney:

Q. What is a mucker?

A. A mucker is a fellow that shovels up the ore that the miners mine.

Q. And you spoke of this gentleman from California a moment ago who furnished the estimate with respect to those employed in dredging operations. Is that Mr. McCormack?

A. That is Mr. McCormack.

Q. Do you know whether or not he is living now?

A. I do not.

Mr. Rigney: We will offer this now, your Honor.

Mr. Barnes: We have no objection.

[fol. 451] The Commissioner: It is admitted.

(Plaintiff's Exhibit No. 24 was marked for identification and received in evidence and made a part of this record.)

By Mr. Rigney:

Q. You sent that memorandum, which is Plaintiff's Exhibit 24, to Mr. Batt; is that right?

A. I took it up to him personally and discussed it with him.

By the Commissioner:

Q. What did he say?

A. He was surprised.

Q. What did he say?

A. He said that he was surprised that the figure was so low.

Q. That is a conclusion. I want to know what he said, if he said anything.

By Mr. Rigney:

Q. In other words, can you recall whatever words he used? If you recall?

A. I think he said, "Well, I will present the figures to the War Production Board at the meeting on the sixth, and thank you very much for them."

Mr. Rigney: Plaintiff now offers in evidence, your Honor, Exhibit No. 26 for identification, being a memoran- [fol. 452] dum of October 5, 1942, to Mr. Donald M. Nelson, from Mr. Robert P. Patterson, Under Secretary of War, and James V. Forrestal, Under Secretary of the Navy.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Plaintiff's Exhibit No. 26 was marked for identification and received in evidence and made a part of this record.)

Mr. Rigney: I call your Honor's attention to the entire document, particularly to the last pargraph that:

> "The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided."

By Mr. Rigney:

Q. Mr. Nelson, do you recall in connection with any statements made by the representatives of the gold mining industry at this October 1 meeting, any reasons which they advanced at that time in their arguments against why the order should not be issued?

A. Well, they thought that the disruption of the Communities, and the lowering of morale, making ghost towns of certain communities in the West, would hurt the overall war effort more than the few hundred muckers and miners that would be available to the copper and other nonferrous metal mines.

[fol. 453] Q. Is there any reason, or were there any other reasons advanced by them, as to why, in their judgment, the order would not be effective?

A. Well, they felt it was an illegal order.

Q. Was anything said about housing conditions in this meeting?

A. No, I do not remember that.

Q. Do you recall whether there was any discussion on the part of the operators with respect to the age of men then employed by them in the lode mines?

A. That statement was brought up by, I think, all of the operators who stated that on the order in October of that year they had already lost all of their most active men who had left the mines and moved, mostly to the West Coast in the shipbuilding yards, and airplane factories, and that the men left were settled and they doubted if very many of them would move, that it was common practice when a mine was shut down in the West that if there was any chance of that mine reopening within a few years the miners continued to live in their houses and eked out an existence in some way, waiting for the mine to reopen, that they did not like to move away.

Q. Do you remember any discussion of a comparison or contrast of the working conditions as between the Homestake Mine at Lead, South Dakota and the Anaconda Copper Mine at Butte?

[fol. 454] The Anaconda Copper Mine is a very high temperature mine; the Homestake Mine——

Mr. Barnes: I object and move to strike that as not being responsive to the question.

The Commissioner: Yes, it is stricken. The question was: What discussion did you hear concerning this thing.

The Witness: The discussion was that the miners in the mine at Homestake, where conditions were most excellent, if they had to move, would not stop——

Mr. Barnes: I again object, unless we have identification of the person speaking and the statements they made.

The Commissioner: That will be sustained.

By Mr. Rigney:

Q. Let me ask you this, Mr. Nelson: Are you familiar with the temperatures prevailing in the Anaconda Copper Mine at Butte?

A. Yes, sir; I have been there.

Q. And are you familiar with the temperatures prevailing in the Homestake Mine at Lead, South Dakota?

A. Yes, I have been in their mine.

Q. Now, will you tell us what the fact is with respect to comparable temperatures between those two mines or working conditions?

Mr. Barnes: I object to this unless it is shown that it [fol. 455] in some way was brought to the attention of Mr. Batt or other WPB representatives present at this meeting.

Mr. Rigney: This is preliminary to my next question, your Honor.

The Commissioner: Overruled. You may answer.

The Witness: These statements were presented to Mr. Batt at——

The Commissioner: I think the question——

Mr. Rigney: You are not answering the question. Let the reporter read the question back, if he may, and you listen to the question, now, and give us your best answer.

The Reporter (Reading): Question: "Now, will you tell us what the fact is with respect to comparable temperatures between those two mines or working conditions?"

The Witness: The Homestake Mine is a mine with excellent temperatures, assisted by excellent ventilation. The

Butte mines are classified as high temperature mines, working sulphide ores with acid water.

The Homestake Mine has fresh water.

By Mr. Rigney:

Q. Now, can you recall whether or not anyone in attendance at this meeting of October 1 mentioned this fact to which you have just testified, that is, in the course of the discussion of October 1 in the presence of WPB officials?

[fol. 456] A. The matter was definitely mentioned.

Q. By whom?

A. By the representatives of the Homestake Mining Company.

Q. Can you tell us whether or not there was any discussion at this meeting of October 1 about the necessity of issuing this order in order to save critical materials?

A. I have no recollection of critcial materials being mentioned anywhere during the meeting.

Mr. Rigney: May this be marked as our next new exhibit, please?

(Plaintiff's Exhibit No. 90 was marked for identification)

Mr. Rigney: Plaintiff offers Exhibit No. 90 for identification, being the interbranch minutes of October 5, 1942.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Plaintiff's Exhibit No. 90 was received in evidence and made a part of this record)

By Mr. Mr. Rigney:

Q. Mr. Nelson, do you recall a man in the WPB in 1942 by the name of T. W. Wilson, Jr.?

A. No, I do not.

[fol. 457] Mr. Rigney: May I have this marked as Exhibit No. 91 for identification?

(Plaintiff's Exhibit No. 91 was marked for identification)

Mr. Rigney: Plaintiff offers in evidence now, your Honor, Exhibit No. 91 for identification, it being a memorandum

of October 6, 1942 from James R. Newman to T. W. Wilson, Jr.

Mr. Barnes: Do you intend to offer proof as to who the addressee or the addressor are?

Mr. Rigney: Yes, we will, if you insist upon it. Can you not stipulate that——

Mr. Barnes: Frankly, I saw this document before the first time when you submitted it to me this morning. I have been searching my memory for some idea as to who these people are. I have no more recollection than Dr. Nelson has.

Mr. Rigney: I see. We will furnish evidence on that.

I might say in connection with Mr. Barnes' statement, that we had the exhibits ready for Mr. Barnes last evening, your Honor, and I called him at his office late in the afternoon and asked him if he wanted them last evening and he said he would rather have them this morning at the office.

So that is what we did.

Mr. Barnes. I object until there is some connection shown as to who these people are, your Honor; what their official [fol. 458] functions or capacities may have been.

Mr. Rigney: Would your Honor take it on my representation to the Court that we will establish the official positions of both of these men within the WPB at this time?

The Commissioner: Yes.

Mr. Barnes: Subject to a motion to strike if that is not satisfactorily established.

The Commissioner: Yes, it will be received.

(Plaintiff's Exhibit No. 91 was received in evidence and made a part of this record)

By Mr. Rigney:

Q. Mr. Nelson, do you recall what next happened after you delivery of this October 3 memo that you took to Mr. Batt? What next happened in so far as this proposition of closing the gold mines was concerned, as far as you know?

A. The next thing of any importance that happened was the meeting of the board, the full board of the War Production Board, which, I think, was on October 6.

Q. Were you in attendance at that meeting?

A. I was invited to attend and did attend.

Q. And do you remember some discussion there of the proposed gold order?

A. Yes, I did.

Q. Do you recall approximately how long the discussion [fol. 459] lasted?

A. Somewhere between fifteen and thirty minutes.

Q. And who do you recall now as having spoken at that meeting in connection with the gold order?

A. I recall Mr. Batt reading the figures from the memorandum which I furnished him on the third.

I recall General Somerville stating that unless this order was issued immediately they could not furlough any soldiers to the copper mines.

I recall assistant Secretary Patterson making the same statement, but a little more vehemently.

I recall Leon Henderson making a long talk on what the Canadians were doing in the gold mines, and those are the highlights of the meeting as I remember them.

Q. Were you called upon for any observations at all?

A. I was not.

Mr. Rigney: May this be marked Plaintiff's Exhibit 92 for identification?

(Plaintiff's Exhibit No. 92 was marked for identification)

Mr. Rigney: Plaintiff offers in evidence, your Honor, Exhibit No. 92 for identification, being the minutes of the War Production Board of October 6, 1942.

By Mr. Barnes:

Q. Have you examined these minutes?

[fol. 460] A. Have I?

Q. Yes.

A. I have read them over a number of times.

Q. Do they correctly represent the people who were in attendance at that meeting, as far as you can recall?

A. To the best of my knowledge.

Mr. Barnes: I have no objection.

The Commissioner: It is admitted.

(Plaintiff's Exhibit No. 92 was received in evidence and made a part of this record)

By the Commissioner:

Q. What have you to say with respect to the statement in here that General Somerville stated that the Army had already furloughed four thousand soldiers?

A. He said they would not continue it.

Q. Were there to be more furloughs, or what?

A. Yes. That was the idea that we understood, that if the gold order was issued immediately that he would continue to furlough soldiers.

In other words, metal miners who were still in the Army would be furloughed.

Q. There wasn't any question about these four thousand?

A. No, he had furloughed soldiers before the order was issued.

[fol. 461] The Commissioner: All right.

By Mr. Rigney:

Q. Do you know when this first furloughing of soldiers occurred for work in the copper mines?

A. It started in September.

Mr. Barnes: May it please the Court, with respect to the preceding exhibit, Plaintiff's Exhibit 91, Mr. McGrail has called my attention to the fact that in the concluding paragraph there is a reference to an attachment, and there is reference to that at the end of the memorandum, too.

I now object to the document in that it is not complete.

The Commissioner: It is a little late for objection after it is in.

Mr. Barnes: I move to strike it, your Honor.

The Commissioner: I think that it should be stricken now, unless you are going to put in a complete exhibit.

Mr. Rigney: Well, your Honor, this exhibit which I have offered is just the way we got in from Archives. I see that it refers to an attachment there which was not attached to the exhibit in Archives, and again I say that we have tried to be meticulous in the preparation of these exhibits, but we can only offer what we can get from Archives, and in several instances, there just wasn't the attachment there which was referred to in the basic document.

The Commissioner: I feel compelled to sustain the mo-
[fol. 462] tion to strike, and it will be stricken.

(Plaintiff's Exhibit No. 91, previously admitted in evidence, was stricken.)

Mr. Rigney: Shall we let the exhibit carry the number 91 for identification?

The Commissioner: Yes, we will do that, anyway.

Mr. Rigney: Will you mark this as the next exhibit?

(Plaintiff's Exhibit No. 93 was marked for identification.)

The Commissioner: Is this meeting of the 6th of October in Exhibit 92 the meeting in which they issued the order?

Mr. Rigney: At which the order was adopted, yes.

Mr. Barnes: There is a slight distinction there. The decision was made to issue the order. The order was not actually issued until two days later.

The Commissioner: That is what I wondered about. All right.

The Witness: May I say something?

The Commissioner: If you have something to add.

The Witness: Yes.

The resolution was made by one member of the War Production Board and passed directing Donald Nelson to issue the order immediately. That was legally what happened.

The Commissioner: All right. Go ahead.

[fol. 463] Mr. Rigney: Your Honor, of course, the significant portion of this exhibit 92 is section 1, gold mining, but I thought that the entire minutes of that day should be reproduced in order that the exhibit would be complete, and I believe this has now been received in evidence; is that correct?

The Commissioner: Yes.

Mr. Rigney: Plaintiff now offers in evidence the minutes of the Interdepartmental group on mineral production of October 7, 1942, as Plaintiff's Exhibit 93.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Plaintiff's Exhibit No. 93 was received in evidence and made a part of this record.)

By Mr. Rigney:

Q. Professor Nelson, what next occurred, as far as you know, with respect to the gold curtailment order following this meeting of the War Production Board of October 6?

A. The L-208 which was drawn under the direction of Dr. Macellus Stow—at the time I was acting as temporary assistant to Mr. Henderson—was taken by me up to Mr. Fred Eaton's office. I left it there.

It was my understanding that he made slight revisions in it. The next thing I knew was the order as signed by [fol. 464] Donald Nelson appeared. That was the following day.

Q. That would be October 8?

A. Yes, sir.

Mr. Rigney: May this be marked Plaintiff's Exhibit No. 94 for identification?

(Plaintiff's Exhibit No. 94 was marked for identification.)

Mr. Rigney: Plaintiff offers in evidence now, your Honor, Plaintiff's Exhibit No. 94 for identification, being the minutes of the Interbranch meeting of October 9, 1942.

Mr. Barnes: Your Honor, we now seem to be going in the other direction. Previously I have objected on the grounds of relevancy and materiality to exhibits in 1941 prior to the outbreak of the war.

We are now faced with this situation: We have L-208 issued; we have the resolution for its adoption by the full War Production Board, consisting of the Vice-President of the United States, representatives of the Secretary of War, the Secretary of the Navy, the Secretary of Commerce, the Director of production of the War Department, and a representative of Mr. Hopkins, who was special assistant to the President, and the Price Administrator, those were the members of the Board.

Now, we are going to a date after that; we are going to a discussion among subordinate members of the staff dealing with whether or not the order should have been issued. [fol. 465] It seems to me that the decision had been made by that group of individuals, the order had been issued, and these documents have no relevancy or materiality whatsoever, and I object on that basis.

The Commissioner: On your theory, then, the only evidence we should take is evidence that took place on the day that the order was issued.

Mr. Barnes: Your Honor, it seems to me that we have an order issued, a decision made by the group of individuals whose names I have mentioned.

But what we have to decide in this case, or the issue in this case is, whether they acted within the scope of their powers, and whether they acted in good faith at the time they acted.

They were the group who acted. They were the people who made the decision.

There has been an awful lot of documentation put in here. There has been little or no connection to that group of individuals showing knowledge conveyed to them.

Certainly various members of the staff of the War Production Board might have had different views. That is not at all unusual. As a matter of fact, that is why they had clearance committees, and things of that kind there to resolve conflicts of views.

But the decision was made by this group of individuals. [fol. 466] Now, the fact that somebody later on second-guessed them and thought they did something that was erroneous seems to me to have no bearing whatsoever on any issue involved in this case.

The Commissioner: It will be received.

(Plaintiff's Exhibit No. 94 was marked for identification and received in evidence and made a part of this record.)

Mr. Rigney: I invite your Honor's attention, with respect to Exhibit 94, particularly to what appears on the upper half of page 2 where reference is made to the remarks of a Mr. Theodore E. Peck.

Plaintiff now offers in evidence Exhibit No. 34 for identification, being a jointly signed statement of Paul V. McNutt, Chairman of the War Manpower Commission, and Donald M. Nelson, Chairman of the War Production Board.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Plaintiff's Exhibit No. 34 was received in evidence and made a part of this record.)

By Mr. Rigney:

Q. Mr. Nelson, I show you Plaintiff's Exhibit No. 8 for identification, being a letter, or purporting to be a letter [fol. 467] of the War Production Board dated October 13 to Idaho-Maryland Mines Corporation, and ask you if that letter was issued by your office?

A. This letter was issued by my office, on instructions to Mr. E. H. Rott whom I had set up as administrator of order L-208, and it was similar to letters sent to anyone who requested an appeal under L-208.

Q. Are those Mr. Rott's initials at the bottom?

A. Correct.

Q. And he was your assistant, was he, or deputy, at that time? What title did he have?

A. The title that he was given was Deputy Administrator of Order L-208. I still had to keep the title of administrator, but he was made deputy and he did all the work.

Mr. Rigney: Plaintiff offers Exhibit No. 8 for identification.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Plaintiff's Exhibit No. 8 was received in evidence and made a part of this record.)

By Mr. Rigney:

Q. Do you know how long Mr. Rott continued as administrator of order L-208, Mr. Nelson?

A. Well, I made a slight error in my testimony yesterday. [fol. 468] I said that I left the mining division on the first of December. I left it temporarily. I came back about a week later and stayed there until about the first of January, at which time I left permanently. And when I left permanently on the first of January, Mr. Rott was still deputy administrator of order L-208.

Q. The first of January 1943?

A. Correct.

Q. You then thereafter had another position and other duties?

A. Then I was assistant to Howard Young in a new division that had been set up.

Mr. Rigney: May this be marked Plaintiff's Exhibit No. 95 for identification?

(Plaintiff's Exhibit No. 95 was marked for identification.)

Mr. Rigney: Plaintiff offers in evidence, your Honor, Exhibit No. 95 for identification, being the interbranch minutes of October 16, 1942.

Mr. Barnes: Your Honor, I object to that on the grounds previously stated with respect to Plaintiff's Exhibit No. 94, except that we are getting even more remote from the date of issuance.

I have not found in this document any reference to gold mining or gold miners, either, I might point out, as a further [fol. 469] basis of objection.

Mr. Rigney: There is a discussion of the problem of miners in the nonferrous metal mines, Your Honor, and in connection with counsel's earlier objection as to time, I might call your Honor's attention to the fact that our petition contains the allegation that as early as the spring of 1943, the War Production Board learned that order L-208 was not achieving the purpose for which it was issued, namely, the transfer of hard rock miners and helpers from gold mines to copper and other nonferrous mines, and any reasonable consideration of the facts above set forth by the War Production Board prior to the issuance of said order L-208 would reveal that said order could not achieve its purpose.

The Commissioner: It may be received.

(Plaintiff's Exhibit No. 95 was received in evidence and made a part of this record.)

Mr. Barnes: In connection with counsel's statement I would like to point out, however, that order L-208, by its very terms, gave the mines a period of sixty days for a complete closing, so that if they are offering some that occurred eight days after the issuance of the order to show that it has not been fully effective, I don't think it has any relevancy and materiality on that basis, either.

The Commissioner: All right.

[fol. 470] Mr. Rigney: You do not want to hear me, do you?

The Commissioner: No.

Mr. Rigney: May this be marked Plaintiff's Exhibit 96 for identification?

(Plaintiff's Exhibit No. 96 was marked for identification.)

Mr. Rigney: Plaintiff now offers in evidence Exhibit No. 96 for identification, being the interbranch minutes of October 19, 1942.

Mr. Barnes: We object on the same basis that we did with respect to Plaintiff's Exhibit 94, your Honor.

The Commissioner: I had to read that other one pretty closely to see just how it might tie in. I would like a statement from counsel on how this ties in with the problem.

Mr. Rigney: Your Honor, there is a discussion here of Mexican labor. We expect to offer some testimony at a later time along that line. There is a consideration of obtaining Mexican labor for use in the mines.

There is a discussion at the bottom of page 1 and the top of page 2 concerning gold mines that were producing fluxing ores, and then a discussion of what the Employment Service was doing in connection with this whole proposition of transferring labor from one place to another.

The Commissioner: It will be received.

(Plaintiff's Exhibit No. 96 was received in evidence and [fols. 471-475] made a part of this record.)

[fol. 476] Mr. Rigney: Plaintiff offers in evidence Exhibit No. 97 for identification, being the minutes of the interdepartmental committee of October 20, 1942.

And I should like to invite your Honor's particular attention to the second paragraph on page 4, a short paragraph reading:

> "Reports verified on the results of recruiting gold miners for work in other mines. Some gold miners seem to have been transferred to Butte, but it is not known how many were involved. Mr. King requested [fol. 477] more definite information at subsequent meetings."

Mr. Barnes: I am perfectly willing to concede that this is a copy of the minutes of the meeting. I don't think that it is competent evidence to prove facts of the type that

counsel has just read as to reports verified on the results of the order, attributing generalized statements to unspecified individuals.

It is not competent proof of the facts stated therein any way, and if it is being offered as proof of those facts, I very definitely object to it.

Mr. Rigney: Your Honor, here is a meeting of representatives of the War Production Board and the Services of Supply and the War Manpower Commission, and other agencies, but those particularly that I have mentioned, who were closest to this whole proposition.

And here are their official minutes, and they reflect a statement that I read to you, which I think it is reasonable conclude, was the consensus of the meeting of these people who attended, these high officials of these various departments.

I don't know how you could get any better evidence of it at this late date than this document right here.

The Commissioner: You are offering that as proof of the facts?

[fol. 478] Mr. Rigney: Of that paragraph and anything else that is in it.

The Commissioner: Well, I don't think it proves the facts, but I am going to admit it as an exhibit which reflects the minutes of the meeting. It proves what may have taken place before the Board, but——

Mr. Dunn: And a state of mind.

Mr. Rigney: And a state of mind, my superior, Mr. Dunn, calls my attention to.

The Commissioner: Yes.

(Said minutes of interdepartmental committee meeting of October 20, 1942, marked Plaintiff's Exhibit No. 97, admitted in evidence and made a part of this record.)

Mr. Rigney: Plaintiff asks that this document of October 16, 1942, the minutes of the interbranch meeting, be marked Plaintiff's Exhibit 98 for identification.

(Said document was marked for identification as Plaintiff's Exhibit No. 98.)

By Mr. Rigney:

Q. Professor Nelson, you are familiar with the facts with respect to the construction of the U. S. Army Ski-tow at [fol. 479] Pando, Colorado in 1942?

A. Yes.

Q. Did you make a trip out there in your official capacity at about that time?

A. I made a trip to Pando accompanied by Mr. Fred Eaton, under the statement that the camp would not be closed for two weeks.

Q. First, supposing you tell us what there was out there. What was it?

A. When we arrived there we found that the construction had been completed on a skiway running up from Tennessee Pass, which was near Pando, to the top of the Rockies, a skiway modified and designed to train Alpine troops.

Q. Under the Army program?

A. The Army program of training.

Q. And do you know when the construction went on, when it was being built?

A. Well, at the time we arrived the construction was completed and over eight thousand men had already left the property.

We were told they would not leave until after we got there. We found——

Mr. Barnes: Your Honor, I object and move to strike this as being hearsay, the statement as to what he was told by an unidentified individual or individuals.

[fol. 480] The Commissioner: It may be stricken.

The Witness: There were only a few of the workers on the project when we arrived. The setup was designed so that it would almost have been impossible for a person who wanted to be referred by the USES——

Mr. Barnes: I object to this as being beyond the scope of the question and not being responsive.

The Commissioner: Sustained.

By Mr. Rigney:

Q. Let me ask you this, Mr. Nelson: Do you know when the completion of this ski-tow was about to be accomplished?

Mr. Barnes: I object further——

The Witness: At the time——

The Commissioner: When there is an objection, don't answer.

Mr. Barnes: I object further to any further examination on this subject on the ground that it is completely irrelevant and immaterial to any issues involved.

The Commissioner: What is the relevancy, Mr. Rigney?

Mr. Rigney: The fact that we want to show, your Honor, is that there was this project out there. We expect to offer proof that many of the men recruited for this very Army project came from mining endeavors in that vicinity.

The Commissioner: Let us get to that point then.

[fol. 481] Mr. Rigney: All right, sir. I would have to preliminarily establish what the situation was out there, that is all.

By Mr. Rigney:

Q. Do you know, Mr. Nelson, whether or not some of the employees engaged on this ski-tow at Pando were recruited from nonferrous metal mines?

Mr. Barnes: I object to that question, unless the source of the witness' knowledge is first developed.

Mr. Rigney: My co-counsel calls my attention to the fact that perhaps the witness should be permitted to answer the question as to whether he knows. Does he know? That was the question that I asked him, I think, does he know.

The Commissioner: Let us have the question read.

(The pending question, as above recorded, was read by the reporter.)

The Witness: They were——

The Commissioner: Yes, he can answer the question: Does he know.

Mr. Barnes: No.

By Mr. Rigney:

Q. The question is not whether or not they were recruited, but whether or not you know the facts. Do you know the fact in that regard, or not?

A. May I ask for a little information? The general [fol. 482] manager of the company told me that.

The Commissioner: That is not what the question is. The question is: Do you have knowledge with respect to a certain event, whatever the event?

The Witness: I was not there at that time, and, therefore, I have no knowledge of it.

Mr. Rigney: Plaintiff will now offer in evidence Exhibit 98 for identification, your Honor.

Mr. Barnes: Your Honor, I object to this on a series of grounds, the first being that we are getting more and more remote from the date of the issuance of the order. We are now at a meeting of a group of subsidiary individuals on October 26, 1942.

So far as I can see from examination of this document, its only possible relationship to this controversy is on the matter now presented with respect to Pando, as to which there has been no showing of any relevancy or materiality as yet.

The Commissioner: Are you finished?

Mr. Barnes: Yes.

The Commissioner: It may be received.

(Said minutes of interbranch meeting of October 26, 1942, marked Plaintiff's Exhibit No. 98, admitted in evidence and made a part of this record)

[fol. 483] Mr. Barnes: I should also like to point out in this connection that Pando was in Colorado. There has been no showing that any of the plaintiffs who are now before the court were engaged in gold mining activities in the State of Colorado.

The Commissioner: All right.

By Mr. Rigney:

Q. Mr. Nelson, where is the Climax Molybdenum Mine?
A. About twelve miles from Pando.
Q. In Colorado?
A. Yes, sir.

Mr. Rigney: May I say for the record that we invite your Honor's attention to what is contained in this Exhibit 98 at the bottom half of page 2, and the following page; in other words, references to Pando.

The Commissioner: Yes, all right.

Mr. Rigney: May this be marked Plaintiff's Exhibit No. 99 for identification?

(Said document was marked for identification as Plaintiff's Exhibit No. 99.)

By Mr. Rigney:

Q. Did you know, in the course of your service with WPB, a Mr. John J. Corson, who was in the government service at that time?

[fol. 484] A. I knew him before he went into government service, and after he went into government service.

Q. And what position did he occupy, or what department was he connected with?

A. I think at one time he was in housing, and then——

Q. Specifically with reference to November 1942, if you can tell us.

A. I couldn't tell you his title there; I know he dealt a great deal with labor and associated problems.

Q. Let me show you Plaintiff's Exhibit 99 for identification, and I ask you to look at that to see if that refreshes your recollection with respect to the position that Mr. Corson held at that time. (Handing document to the witness)

A. It does.

Q. What was it?

A. U. S. Employment Service.

Q. He was with the U. S. Employment Service at that time?

A. Right.

Mr. Rigney: Plaintiff offers in evidence, your Honor, Exhibit 99 for identification, being a memorandum from Mr. John J. Corson, Director of the U. S. Employment Service, to Mr. Donald M. Nelson.

Mr. Barnes: Could I see that? The one you sent me was [fol. 485] incomplete.

I think, your Honor, that the objection, if any, to this, goes to the weight to be attached to it, which, I think, is perfectly apparent from a reading of the document, that it is extremely preliminary, and aside from that objection I have no objection to this.

The Commissioner: All right, it will be received.

(Said memorandum from Mr. Corson to Mr. Donald Nelson, marked Plaintiff's Exhibit No. 99, admitted in evidence and made a part of this record.)

Mr. Rigney: I had intended to ask your Honor to bear with me while I read the complimentary references to Homestake, but I think your Honor has read them now.

The Commissioner: We will recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearing.)

Mr. Rigney: Plaintiff now offers in evidence Exhibit 39 for identification, marked at pretrial, a memorandum of November 16, 1942, from Mr. Corson to General McSherry.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

[fol. 486] (Said memorandum, dated November 16, 1942 from Mr. Corson to General McSherry, marked Plaintiff's Exhibit No. 39, admitted in evidence and made a part of this record.)

Mr. Rigney: May I invite your Honor's attention to the statement contained in the attachment to this November 16 memorandum, the attachment of November 11 of Mr. A. W. Motley:

> "The closing of the gold mines has certainly not solved the labor shortage"——

The Commissioner: Wait a minute, I do not see the attachment here.

Mr. Rigney: That is it, sir (indicating).

The last paragraph, toward the middle of that last paragraph, reads:

> "The closing of the gold mine has certainly not solved the labor shortage in the nonferrous metals industries."

Mr. Barnes: May I also point out, your Honor, in that connection, that this is based on reports received through November 10, a period of thirty days after the effective date of the order, which gave the mines a period of sixty days.

Mr. Rigney: I might say the order of October 8 gave the gold mines only seven days in which to close down from

[fol. 487] subject to any appeal that might be granted in a given situation.

Order L-208 gave them just seven days to close down their operations, subject to their appeal rights.

May this be marked Plaintiff's Exhibit No. 100 for identification.

(Said document was marked for identification as Plaintiff's Exhibit No. 100)

Mr. Rigney: Plaintiff offers in evidence Exhibit 100 for identification, being the minutes of November 23, of the interdivision meeting.

By Mr. Rigney:

Q. I notice this is the first time, Mr. Nelson, that we have had a reference to the interdivision meeting. Would you tell us what that was?

A. Well, at that particular time in the War Production Board, in one of the numerous shake-ups of the divisions, all of the branches had their names changed to divisions, so this is the same as if it were an interbranch meeting.

Mr. Barnes: Your Honor, could I ask counsel for a statement as to the relevance of this document to the issues involved here?

Mr. Rigney: The document has further reference to the situation at Pando, your Honor, and it discusses the efforts [fol. 488] of the U. S. Employment Service to obtain miners for the nonferrous metal mines.

And I think in that connection it is relevant and material.

Mr. Barnes: I fail to see how it can be relevant and material. We are talking about an order, which as I previously pointed out, was submitted to the full War Production Board on October 6, determined at that time to be issued by it, and issued on October 8.

Of course, what the United States Employment Service may have done at some subsequent date has no relevancy and materiality, and I object to receipt of this on that basis.

The Commissioner: It will be received.

(Said minutes of interdivision meeting of November 23, marked Plaintiff's Exhibit No. 100, admitted in evidence and made a part of this record.)

Mr. Rigney: May this be marked Exhibit No. 101 for identification.

(Said document was marked for identification as Plaintiff's Exhibit No. 101.)

By Mr. Rigney:

Q. Who was Mr. H. W. Dodge in the War Production [fol. 489] Board in November of 1942?

A. Mr. Dodge was one of the high officials. I think his title about that time was deputy——

Q. Perhaps this will help you, Exhibit 101 for identification, and I show you that to refresh your recollection with respect to Mr. Dodge's official title.

A. He was the Deputy Director General for Staff.

Q. And was he in some sense your superior at that time?

A. He was my superior, and I wrote memorandums to him.

Q. Did he have anything to do with this trip which you made out to Colorado in connection with this Pando project?

A. He was one of the top officials responsible for sending me out there.

Q. Will you look at Plaintiff's Exhibit 101 for identification, and tell his Honor if that is a copy of the report which you made to Mr. Dodge on November 24, following your visit out to Pando?

A. It is.

Mr. Rigney: Plaintiff offers in evidence, your Honor, Exhibit 101.

Mr. Barnes: I object, your Honor, on the ground that what the United States Employment Service may or may not have done at Pando in November of 1942, can have no [fol. 490] relevancy or materiality to the issues involved here with relation to the issuance of L-208 in October 8, 1942.

The Commissioner: It may be received.

(Said memorandum dated November 24, 1942, from Dr. Nelson to Mr. Dodge, marked Plaintiff's Exhibit No. 101, admitted in evidence and made a part of this record.)

The Commissioner: That does not go to the question of issuance, but the continued application of the order.

Mr. Barnes: There is no showing any of these matters were brought to the War Production Board itself, which was the body that directed the issuance of the order.

Mr. Rigney: May this be marked Exhibit No. 102 for identification.

(Said document was marked for identification as Plaintiff's Exhibit No. 102)

Mr. Rigney: Plaintiff offers in evidence Exhibit No. 102 for identification, being a memorandum of November 25, 1942 from Paul H. Norgren to Mr. Wendell Lund, subject: Report on Displacement and Reemployment of Gold Miners.

Mr. Barnes: Can the witness identify either of those individuals?

[fol. 491] By Mr. Rigney:

Q. Do you know who Mr. Wendell Lund was and what his position was in WPB?

A. Yes, he was Director of the Labor Division.

Q. At this particular time?

A. At this particular time. I knew him very well.

Q. And do you know what Mr. Paul H. Norgren's official capacity was?

A. Mr. Norgren was, as I understand it——

Mr. Barnes: I object to a statement of the witness' understanding. If he knows, that is one thing.

The Witness: Mr. Norgren had been at several meetings I attended, and I knew him.

By Mr. Rigney:

Q. And was he an official of the War Production Board or employee of the War Production Board?

A. He was an employee of the War Production Board or official, whichever you wish to call him.

Q. Do you know what particular phase of the Board's work he was concerned with?

A. Labor problems.

Mr. Rigney: I offer Exhibit 102 in evidence, your Honor.

Mr. Barnes: Again, your Honor, I think that the objection, if any, to this, goes to the question of weight.

[fol. 492] The Commissioner: It will be received.

(Said memorandum, dated 11-25-42, from Mr. Norgren to Mr. Lund, marked Plaintiff's Exhibit No. 102, admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Mr. Nelson, I am not sure whether you told us. My recollection is that you have already testified that after January 1943 you became a deputy or an assistant to Mr. Howard I. Young; is that correct?

A. I have made that statement.

Q. And your service, then, through 1943 and until you left the War Production Board in December of 1944, was that under Mr. Young most of that time?

A. Practically all the time it was under Mr. Young.

Q. Did you know a man who was with the War Production Board in 1943 by the name of Mr. A. S. Knoizen, or N-o-i-zen; I have heard it pronounced both ways.

A. I knew him extremely well.

Q. Do you know which is the correct pronunciation?

A. Knoizen. He was vice-president of Joy Manufacturing Company, and on leave of absence from the Joy Manufacturing Company as a dollar-a-year man working for the [fol. 493] War Production Board. He took my place as Director of the Mining Division.

Q. And about when would that be that he took that position?

A. It was around the first of January.

Q. Of 1943, about the time you left. Was he your immediate successor?

A. When he left he immediately succeeded me.

Q. Do you know whether Mr. Knoizen is living or deceased now?

A. He is deceased now.

Mr. Rigney: This is one of the original exhibits, your Honor, being No. 53 for identification, and at the time they were marked at pretrial there was a chart which was missing from this exhibit, and we have obtained it, and I should like now to offer the complete exhibit No. 53 for identification in evidence.

Mr. Barnes: I object on the grounds of irrelevancy and immateriality to any issue involved in this case.

The Commissioner: It may be received.

(Said memorandum of 3-30-43 from Mr. Knoizen to Mr. Batt, marked Plaintiff's Exhibit No. 53, admitted in evidence and made a part of this record.)

[fol. 494] Mr. Barnes: Might that be on the understanding also, your Honor, that it is subject to verification as to the fact that this is the chart that is referred to?

The Commissioner: Yes.

Mr. Rigney: May this be marked as Plaintiff's Exhibit 103 for identification.

(Said document was marked for identification as Plaintiff's Exhibit No. 103.)

Mr. Rigney: Plaintiff now offers in evidence, your Honor, Exhibit 103 for identification, being a memorandum from Mr. Heacock to Mr. Howard Young, of April 16, 1943.

Mr. Barnes: I object on the grounds that it is irrelevant and immaterial to any issue involved in this case.

Mr. Rigney: Could I call your Honor's attention to the end of the paragraph:

> "I understand that study of the effects of order L-208 as administered are now underway by direction of Vice-Chairman Batt. Doubtless the authorities who would be responsible for an eventual amendment to this order will be duly advised concerning the results of these studies."

The Commissioner: It will be received.

(Said memorandum, dated 4-16-43 from Mr. Heacock to Mr. Young (marked Plaintiff's Exhibit No. 103, admitted [fol. 495] in evidence and made a part of this record.)

By Mr. Rigney:

Q. Mr. Nelson, from your service with the War Production Board and your knowledge of its work, can you tell us whether or not any industry other than goldmining which did not consume critical materials in the production of its end product as distinguished from maintenance, re-

pair and operating materials in its normal daily operations, was closed down by WPB order?

A. No other industry was.

Mr. Rigney: You may inquire.

Mr. Herrington: May I ask whether it would be appropriate at this time to introduce the appeal files of Idaho-Maryland Mills before Mr. Barnes commences cross-examination?

The Commissioner: If you would like to, I think it would be all right.

Is that satisfactory with you Mr. Barnes?

Mr. Barnes: Yes.

Mr. Herrington: Your Honor, may I make this statement for the record, that the appeal files of the Idaho-Maryland Mines were derived primarily from the files in the Attorney General's office which Mr. Kendall Barnes made available to me, and I would like to have my appreciation of his [fol. 496] cooperation extended on the record. I am sure that without that courtesy we would not have been able to obtain these documents.

At the pretrial document No. 32 was introduced for identification, being a letter from Idaho-Maryland Mines Corporation to the Mining Branch of the War Production Board, dated May 5, 1942.

I would like to introduce this in evidence now. It would be the next number, Plaintiff's Exhibit—

The Commissioner: That would take the same number.

Mr. Herrington: This will take the same number?

Mr. Barnes: No objection.

The Commissioner: It is received.

(Said letter, dated 5-5-42, from Idaho-Maryland to the WPB, marked Plaintiff's Exhibit No. 32, admitted in evidence and made a part of this record.)

Mr. Herrington: Next is a letter from Idaho-Maryland Mines Corporation to Wilbur A. Nelson, Mining Branch, dated at Grass Valley, November 12, 1942, which is a document which Mr. Barnes kindly furnished to me.

Mr. Barnes: No objection.

Mr. Herrington: This will be No. 104.

The Commissioner: It is admitted.

[fol. 497] (Said letter, dated 11-12-42, from Idaho-Maryland to Wilbur A. Nelson was marked Plaintiff's Exhibit No. 104 and admitted in evidence and made a part of this record).

Mr. Herrington: Next is a telegram dated December 8, 1942, from Edward H. Rott, Deputy Administrator, to Idaho-Maryland Mines Corporation, next in order to be introduced in evidence.

Mr, Barnes: No objection.

The Commissioner: It is admitted.

(Said telegram, dated 12-8-42, Mr. Rott to Idaho-Maryland, was marked Plaintiff's Exhibit 105, admitted in evidence and made a part of this record)

The Commissioner: I would suggest that you mention the number because it helps in reviewing the record.

Mr. Herrington: Plaintiff's Exhibit No. 106 is a letter dated December 8, 1942, addressed to Idaho-Maryland Mines Corporation by Edward H. Rott, Deputy Administrator.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

[fol. 498] (Said letter, dated 12-8-42, from Mr. Rott to Idaho-Maryland, was marked Plaintiff's Exhibit No. 106, admitted in evidence and made a part of this record)

The Commissioner: Have the reporter mark the whole bunch of them and then you can go right along. You can go right on through.

Mr. Herrington: I think I can run right through them.

The Commissioner: All right.

Mr. Herrington: Plaintiff's Exhibit No. 107 is a letter from Idaho-Maryland Mines Corporation dated January 5, 1943 to Edward H. Rott, Deputy Administrator.

Mr. Orick: That has been marked as Exhibit No. 29.

Mr. Herrington: That is corect. That has been marked Exhibit 29. It was introduced at pretrial.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said letter dated 1-5-43 from Idaho-Maryland to Edward H. Rott, marked Plaintiff's Exhibit No. 29, admitted in evidence and made a part of this record)

Mr. Herrington: Exhibit No. 107 is an analyst's summary of the application of Idaho-Maryland Mines Corporation by the War Production Board.

[fol. 499] Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said analyst's summary was marked Plaintiff's Exhibit 107 admitted in evidence and made a part of this record)

Mr. Herrington: Plaintiff's Exhibit 108, a letter dated January 28, 1943, from A. K. Holcombe, Chairman of the Appeals Board, to the Idaho-Maryland Mines Corporation.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said letter dated 1-28-43 from Holcombe to Idaho-Maryland was marked Plaintiff's Exhibit 108 admitted in evidence and made a part of this record)

Mr. Herrington: Exhibit No. 109 is a telegram from Edward H. Rott to Idaho-Maryland Mines Corporation, dated February 5, 1943.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said telegram dated 2-5-43 from Rott to Idaho-Maryland, was marked Plaintiff's Exhibit 109, admitted, and made a part of this record).

[fol. 500] Mr. Herrington: Exhibit No. 110 is a letter from Idaho-Maryland Mines Corporation to the War Production Board, dated March 22, 1943.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said letter dated 3-22-43 from Idaho-Maryland to WPB was marked Plaintiff's Exhibit 110, and admitted in evidence and made a part of this record)

Mr. Herrington: Plaintiff's Exhibit No. 111 is a letter from Edward H. Rott, dated March 30, 1943, to Idaho-Maryland Mines Corporation.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said letter, dated 3-30-43 from Mr. Rott to Idaho-Maryland, was marked Plaintiff's Exhibit 111, admitted in evidence, and made a part of this record)

Mr. Herrington: Plaintiff's Exhibit No. 112 is a letter from Idaho-Maryland Mines Corporation dated December 13, 1943, to Howard I. Young, Director of the Mineral Resources Coordinating Division of the War Production Board.

I am not sure that that letter came from your office, Mr. [fol. 501] Barnes. That looks like a letter from our file.

Mr. Barnes: Let me check that one moment.

Subject to verification of this one, we have no objection.

The Commissioner: It is admitted.

(Said letter, dated 12-13-43 from Idaho-Maryland to Mr. Young was marked Plaintiff's Exhibit 112, admitted in evidence and made a part of this record)

Mr. Herrington: Pretrial Plaintiff's Exhibit 30 is a letter dated December 20, 1943, from Howard I. Young to Albert Crase.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said letter dated 12-20-43, from Mr. Young to Mr. Crase, was marked Plaintiff's Exhibit No. 30, admitted in evidence and made a part of this record)

Mr. Herrington: Pretrial Exhibit 30-B is a letter dated December 20, 1943, from Mr. Knoizen to Mr. Crase.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

[fol. 502] (Said letter, dated 12-20-43, from Mr. Knoizen to Mr. Crase, marked Plaintiff's Exhibit 30-B, admitted in evidence and made a part of this record)

Mr. Barnes: Was that marked at pretrial?

Mr. Herrington: That was 30-B.

Mr. Barnes: I have it in the pretrial memorandum as 30.

The Commissioner: It is the letter of December 20.

Mr. Herrington: It is given as 30 and 30-B. I think they were clipped together.

The Commissioner: There were two letters here in the pretrial memorandum, one dated December 20 from Young to Crase, and another one December 20 from Knoizen to Crase.

Mr. Herrington: Next we will introduce pretrial Exhibit No. 31, a letter dated January 31, 1944, from Idaho-Maryland Mines to Knoizen, transmitting the appeal of Idaho-Maryland Mines Corporation.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

Mr. Herrington: As pretrial Exhibit 31 we will introduce in evidence the appeal of Idaho-Maryland Mines Corporation referred to in the preceding exhibit.

The Commissioner: I thought those were marked 31 at pretrial.

[fol. 503] Mr. Barnes: They were both marked 31.

Mr. Herrington: They were both marked 31. I introduced them separately.

The Commissioner: Since they already have the same number before, we had better leave it that way.

Mr. Herrington: I will introduce the letter and the copy of appeal as Plaintiff's Exhibit 31.

The Commissioner: Admitted.

(Said letter, dated 1-31-44 from Idaho-Maryland to Mr. Knoizen, marked Plaintiff's Exhibit 31, admitted in evidence and made a part of this record)

Mr. Herrington: I next introduce as Plaintiff's Exhibit 113 a letter from Henry W. Erickson to E. L. Oliver, President, Idaho-Maryland Mines Corporation, dated February 7, 1944.

Mr. Barnes: Subject to verification, no objection.

The Commissioner: It is admitted.

(Said letter dated 2-7-44 from Mr. Erickson to Mr. Oliver, was marked Plaintiff's Exhibit 113, admitted in evidence and made a part of this record)

Mr. Herrington: Next is Plaintiff's Exhibit 114, a telegram dated March 1, 1944, from Idaho-Maryland Mines [fol. 504] Corporation, to Henry W. Erickson.

Mr. Barnes: Subject to verification, no objection.

The Commissioner: It is admitted.

(Said telegram dated 3-1-44 from Idaho-Maryland to Mr. Erickson, was marked Plaintiff's Exhibit 114, admitted in evidence, and made a part of this record)

Mr. Herrington: Plaintiff's Exhibit 115 is introduced in evidence, a letter dated March 3, 1944, from A. W. Motley to Henry W. Erickson.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said letter, dated 3-3-44, from Mr. Motley to Mr. Erickson, was marked Plaintiff's Exhibit No. 115, admitted in evidence and made a part of this record)

Mr. Herrington: I next introduce in evidence Plaintiff's Exhibit No. 116, which appears to be an appeals work and clearance form of the War Production Board acting upon the appeal of Idaho-Maryland Mines Corporation.

Mr. Barnes: Yes.

The Commissioner: Without objection it may be received.

(Said appeals work and clearance form was marked [fol. 505] Plaintiff's Exhibit No. 116, admitted in evidence, and made a part of this record)

Mr. Barnes: Your Honor, in that connection, there is one point I would like to emphasize here, that I made available to plaintiff's counsel the entire appeal file of the War Production Board which includes certain interoffice communications, one or two of which have already been received, and the basic working papers, and that is what is included in the documents the plaintiffs here offer.

Some of them are not documents that passed between the parties, but include the recommendations and the action taken within the Board on these appeals.

The Commissioner: Yes.

Mr. Herrington: I next introduce in evidence Plaintiff's Exhibit No. 117, a letter dated March 10, 1944, to Idaho-Maryland Mines Corporation, from the War Production Board, apparently signed by J. Joseph Whelan.

Mr. Barnes: Subject to verification, I have no objection.

The Commissioner: It is admitted.

(Said letter dated 3-10-44 from WPB to Idaho-Maryland, was marked Plaintiff's Exhibit 117, admitted in evidence, and made a part of this record).

[fol. 506] Mr. Herrington: Plaintiff will next offer in evidence a letter dated March 24, 1944, addressed to the Mining Division of the War Production Board by E. L. Oliver, president of the Idaho-Maryland Mines Corporation as Exhibit No. 118.

The Commissioner: Do you have any question about this?

Mr. Barnes: Just one moment.

The Commissioner: I thought you were objecting to something.

Mr. Barnes: Your Honor, there is on the bottom of this copy a note addressed to a Mr. Keating, otherwise unidentified, that does not appear on the original letter that was sent to the War Production Board.

Mr. Herrington: This is apparently a copy, and I would suggest for the purpose of the record the note be deemed deleted.

The Commissioner: All right, it may be received.

(Said letter dated 3-24-44 from Idaho-Maryland to WPB Mining Division, was marked Plaintiff's Exhibit No. 118, admitted in evidence and made a part of this record)

Mr. Herrington: I next introduce in evidence Plaintiff's Exhibit No. 119, a letter dated March 31, 1944, from Mr. [fol. 507] Knoizen to Mr. Oliver, president of Idaho-Maryland Mines Corporation.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said letter dated 3-31-44 from Mr. Knoizen to Mr. Oliver, was marked Plaintiff's Exhibit 119, admitted in evidence and made a part of this record)

Mr. Herrington: Plaintiff will next introduce in evidence Plaintiff's Exhibit No. 120, a letter dated March 24, 1944, addressed to S. W. Christianson, Deputy Administrator, War Production Board, from Idaho-Maryland Mines Corporation.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said letter dated 3-24-44 from Idaho-Maryland to Mr. Christianson, was marked Plaintiff's Exhibit 120, admitted in evidence and made a part of this record)

Mr. Herrington: Plaintiff next introduces in evidence Plaintiff's Exhibit No. 121, a letter dated November 30, 1944, from S. W. Christianson to Neil O'Donnell, general manager of Idaho-Maryland Mines Corporation.

Mr. Barnes: No objection.

[fol. 508] The Commissioner: It is admitted.

(Said letter dated 11-30-44 from Mr. Christianson to Mr. O'Donnell, was marked Plaintiff's Exhibit 121, admitted in evidence, and made a part of this record)

Mr. Herrington: Plaintiff will next introduce in evidence Plaintiff's Exhibit 122, a letter dated December 12, 1944, from Neil O'Donnell, general manager of Idaho-Maryland Mines Corporation, to S. W. Christianson of the War Production Board.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said letter dated 12-12-44 from Mr. O'Donnell to Mr. Christianson, was marked Plaintiff's Exhibit 122, admitted in evidence, and made a part of this record)

Mr. Herrington: I next introduce Plaintiff's Exhibit No. 123, a letter dated December 12, 1944, addressed to S. W. Christianson by Neil O'Donnell, general manager of the Idaho-Maryland Mines Corporation.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said letter dated 12-12-44 from Mr. O'Donnell to Mr. [fol. 509] Christianson, was marked Plaintiff's Exhibit 123, admitted in evidence and made a part of this record)

Mr. Herrington: Off the record.

(Here followed discussion off the record)

Mr. Herrington: Perhaps, your Honor, for the purposes of identification, rather than as evidence at this time, there should be introduced in evidence, or introduced as exhibits on behalf of Idaho-Maryland Mines Corporation, and appropriately marked for identification, some photographs

that were taken some time after order L-208 went into effect, and which show the effects of the lack of maintenance and the inability of the company to maintain its mine, and the effect upon the underground workings.

Those may become important at a later date, but I think for identification I would like to introduce them all at this time and have them so marked.

The Commissioner: That is a little confusing. Do you merely want them marked for identification or are you offering them in evidence?

Mr. Herrington: I have no way of identifying them at the present time until I have a witness here from Idaho-Maryland, your Honor. They were furnished to me by the courtesy of Mr. Barnes. They are marked on the back as Idaho-Maryland and there are certain dates put on there [fol. 510] in pen.

These are the only identifications that appear on the documents themselves.

Mr. Barnes: Your Honor, there is a collateral problem here in the file that came to me. My recollection is that there were two different letters that file—you may recall this, too, Mr. Herrington—that refer to the transmittal of photographs. It is impossible, from examining the documents, to know which group was transmitted at which time, and which ones are referred to at any time.

And there will have to be, as far as I am concerned, some further identification of them.

I have no objection to having them marked at this time for identification as the documents that came from the War Production Board appeal file, but there will have to be some further testimony with respect to what they portray, and when they were taken, and things of that type.

The Commissioner: Well, of course, you can ask the reporter to mark them, but if you are offering them in evidence, of course——

Mr. Herrington: I think Mr. Barnes would be entitled to know exactly when they arrived and how they are referred to, but possibly through testimony of a witness from Idaho-Maryland, they can be identified.

The Commissioner: The reporter will mark them.

[fol. 511] Mr. Herrington: I would like to introduce all of the photographs——

The Commissioner: If you are introducing them, you are offering them in evidence.

Mr. Herrington: I am offering them for identification.

The Commissioner: All right.

Mr. Herrington: There is an identifying number on the back of each one of these. It may be that through those numbers we can identify them. I don't know who put the numbers on.

The Commissioner: As long as they have numbers so that there are no duplications, we do not need to further number them.

Mr. Barnes: In that case the record should probably indicate what those numbers are, sir.

Mr. Herrington: Off the record.

(Here followed discussion off the record)

(Said photographs were marked for identification as Plaintiff's Exhibits Nos. 124-A through 124-S).

Mr. Barnes: In the haste in which those documents were introduced, I have not been able to check against the WPB appeals file there. If it should develop that there are additional documents in the WPB appeals file which are pertinent, do you have objection to my offering them without [fol. 512] further identification?

Mr. Herrington: No, I would be delighted if you would, Mr. Barnes. It would be very helpful.

Mr. Rigney: I have discovered that I would like to put in two additional exhibits which I intended to offer.

By Mr. Rigney:

Q. Mr. Nelson, I show you Plaintiff's Exhibit 52 for identification, and ask you if you prepared this memorandum of April 30, 1943 and transmitted it to Mr. Howard I. Young?

A. I did.

Mr. Rigney: Plaintiff offers Exhibit No. 52 for identification in evidence, your Honor.

Mr. Barnes: Your Honor, that is set up as a comment or commentary on another document referred to in it. Do you intend to offer that?

Mr. Rigney: I am going to offer that also.

In other words, it refers to this next document. If this document is received, I then propose to offer this, or I will make a simultaneous offer if you have no objection.

Mr. Barnes: With that understanding, I have no objection.

The Commissioner: All right, it will be received.

(Said memorandum, dated 4-30-43, from Mr. Young to Dr. Wilbur Nelson, marked Plaintiff's Exhibit 52; admit-
[fol. 513] ted in evidence and made a part of this record)

Mr. Rigney: May this be marked now as the next numerical number, 125?

(Said document was marked for identification as Plaintiff's Exhibit No. 125)

By Mr. Rigney:

Q. Would you look at Plaintiff's Exhibit No. 125, Mr. Nelson, and tell us if this report of April 22, 1943, from Edward T. Dickinson, Jr., to William L. Batt, is the report to which your memorandum of April 30 refers?

A. It is.

Q. What was Mr. Dickinson's position with the War Production Board at that time?

A. He was executive director of the planning committee.

Q. Do you know, Mr. Nelson, whether or not Mr. Samuel Lipkowitz who has been referred to in the testimony here, is employed here in Washington now?

A. About a year ago I had occasion to call on a committee of Senator Johnson's——

Q. How about now, if you could tell us whether he is here at or about this time?

[fol. 514] A. He left their committee and went with the International Bank.

Q. Here in Washington?

A. Yes, but whether he is in Washington or in Iran, I do not know.

Mr. Barnes: He is in Washington.

The Commissioner: The record may be unclear on that exhibit 125. Was it offered?

Mr. Rigney: I think I should offer it now, your Honor, Plaintiff's Exhibit No. 125 for identification, being the report of April 22, 1943 from Edward T. Dickinson, Jr., to William L. Batt.

Mr. Barnes: I have no objection.

The Commissioner: It is admitted.

(Said memorandum dated 4-22-43 from Mr. Dickinson to Mr. Batt, marked Plaintiff's Exhibit 125, admitted in evidence, and made a part of this record)

By Mr. Barnes:

Q. Do you know whether or not Mr. Dickinson is working here in Washington?

A. I do not. I haven't seen him since I left the War Production Board.

The Commissioner: Is there any further direct?

[fol. 515] Mr. Rigney: No, your Honor.

Mr. Barnes: May I ask whether counsel for Central Eureka intends to offer an appeal file at this time?

Mr. Pittman: Not at this time. We have some documents and exhibits we will offer in evidence at a later time.

Mr. Barnes: We would like to find them for you.

Mr. Pittman: On the appeal, yes.

Mr. Herrington: May I ask Dr. Nelson a couple of questions?

Mr. Barnes: Certainly.

Cross-examination.

By Mr. Herrington:

Q. Did you know Errol MacBoyle?

A. I did.

Q. He was president of the Idaho-Maryland Mines Corporation in 1942?

A. He was.

Q. Was he in Washington, do you recall, on or about October 1, 1942?

A. As I recall it, Mr. MacBoyle was here at that time, and had an appointment at the Raleigh Hotel and spent several months here continuously.

Q. Did you have any discussion with him at that time?

A. I had numerous discussions with him.

Q. Do you recall the subject of those discussions?

[fol. 516] A. They all dealt with the Idaho-Maryland and the effect of a gold order closing it down.

Q. Was there any discussion at all with respect to the development of tungsten in the Idaho-Maryland Mine?

A. There was. I was shown samples of tungsten ore.

Q. Do you recall any of those discussions?

A. Just facts that on certain levels and at certain places you had found that you had considerable tungsten ore and that you would like to have had the opportunity of seeing if you could mine it.

Q. What, in your official capacity, had you to do with the development of tungsten at that time?

A. Nothing.

Q. Do you know whether or not the War Production Board was encouraging the production of tungsten?

A. Very definitely.

Q. Did Mr. MacBoyle have any discussion with you with respect to the development of tungsten in connection with the operation of the gold mine?

A. He did.

Q. What was the substance of those discussions, if you recall?

A. That he wanted to know what division of the War Production Board he should get in touch with to see if he could go forward in this matter. That was the Ferro Alloy [fol. 517] Division.

Q. Did you introduce him?

A. I did. And that was the man's name that I couldn't remember, it was Miles Smith.

Q. Were you present at any of the discussions?

A. I don't remember.

Q. Was Mr. MacBoyle present at the meeting that was held on October 1 when the mine operators were called to Washington?

A. It is my recollection he was.

Q. Do you recall any discussion that he may have had at the meeting?

A. No, except that he, as all the other operators, protested.

Q. Vehemently?

A. Vehemently.

Mr. Barnes: I object and move to strike that as being a conclusion on the part of the witness.

The Commissioner: It may be stricken.

By Mr. Herrington:

Q. Dr. Nelson, do you recall the letter of October 13, 1942, which was written by you to Idaho-Maryland Mines Corporation, and was introduced in evidence as Plaintiff's Exhibit No. 8, wherein you stated generally that a preference rating could not be recommended on the application [fol. 518] and that limitation order L-208 prohibited the further production of gold mining?

A. If I could refresh my memory with the document.

Q. Yes. (handing document to witness)

A. This is the same document that I saw earlier in the day.

Q. Yes.

A. Yes, I remember it.

Q. Was this more or less of a form letter, Dr. Nelson?

A. It was more or less a form letter.

Q. It was sent substantially in the same form to all other gold miners?

Mr. Barnes: I object as calling for a conclusion on the part of the witness.

The Commissioner: Overruled.

The Witness: I might say that I was very familiar with the preparation of that letter and with very minor modifications I know it was sent to the gold miners.

Mr. Herrington: Thank you.

The Commissioner: Are there any further questions from this side of the room?

(No response)

Cross-examination

By Mr. Barnes:

Q. Over what period of time was it that you said that [fol. 519] Mr. MacBoyle was in Washington?

A. He was here for several months prior to the closing of the gold mines in October.

Q. When did you first talk with him on the subject of his mine during that period?

A. I could not give you that date without refreshing my memory by looking at my diary, but I know that as soon as he arrived in Washington he called on me, and he saw me at least several times every week, from that date until L-208 was issued.

Q. It was in that period of time, was it, that the question of tungsten first came up?

A. It came up, I would say, at least a month before L-208 was issued.

Q. Now, at this meeting on October 1, that Mr. MacBoyle attended, do you recall his saying anything about tungsten at that time?

A. I do not.

Q. What did he tell you about tungsten in the mine when he discussed it with you? Did he tell you anything about the quantities of tungsten or whether it was commercially recoverable?

A. He said he thought it was commercially recoverable, and he wished to have the privilege of doing further exploration to prove whether or not it was. I saw numerous [fol. 520] samples of the gold ore containing tungsten mineral sheelite, which is a mineral that is very hard to recognize, except under flourescent light in the dark. It is very easy to overlook.

Q. Had Idaho-Maryland, to your knowledge, ever recovered any tungsten prior to that time?

A. They had not.

Q. If tungsten were available and in commercially recoverable quantities, would it normally be a valuable by-product?

A. It would.

Q. And after you introduced Mr. MacBoyle to Mr. Smith, did you have any further discussions with him on the tungsten question?

A. I have no recollection of anything further—with Mr. Smith, I meant.

Q. Yes. Did you talk to Mr. MacBoyle about the tungsten after that date?

A. Every time he saw me he generally brought it up.

Q. But you had no authority over it?

A. I had no authority.

Q. Now, you referred to the fact that you had done over the years consulting work in a number of states of the union.

A. Had done what?

Q. Consulting work.

[fol. 521] A. Yes, I have done consulting work in, I said, approximately twenty-five different states in the union.

Q. Has any of that ever been for gold mines?

A. Yes, I have made two private reports on gold mines, and several reports for the War Production people of additional gold mines.

Q. Now, your private reports, what was the nature of those reports on gold mines?

A. Well, they were, in one case, a detailed report on what additional development work should be done; how many faces should be worked so that the mine could operate profitably.

Q. What mine was that?

A. Jardine Mine, Jardine, Montana, six miles from Gardiner.

Q. What was the nature of your other report?

A. My other report was a report on the Surf Inlet Gold Mine on the Princess Royal Island, about seventy-five miles from Alaska in British Columbia. It was an abandoned mine and the new owner of the mine asked me to visit the property with them and make recommendations for additional drilling to see if the Mine could be reopened.

It was a purely geological report.

Q. Approxiately when were those two reports made?

A. Those two reports were made in the year 1945, after [fol. 522] I left the War Production Board and before I resumed my teaching duties at the University of Virginia.

Q. Had you done any work, consulting work, with respect to gold mines prior to your employment with the War Production Board?

A. Well, I don't know whether you would call it much work, but I had an attorney in Washington who called me up and asked me to examine a gold mine for his clients in Virginia that was reported to have eight hundred dollars worth of gold to the ton.

I made an examination. It wasn't a mine; there was just-

trenches about eight feet deep, and the best I could get was eighty cents to the ton.

I have done a considerable amount of work of that type, if you would call that examination of gold mines.

Q. Now, I take it that, going back to the initial issuance of P-56, that applied to all mines; is that correct?

A. The September 17 order which was never administered did, but the first order that was administered was the September 22 amendment.

Q. What mines were not covered by it?

A. All placer gold mines.

Q. Did it cover all other metallic and nonmetallic mines?

A. And coal.

[fol. 523] Q. And coal?

A. Yes, sir.

By the Commissioner:

Q. Was there any reason for deletion of the placer gold mines, as such, from that?

A. It already seemed to be the policy of the planners and——

Mr. Barnes: Your Honor, I object to this type of statement on the part of the witness.

The Witness: All right, I will say it was the policy of Mr. Batt, and Mr. Donald Nelson's assistants, Mr. A. C. Hill, whom I talked to, that resulted in this clause being put in.

By Mr. Barnes:

Q. Did Mr. Batt speak to you at sometime during that period between September 17 and September 22, 1941, on that subject?

A. I don't think he did, but Mr. Hill did. Mr. Hill was one of Donald Nelson's assistants.

Q. Do you know whether Mr. Batt was even employed in the Office of Production Management at that time?

A. I am very certain he was. I remember very distinctly Mr. Hill called me in and said that I had drawn the order with too high ratings, and that the placer gold clause should be placed in.

[fol. 524] And then I went in to see Donald Nelson and he said that Mr. Hill had stated the position correctly.

Q. Did you talk to anybody else about it at that time?

A. I do not remember.

Q. So that P-56 applied to all mines other than placer gold mines; is that correct?

A. When it was amended on September 22.

Q. How long after that was it that you had the meeting of these so-called coordinators of mines, state coordinators?

Mr. Rigney: I am sorry, I did not get that question. Could I have it read?

(The pending question, as above recorded, was read by the reporter)

The Witness: As soon as P-56 was turned over to the Mining Division to administer, and approval was received from Donald Nelson to send wires out to the governors of all of the states and territories, wires were sent out immediately and replies received, and a meeting was requested in Washington, I believe in either forty-eight or seventy-two hours.

By Mr. Barnes:

Q. Well, how long was that after the date of the issuance of the order, now, September 22?

A. I would say somewhere of the magnitude of about a week. I think the records of the War Production Board will show it accurately, the date of that meeting.

[fol. 525] Q. When was it that you began issuing serial numbers to the mines?

A. As soon as we were given the names of mines which we knew deserved serial numbers. We did not have to wait to have the coordinator from Utah to come in to give Bingham Canyon a serial number. We had men in the Mining Division in charge of the metal mines that immediately gave us a number, probably of one hundred or more mines, that were active in the war effort.

Q. Did you issue those serial numbers without application on the part of the mines concerned?

A. Where the Mineral Branch handling the product requested immediate issuance, we issued it; otherwise we

waited for the application to come from the mine operator.

Q. What do you mean by the mineral branch handling the product? By that do you mean the copper division or the copper branch?

A. The copper branch, for instance, said, "You issue Bingham Canyon a serial number. You issue the five big copper mines in Arizona and issue Anaconda at Butte."

All of them were well known and many others were well known.

I might say the first people that came in to get a serial number were the representatives of the salt industry.

Q. Were they included within the scope of P-56?

[fol. 526] A. Yes. Every mine in the United States, metallic, nonmetallic, or coal, that entered into the war effort was included.

Q. Incidentally, I noticed in some of these documents that you identified, Mr. Nelson, the name of John Gregg. Who was he, do you recall?

A. John Gregg was the chairman of the committee through which all P orders and M orders had to clear, and you appeared before him with your order as you had drawn it and then he and his committee criticized you for anything they could find in the order they did not like, and also told you the ratings were too high, and then they had a meeting after you left and made recommendations to Mr. Matthison.

Q. Was that the committee that subsequently became known more formally as the Clearance Committee?

A. I think that was the name it finally received.

Q. At a later date the chairmanship changed, and I think Mr. Phraner was chairman, wasn't he?

A. There were at least four people that were chairmen of that committee that I can remember. I cannot remember them by name, but I could recognize them if I saw them.

Q. Do you know who appointed that committee, or to whom it was responsible?

A. I have no knowledge of that. I knew its functions.

Q. There was also reference here to the appeals board. [fol. 527] What was its function as you knew it?

A. What?

Q. The appeals board.

A. The appeals board of the War Production Board?

Q. That is right.

A. The Appeals Board of the War Production Board was a board to which people appealed from orders where they felt the order was harmful to them or to their company, I should say.

Q. Did the administrators of the orders have any authority to grant appeals?

A. Are you referring to L-208?

Q. Did you have any personal contact with any other orders?

A. No, sir.

Q. I will limit it to L-208.

Did the administrator of the order have any authority to grant appeals?

A. At the time L-208 was issued and assigned to the Mining Branch, the War Production Board set up a special appeals board to handle all appeals, because I suppose they felt the general appeals board did not have the mining background.

That appeals board was composed of an attorney, myself, and a labor man, Allen Buchanan.

[fol. 528] Q. Who set that committee up, do you recall?

A. Fred Eaton had a great deal to do with it, but where the authority came from, I do not know. The lawyer was Munny Boyd.

Q. T. Munford Boyd?

A. We always called him Munny Boyd.

The Commissioner: We will recess now until two o'clock.

(Thereupon, at 12:30 o'clock p. m., a recess was taken in the hearing until two o'clock p. m., same day.)

[fol. 529] AFTERNOON SESSION

(The hearing was resumed, at the time above-mentioned, pursuant to the recess previously taken.)

Mr. Harold B. Alderson, a reporter, was thereupon sworn by the Commissioner to well and truly take down and transcribe the questions propounded to and the answers given by the witnesses, and to do all other things required of the reporter.

The Commissioner: You may proceed.

WILBUR A. NELSON, resumed the witness stand and was examined and testified as follows:

Cross-examination, (resumed)

By Mr. Barnes:

Q. When we recessed, I believe we were talking about the appeal procedure under L-208, and you were referring to this special Appeal Board or Panel which was established under that order.

A. That special panel was established as soon as L-208 was issued.

Q. Did you receive a memorandum of any type from any of your superiors directing you to establish that panel or authorizing you to act?

A. I have nothing that I remember in writing, but we had authorization and we were told to meet in Judge Boyd's office.

[fol. 530] Q. Who authorized you?

A. I think it was Mr. Eaton.

Q. Now, there has been some reference here, for example, to a hearing which was held on the Homestake appeal. Was that held before that group?

A. It was not. Our group was only in existence for a few weeks, and it soon became evident that it was taking up about 75 per cent of the time of each one of us, so that we were unable to perform the duties that we had regularly assigned to us. So all of the appeals were turned over then to the General Appeals Board to handle.

Q. Were they first processed by the administrator of the order in any way?

A. Not after they were turned over to the General Appeals Board.

Q. At any time while you were connected with the Mining Division after L-208 went into effect, did the administrator of the order have any authority to act on appeals other than this Appeals Panel?

A. He never had any authority. I was called on by the Chairman of the General Appeals Board very often to appear before them to present pertinent facts.

Q. Now, there has been reference here and you have identified minutes of the Interdepartmental Committee on

Non-Ferrous Metals, for example. Who organized that committee, do you know?

[fol. 531] A. As far as I know, Mr. H. O. King was responsible for the organization of that group.

Q. And Mr. King was then head of the Copper Branch or Copper Division, is that correct?

A. As far as I remember, that was the only position he ever occupied. The meetings were held in his conference room, next to his office.

Q. And as head of the Copper Branch, he was on a parity with you?

A. Yes.

Q. And then there was also an Inter-branch, subsequently the Inter-division Committee. Was that non-ferrous metals?

A. No, that was just a committee made up of the chief or head of each one of the branches, later divisions, which reported to A. I. Henderson. We all met together about once a week to discuss interrelated problems.

Q. Who organized that committee, do you know?

A. I think Mr. Henderson organized it at my request.

Q. And to whom did that committee report? Did it report through any normal channels?

A. The minutes were drawn up and as a rule were forwarded first to Mr. Henderson. At certain times when that committee was meeting, the members of the commit-
[fol. 532] tee passed resolutions and authorized me specifically to present them to certain persons.

Q. And you did that if they so authorized you?

A. I did.

Q. Now, turning to a period, let us say, a period about January 1, 1942, to take a starting point, what was the situation with respect to priorities for gold mines on that date?

A. The last amendment to P-56 before January was, I think, made on December 30 or somewhere close to that, and it only added a few items to the list which was attached to the P-56 order. After January 1? Is that what you wish me to tell you?

Q. Yes, or just about January 1.

A. That was the situation on January 1.

Q. So that everybody except the placer mine got an A-8

under P-56 for maintenance and repair parts, is that correct?

A. That is correct.

Q. What about the placer mines, what was their situation?

A. They worked under the General Maintenance Order, which was at that time either P-22 or 100, I don't remember whether they swapped places, which carried an A-10 rating.

Q. As of that date, approximately January 1, 1942, do [fol. 533] you recall how an A-8 or A-10 rated in the general procurement of alloy steels?

A. Well, an A-8, at the 1st of January, 1942, still was a fair rating for repair parts. Of course, alloy steel was the toughest of all items to get, and sometimes people had to be given special treatment if they couldn't apply the general rating.

Q. Well, now, let us suppose that a mine operator——

By the Commissioner:

Q. Let me ask this question: When you say "it didn't apply," do you mean that they weren't able to secure the delivery under such a rating?

A. Under A-8, you mean?

Q. Yes.

A. Yes.

Q. That is why the special treatment was required?

A. Yes.

Q. All right.

By Mr. Barnes:

Q. How would they go about getting special treatment?

A. Well, we had the PD-1 forms that could be used.

Q. And it was PD-1-A, wasn't it?

A. It varied so often that you would have to give me a document to let me refresh my memory.

Q. But in any event, they would come in with an appli- [fols. 534-535] cation for a special rating for a special part, is that correct?

A. Correct.

Q. How would that be processed if it were a mine which was making the application?

A. Well, I had a division in the Mining Branch that was set up just to handle those particular ratings, and I paid very little attention to how they were handled because it was turned over to that section chief.

Q. But in any event, if a mine came in on a PD-1 or a PD-1-A for a special priority, he would go to the Mining Branch?

A. Yes, sir.

Q. And go to this Priority Section?

A. Yes.

Q. What happened on the processing after that, you are not sure about?

A. We had an expediter who attempted to expedite items, and if it was a steel item he went over to the Steel Section and got with the steel expediter. But the details of it, as head of the branch, I did not worry about.

Q. Had you ever heard of this organization, the Joint Economic Committee of Canada and the United States, during this period 1941-1942?

A. Yes, sir, I had heard of it a number of times.

[fol. 536] Q. In what connection?

A. In connection with the export of mining machinery for gold.

Q. Was that handled—or wasn't there a so-called Canadian Branch in the War Production Board?

A. Not that I know of. My recollection is that everything relating to foreign mines was specifically the function of Mr. Batt. When anything relating to foreign mines came up, we would contact Mr. Batt, who was Vice Chairman, and he was the person who handled all such matters.

Q. And it is your recollection that that was the way—did you hear of this organization through Mr. Batt, then?

A. No. It was general knowledge all throughout the War Production Board, of this Joint Committee of Canada and the United States.

Q. Now, you identified here, Professor Nelson, a memorandum you wrote to Donald Nelson on January 20, 1942, which related to problems in the mining industry.

A. Related to what?

Q. Problems of the mining industry.

A. Is that the 9-page memorandum?

Q. I think it is 9 pages, yes.

A. Yes, sir.

Q. Was that a report that he had requested of you, or was that something that you were volunteering?

[fol. 537] A. I had seen Mr. Nelson a few days before that, and asked him if I could prepare such a report for him, as he said he would like to familiarize himself with all of the needs. I was seeing him because we were having trouble in priorities, and so this memorandum was written to, first, show from my viewpoint how mining fitted into agriculture and transportation and other war efforts——

Q. In other words, to show the relative importance of mining?

A. The relative importance of mining, and then to go into details in regard to mining problems.

Q. Incidentally, this memorandum was written within a matter of just a few days after the organization of the War Production Board and Mr. Nelson's appointment as Chairman?

A. Very shortly after that, and one of the first times that I had the pleasure of having an appointment with him.

Q. Prior to that time, Mr. Nelson had been the Director of Priorities of OPM?

A. Yes. I met him very often in the former position, but I had not had an opportunity to meet him in his new position.

Q. The document we are referring to is Plaintiffs' Exhibit 70.

A. Yes.

Q. On page 7 of this memorandum, the sentence appears:

[fol. 538] "There are other types of mining besides gold which may also have to be given harsh treatment in future months."

To what were you referring when you made that statement?

The Commissioner: Do you want to see the memo?

The Witness: I would like to.

The Commissioner: You may see it.

(Plaintiffs' Exhibit No. 70 handed to the witness.)

The Witness: That was page 7, was it?

By Mr. Barnes:

Q. Yes, on page 7.

A. I don't see it on page 7, sir.

Mr. Rigney: It is on the bottom of the page.

The Witness: Well, that was the last paragraph in connection with a discussion of what should be the policy which we should have towards foreign gold mines. I classified domestic gold mines as a different mining group from foreign gold mines, but in addition to that there may have been some non-metallic mines that could have been readily curtailed.

By Mr. Barnes:

Q. What type of non-metallic mines do you have in mind there?

A. Limestone quarries, sandstone quarries, and similar things.

Q. Although the products of those would be used largely [fol. 539] in construction, is that correct?

A. That is right.

Q. Metallurgically speaking, what were the uses of gold during this particular period as of the date you were writing this memorandum, for example?

A. You say metallurgically speaking?

Q. I am trying to avoid getting into the possible economic uses of gold. Physically, what were its uses? That might be a better way of phrasing it.

A. I wouldn't know how to answer the metallurgical question.

Q. Physically, what were the uses of gold?

A. Well, there are uses commonly known. It is used in a great many laboratories for special laboratory purposes, where no other metal has the qualities that gold has.

Q. Can you name some of those?

A. Well, I know the physicists use gold wire for certain purposes, and I am not enough of a physicist to know what these purposes are. I know that it is used in dentistry; and I know it is used in jewelry of all types; and it is very desirable sometimes to have watches that have nothing in them that will magnetize, and gold can be used as one of the elements in such watches, for the cases.

The most spectacular use of gold during World War II that I know of was when General Mark Clark carried a lot [fol. 540] of Canadian gold coins to North Africa to use in making the way easy for our troops to invade Africa.

Q. As far as this country was concerned, gold could not be used for coinage at that time?

A. No. So we had to go to Canada. But I think that that had a very definite and remarkably good war use.

All of our aviators flying in North Africa were always given several gold coins to be used if their plane went down and they had to get back to civilization.

Q. Do you have any idea what the total quantity of gold used for that purpose was during the war?

A. Naturally, I do not.

Q. Do you have any idea what the total requirement of gold in laboratories was at any time?

A. I do not.

Q. Do you know what the total requirement for gold in dentures was at any time?

A. I do not.

Q. Incidentally, there is quite a bit of gold produced, I take it, in mines which are not predominantly gold mines, is that correct?

A. It is.

Q. Were those mines, to your knowledge, ever shut down during the war?

A. None of the large mines, generally copper mines that [fol. 541] had gold as a by-product, were shut down. There were also many other mines carrying gold as a by-product.

Q. Does that mean that gold is generaly present in the ores extracted by those mines, when you speak of it as a by-product?

A. It depends a great deal upon what metagonetic mining province the mine is located as to the assemblage of metals in a particular ore.

Q. But frequently, you will find more than one metal in an ore, is that right?

A. Frequently you will.

Q. Is it always economically feasible to extract all of the metals from an ore that are present in it?

A. I am not a metallurgist and I can't answer that question.

Q. That has never come within the province of any of your consulting work?

A. It has not.

Q. Referring to the amendment to P-56 of March 2, 1942, how did that affect the priority situation with respect to gold mines that you have described as existing on about January 1st?

A. The March 2 amendment had as a first clause, under mining enterprise, any plant actually engaged in extractio. by surface, open pit or underground methods or in the [fol. 542] beneficiation, concentration or preparation for shipment of the products of mining activity but not including any plant more that 30 percent of the production of which, in dollar value, consists of gold and or silver. The 30 percent clause was the amendment made on March 2.

Q. And with respect to a mine which was producing ore which produced or had more than 30 percent of its output consist of gold, let me put it that way, what was its situation with respect to priorities immediately following the issuance of P-56?

A. We notified them that their serial number was withdrawn, but as this clause was drawn by a non-mining man, it affected mines such as Bingham Canyon and other of our greatest copper producers in the United States. So at the time that we withdrew their serial number, we notified them we were reinstating it, due to the importance of the war minerals that they were producing.

Q. Did you do that on representation from the Mineral Divisions involved?

A. We did it on representation from the Mineral Divisions involved. In some cases when we revoked the order, we said, "If you are producing appreciable amounts of strategic minerals, notify us, giving proof, and your number will be reinstated."

[fol. 543] Q. Now, do you have any recollection as to how many serial numbers were revoked under that provision, regardless of the number subsequently reinstated?

A. I have no definite remembrance except that there was an extremely large number, as most of them should never have been revoked.

Q. Well, now, what proportion of them were reinstated?

A. Practically all of them.

Q. Well, let us take Homestake as an illustration. Was the Homestake serial number reinstated?

A. It was taken away on March 2 and was never reinstated.

Q. What about Idaho-Maryland? Do you know about that?

A. The same thing applied to Idaho-Maryland.

Q. What about Central Eureka? What do you know about it?

A. For some reason I have no recollection of Central Eureka.

Q. What about Bald Mountain? Do you know about it?

A. Bald Mountain is just a name to me.

Q. Does Oro Fina mean anything to you?

A. I have heard the name.

Q. Do you know whether the serial number was revoked or not?

A. No, I do not, but it had to be revoked because it [fol. 544] was a gold producer.

Q. Do you know whether it was reinstated or not?

A. If it was revoked, and I said it was, it was not reinstated.

Q. Well, you said that most of them were reinstated, so now which ones were reinstated then?

A. Well, it would be easier to say which were not reinstated.

Q. All right, which were not reinstated?

A. May I answer it that way?

Q. Yes.

A. The large gold mining companies that it was common knowledge and nothing else, such as Homestake, Cripple Creek, Idaho-Maryland, and the other Grass Valley mines that I can't think of the names right now, and all of the mines on the mother lode in California—their serial numbers were taken away.

Q. And the same being true with respect to the Alaska mines that were not placer mines?

A. The Alaska mine numbers were taken away. We then called on the mineral branches to tell us if they wanted any of these numbers reinstated due to the fact that they produced needed amounts of strategic minerals. Those strategic minerals in one case was arsenic, and in most cases

it was copper, lead or zinc, or maybe some molybdenum. [fol. 545] Furthermore, we were then contacted—and we didn't go to them but we were contacted by representatives of the large smelter companies operating in the West—and they said, "How are we going to continue to operate our smelters when you have shut down the mines from which we get our silicious ore, our fluxing ore, and our diluents?" We asked them to furnish us complete lists of the mines from which they received these two types of fluxing materials, the tonnage received each month, and a complete analysis of that tonnage.

We went over those lists with the smelting companies' representatives and where those mines produced several hundred tons a month we reinstated their numbers; and where they produced five, ten or fifteen tons a month, which was the case of a few of them, we said, "Just increase the output from the other mine and we will not give those numbers back."

Q. Now, these smelters were engaged in recovering just gold?

A. No, they were the great copper smelters and the lead smelters of the West. The added fluxing material they needed to balance their charge—of which I know only the general terms because I said I am not a metallurgist; I know what goes in but I don't know the details—was such that if they could get a fluxing ore, a quartz ore, containing a dollar's worth of gold, they would buy that in preference to a fluxing ore containing fifty cents worth of gold because it permitted [fol. 546] them to probably smelt larger amounts of ores not having quite as high an average or content than otherwise.

In other words, the more gold they could get out of the fluxing ore, the lower the grade of the copper and lead ore was that they could smelt.

Q. But in their smelting process they did recover the gold along with the copper and lead?

A. That is why they wanted it; they definitely recovered it.

Q. Now, that 30 per cent clause which was removed from P-56 by the amendment of May 15, 1942, was it not?

A. It was.

Q. What happened with respect to the serial numbers of the gold mines then?

A. They were not given back to them.

Q. Did any of them make reapplication for serial numbers?

A. I do not remember. The statement was made that there would be no charge in the operation of P-56 when the 30 per cent clause was taken out.

Q. Who made that statement?

A. I was told to make that statement by Mr. Knowlson, in conference with either Mr. Batt or Mr. Nelson.

Q. Where and when did you make the statement?

A. I made the statement the day of the last meeting [fol. 547] with Senator McCarran's committee in the Capitol at which time they were going to demand that the clause be withdrawn, I think, by Congressional action if they had the authority, but Donald Nelson told me to please open the meeting by telling them that we would withdraw the clause.

Q. You withdrew the clause but didn't change the administration of the order?

A. And we told them that at that meeting.

Q. And that made Senator McCarran happy, did it?

A. He said that the psychological effect of this 30 per cent clause was extremely harmful throughout the West and it would help them a great deal to have it taken out. I can't answer as to whether or not it made him happy.

Q. You told him you were not going to reinstate any serial numbers to gold mines?

A. Definitely.

Q. And you did it?

A. We did it at the meeting in the presence of the senators and Mr. Knowlson.

Q. Now, after the institution or after the 30 per cent clause had first been put in P-56, you had these meetings you refer to in Reno and Denver, did you not?

A. That was after the clause was put in?

Q. That is right.

A. There was such a furor in the West that Mr. Batt, [fol. 548] I think it was, told me, well he handed me airplane reservation and said, "Go out there and talk to the people."

Q. Were you present at the hearings or any of the pre-

liminary hearings of Senator McCarran's committee prior to the issuance of the amendment of May 15?

A. You mean the meeting in which I made the statement, the last day of the meeting?

Q. Prior to that day, prior to the last day of the hearings, had you been present?

A. I was at every meeting that committee held, and it lasted for a number of days.

Q. Did any of the governors of the western states to whom you had spoken in either Reno or Denver appear before Senator McCarran's committee?

A. I would have to refresh my memory with the minutes of those meetings.

Q. You don't have any independent recollection now?

A. I don't have any recollection now, but I would have to refresh my memory.

Mr. Rigney: These are the hearings of May, 1942?

Mr. Barnes: Right.

By Mr. Barnes:

Q. In your testimony you described these two meetings in Reno and Denver as being very large public meetings, is that correct?

[fol. 549] A. It is. The meeting at Reno was a meeting called by the Secretary of the Interior, Ickes, on some of his large progams, and we were asked to attach our program on to his, and so it was an extremely large meeting.

Q. Well, now, in your memorandum to Mr. A. I. Henderson, on March 16, Plaintiffs' Exhibit No. 72, you list only five governors and one state geologist as having been present at that meeting.

A. Well, I would like to see that exhibit, if I may.

(The document was handed to the witness.)

The Witness: I also mentioned that Mr. Kelly represented the governor of New Mexico, and the large group of mine operators from California stated they represented the governor of California.

By Mr. Barnes:

Q. How large a group of mine operators was that?

A. I think there were between five and ten.

Q. So that makes a total of fifteen or sixteen people?

A. They were the people that were on the platform and talked and the audience was as many people as could jam the McKay Auditorium.

Q. Did you make your speech then to the ten or fifteen people on the platform or did you make your speech to the audience who were there?

A. Well, I have always talked to my audiences.

[fol. 550] Q. Did you indicate to Mr. Nelson that this had been a public speech rather than a discussion with the small group that you named?

A. This was definitely a public meeting open to anyone who wished to attend.

Q. Did you indicate that in that memorandum?

A. Whether I had indicated it in a memorandum or not, Mr. Henderson knew that it was that type of a meeting.

Q. How did he know that?

A. Well, I had personal visits with him on my return—and this is just for the record.

Q. Professor Nelson, showing you Plaintiffs' Exhibit No. 74, was it customary to sign some document of this general type, perhaps differing in form from time to time with respect to the issuance of each order with which you had any contact in the War Production Board?

A. Yes, sir. This is the SEC-4 form used at that particular time which was required to be filled in when any order was being promulgated, or whether any amendment to an order was being promulgated, and such a promulgation had to be started by the person in charge of the branch or division which would enforce or handle that order. It is customary for the chief of the branch to place his signature and the date on which he placed it on this order, and to be followed by the signature of his priority specialist.

[fol. 551] Q. Is this your signature appearing on this document here?

A. It is not.

Q. Whose signature is that, do you know?

A. I never worte that; that is not my signature. You can compare it, too. It is nothing like my signature.

Q. Do you recognize the handwriting at all?

A. Well, I am not a handwriting expert.

Q. I know.

Mr. Rigney: May the record indicate what the document is?

Mr. Barnes: I will have it marked.

By Mr. Barnes:

Q. Have you ever seen handwriting similar to that on any of your staff in the War Production Board?

A. Well, it is something that looks like handwriting that I have seen, but I am not going to testify as to what it is. It is definitely not my signature. I didn't know that that document existed while I was with the War Production Board.

Mr. Barnes: Your Honor, I would like to have the document I have just shown the witness marked as Defendant's Exhibit No. 2 for identification. This is the form that was used on the issuance of L-208. It has no heading on the top of the form at all. It says, "Subject of Order—Gold [fol. 552] Mining, No. L-208, Branch Mining," and then opposite the word "New" there is an "X," and under "See brief summary of action recommended," the statement is inserted that attached order be issued by the Director General for Operations, and it bears the signature Wilbur A. Nelson and the signature Frederick M. Eaton, the signature J. H. Holland, and the signature J. A. Krug.

Mr. Rigney: I think the record should reflect that it bears the name Wilbur A. Nelson, but the witness has denied that he signed it.

The Commissioner: That is in the record.

Do you intend to offer that document?

Mr. Barnes: I am not offering it at the moment. It will be offered later on.

The Commissioner: All right.

(Said document was marked for identification as Defendant's Exhibit No. 2).

By Mr. Barnes:

Q. Let me show you this document which has been marked as Defendant's Exhibit No. 3 for identification and ask you whether that is your signature that appears on there.

A. This is my signature, made on the 13th of November, 1942.

Q. And what does that relate to?

A. Gold mining, L-208.

Q. Did that become known as Amendment No. 1 to that order?

[fol. 553] A. It says amendment, and I see nothing to show that it is the Amendment No. 1.

Q. Do you recall how many amendments there were to L-208?

A. I do not.

Q. Do you see references made also to see attached memorandum under the heading "C", and do you recognize the material digested there as being the substance of an amendment to L-208?

A. I remember this freezing provision that is in this amendment.

OFFERS IN EVIDENCE

Mr. Barnes: I would like to offer this in evidence, Your Honor, as Exhibit No. 3.

Mr. Rigney: I don't suppose you recall at this time, Professor Nelson, whether the summary here was the paper attached to this document at the time you signed it in 1942.

The Witness: The only thing I remember is that there was an amendment at some time added to L-208, freezing the selling of machinery from shutdown mines.

Mr. Rigney: I have no objection.

The Commissioner: Without objection, it may be received.

(Said document, marked "Defendant's Exhibit No. 3," admitted in evidence and made a part of this record.)

The Witness: Might I ask the date of that?

[fol. 554] (The document was handed to the witness.)

The Witness: It seems to have been issued on the ninth.

By Mr. Barnes:

Q. When did it first come to your attention that the War Production Board files contained a form purporting to bear your signature relating to the issuance of L-208 that I showed you and has been marked as Defendant's Exhibit No. 2 for identification?

A. Within the last week.

Q. Who showed it to you?

A. The attorney for Homestake.

Q. Do you recall when?

A. Not definitely.

Q. When?

A. Either Friday or Saturday night in their apartment at the Shoreham.

Q. And they showed you what? A photostatic copy of a document?

A. Yes, it is my recollection it was a photostatic copy.

Q. Did you have a secretary whose initials were M. H. S. at that time?

A. My secretary all of the time I was chief of the mining branch was Miss Meta Baker.

Q. Did you have an assistant with those initials?

[fol. 555] A. I don't remember.

Q. Let me show you this document which appears to have your initials affixed to it, and underneath it the initials which I decipher as being M. H. S.

A. Well, that is Marcellus Stow who was the deputy director of the Mining Division and he signed my initials and then showed that he had signed it by putting his initials under it.

Q. Is the same thing true with respect to this document that I am showing you?

A. The same thing is true. That was signed by Marcellus Stow, with his initials to show that he signed it.

Mr. Barnes: I would like to offer these two documents as Exhibits Nos. 4 and 5.

The Witness: May I see the dates of those, please?

(The documents were handed to the witness.)

Mr. Rigney: What is the purpose of the offer here, Mr. Barnes? That might help us in coming to an answer.

Mr. Barnes: Among other things, to get some additional samples of Mr. Stow's handwriting here on the signature of Dr. Nelson's name.

Mr. Rigney: If it is offered only as a specimen of handwriting, we have no objection to either of these two documents if that is the limited purpose of the offer.

Mr. Barnes: That was not what I stated; I said among

[fol. 556] other things. I am offering the document generally.

Mr. Herrington: If Your Honor please, if this document is offered by the Attorney General for any purpose other

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Mr. Barnes: I am not an attorney general, I appreciate your promotion, but I am not sure Mr. Brownell would.

Mr. Herrington: Potential Attorney General, for any purpose other than to prove the handwriting of Dr. Wilbur Nelson, we will enter an objection to it upon the ground that it is purely a private confidential communication which was never communicated to any of these plaintiffs or to any one else.

Mr. Barnes: That is a particularly fascinating objection to come from Mr. Herrington, because I made available to Mr. Herrington and Mr. Herrington offered in evidence this morning a whole series of inter-office communications with respect to the processing of appeals by the Idaho-Maryland Mines Corporation. I originally demurred from tendering them to him but then felt that in fairness and because we wanted to defend all of the facts in this case, we should make the whole file available. Now Mr. Herrington has the temerity to object because there were some inter-office communications included here or offered by the Government.

Mr. Herrington: I think that there is a difference, Mr. Barnes, on an application of a plaintiff for an appeal there with certain actions taken by the War Production Board. [fol. 557] We have no way of knowing how that action was taken other than the communication that came to us, but it is important to find out from the files of the War Production Board exactly what action was taken within the War Production Board.

Now, Mr. Barnes is offering what purports to be an order preliminary to an amendment of L-208. The fact is that the amendment was made and everyone knew the amendment was made, and it was published in the Federal Register but the reasons behind that amendment do not seem to be material so far as these plaintiffs are concerned.

We are bound by the amendment, and we have no way of knowing how or why the War Production Board reached the conclusion that the amendments should be made.

The Commissioner: How can you reasonably take that position when you take a different position with respect to the issuance of the order itself?

Mr. Herrington: I don't think we do take a different position, Your Honor, as far as the order itself is concerned.

The Commissioner: Well, for the last couple of days there has been much evidence put in that led up to the issuance of the order over the strenuous objection of the defendant.

Mr. Herrington: Yes, because that was for an eintirely different purpose. This is a technical amendment to Order 208 after the order was in effect.

The Commissioner: It may be received. I will be glad [fol. 558] to hear any objection of any other counsel to get them on the record.

Mr. Herrington: Your Honor, there is an Amendment No. 1 which is very definitely in our opinion at least different from the language of this particular inter-office communication.

The Commissioner: Very well.

(Said documents, marked Defendant's Exhibits Nos. 4 and 5," admitted in evidence and made a part of this record.)

By Mr. Barnes:

Q. Professor Nelson, let me show you this document which has been marked as Plaintiffs' Exhibit No. 76 and which is headed "Committee Program for Increasing Production of the Copper Mining Industry." Did you ever see that document in 1941 or 1942?

A. It is my recollection that either this program or one somewhat similar to it was produced by Mr. King at one of his meetings.

Q. Do you have any knowledge whatsoever as to what committee is referred to in that document?

A. Well, it comes from the Services of Supply, and naturally it would have to be some committee formed with the Services of Supply.

Q. Do you know that?

[fol. 559] A. That is just my inference only.

Q. Do you have any knowledge of who the members of the committee were?

A. None whatsoever.

Q. You don't know whether this particular report was one that was submitted at one of your interbranch meetings or interagency meetings or not, do you?

A. I would have to look over all of the minutes of those meetings to refresh my memory.

Mr. Barnes: Your Honor, again I move to strike this exhibit, on the ground there has been no showing whatsoever as to what committee this represents, the personnel, its authority, the appointing authority, anything of that type.

The Commissioner: It that Exhibit No. 91?

Mr. Barnes: No, that is Exhibit No. 76. Would it help any if you saw the transcript where that was originally introduced?

The Commissioner: No, I remember it. Overruled.

Is there any question that this came from the files of the War Production Board?

Mr. Barnes: I have no knowledge, Your Honor, except for the stamp that appears at the bottom if it.

The Commissioner: Wouldn't that be pretty conclusive?

Mr. Barnes: I don't know when it was put in the files, whether this was something put in the files in 1941, 1942, [fol. 560] or 1945.

The Commissioner: All right.

By Mr. Barnes:

Q. Do you know whether that document was ever brought to the attention of any member of the War Production Board?

Mr. Rigney: I think we might be able to save time. Apparently there was a letter of transmittal which accompanied this document from General Somervell, dated July 15, 1942, which became detached from it sometime prior to its offer here yesterday or the day before. We will be able to find that among the paper, because here is General Somervell's letter to Mr. Davis, the chairman of the War Labor Board, and he refers in the second paragraph, General Somervell does, "We have participated with an informal committee of experts representing the War Production Board."

The Comissioner: That isn't in evidence yet.

Mr. Rigney: We will offer the letter and attach it as part of this document.

The Commissioner: All right.

Mr. Rigney: I think there will be no question, then, about it.

By Mr. Barnes:

Q. Dr. Nelson, is there any difference between mining machinery used in a copper mine and mining machinery used in a molybdenum mine, for example, or is it basically [fol. 561] the same type of machine?

A. The question is too all-inclusive. Certain machinery can be used in practically every different type of mine.

Q. What type of machinery is that?

A. Pumps. Any mine that has to pump water uses pumps, and that is mining machinery.

Q. What about blowers?

A. Blowers, there is a variation but in general the type is the same.

Q. What about hoists?

A. Hoists vary a great deal. You have high speed hoists and low speed hoists.

Q. Does the type of hoist depend on the nature of the material mined, or on the depth of the shaft, or other factors?

A. It depends more on the depth of the shaft.

Q. Regardless of the type of material mined?

A. I would think so.

Q. What other types of machinery are used in the mining industry?

A. Well, there is a list attached to the mining machinery order that has been put in evidence which is a much better answer to that question than any I can give, and it is attached to Order P-56-A.

Q. I hand you Plaintiffs' Exhibit No. 5. There is a [fol. 562] one-page list attached to that, is that correct?

A. That was correct, at that time. This was amended from time to time.

Q. Will you look at that list and tell me whether you see listed there any types of machinery that are used only in gold mining and in no other type of mining?

A. I am not qualified to answer that question.

Q. What did you have to do with the issuance of P-56?

A. I issued it as an executive with the technical assistance of the makers of mining machinery. The mining branch was set up with the mining machinery branch and in charge of that branch was a mining machinery man.

Q. Who was that?

A. It was originally Mr. Hildreth.

Q. From what company does he come?

A. I don't remember what company he came from, but he was familiar with mining machinery and he was acceptable to the makers of mining machinery.

Q. Was that your aim in the mining branch, to be acceptable to the companies with whom you were dealing?

A. Pardon me; I didn't hear you.

Q. Would you read the question?

(The question was read by the reporter.)

Mr. Rigney: I think that it is objectionable, Your Honor.

[fol. 563] The Commissioner: Overruled.

(The pending question was read by the reporter.)

The Witness: The aim in the Mining Branch was to have people administering each division not connected with any individual mining machinery company or mine so that impartial service could be given to everyone.

By Mr. Barnes:

Q. I am afraid you still haven't answered my question, and I think it can be answered with a yes or no answer. Would you repeat the question again, please?

(The question was reread by the reporter.)

The Witness: I consider impartial service at its peak should be satisfactory to everyone.

The Commissioner: I don't think that it calls for a yes or no answer.

By Mr. Barnes:

Q. How long did this gentleman continue as head of your mining machinery section?

A. He was replaced before I left the Mining Machinery Division and another man put in because he resigned.

Q. Do you recall who was put in in his place?

A. I would have to refresh my memory. I think it was Mr. Egolf, but I would have to check that with my records.

Q. How do you spell that name?

A. E-g-o-l-f.

[fol. 564] Q. When was it that you first heard mention of an order that might close the gold mines, do you recall?

A. I didn't hear the beginning of the question.

Q. When was it that you first heard mention of an order that might close the gold mines?

A. The communications of Mr. Lester and statements made by Mr. King, I think, in August or in the midsummer of 1942.

Q. And what form were the communications from Mr. Lester?

A. I would like the exhibit in which he made those statements presented to me for pursual.

Q. You have made the statement there about communications from him and I am trying to get the sufficient identification that I can show them to you, and I don't recall any such documents having been offered in evidence.

Mr. Rigney: I don't think that there is any such document offered in evidence.

The Witness: There is a statement about Mr. Lester.

Mr. Barnes: Well, I have here all of the exhibits which I think have been offered in chronological order, starting with Plaintiffs' Exhibit No. 16 which is dated August 14, 1942. Will you see if you can find the statement to which you were referring to?

The Commissioner: We will recess for five minutes and [fol. 565] he can look for it during the recess.

(Thereupon, a five-minute recess was taken in the hearing.)

[fol. 566] The Commissioner: We will proceed.

By Mr. Barnes:

Q. Dr. Nelson, have you been able to locate among those exhibits the two documents to which you referred?

A. I have located two documents in which Mr. King makes statements about curtailing the gold mining.

Q. And those are?

A. September 1 and August 18.

Q. And the one of August 18 is Plaintiffs' Exhibit No. 77, which is a statement made at a meeting at which you were not present, is that correct?

A. That is correct.

Q. So that that——

A. But this is addressed to me.

Q. The memo of September 1, Plaintiffs' Exhibit 17, is a document addressed to you?

A. That is right.

I have found in the minutes of the King meeting of September 15, a statement by Mr. Lester asking that his organization be kept informed of which miners would be affected by the directive, and the directive as to the curtailing of the gold order, as explained in the previous paragraph.

Q. Which is a statement by a Mr. Harbison. Who is he?

A. Mr. Harbison attended a number of these meetings, [fol. 567] and was in the Services of Supply of the United States Army.

Q. So that what you have found is a statement by Mr. Lester that he wanted to have the labor division kept advised of what happened on a proposed gold order, is that correct?

A. That is what I found. But I am certain that I have seen a letter written by Mr. Lester in which he states that there should be a general curtailment of gold mining. It has not been offered in evidence.

Q. When do you mean you have seen it?

A. In the last week. I thought it was in evidence.

May I volunteer some information——

Q. While we are on this, incidentally, the second meeting to which you referred at which Mr. Lester's statement appears, is Plaintiffs' Exhibit 82. You were not present at that meeting, either, were you?

A. No, sir, I was not.

Q. I think your statement relates to identification of Mr. Newman, is that correct?

A. Yes, sir.

Q. You have located something on that?

A. I find a memorandum here at one of the Interdepartmental Committee meetings in which Mr. Newman is a member of the Planning Commission of the War Production Board.

[fol. 568] Q. The Planning Commission or the Planning Committee?

A. The Planning Committee. James Newman, Planning Committee, War Production Board. And this is the one that I said this morning I had heard nothing about either man.

Q. His name appears on Plaintiffs' Exhibit 91?

A. Yes, sir.

Q. Incidentally, what contact, if any, did you have with the Planning Committee during this period of time?

A. Only when they attended these interdepartmental meetings on non-ferrous metals.

Q. Do you know who any of the members of that committee were?

A. Well, by hearsay, I understood that Mr. Nathan was at one time, and later on Mr. Gulick, and I had considerable contact with Mr. Luther Gulick when he was on the planning Commission.

Q. At a later date, wasn't Mr. Lincoln Gordon chairman of that?

A. Well, at one particular time, Mr. Gulick was.

Q. Well, you referred to Mr. Newman as a member of the committee. Do you know whether he was a member of the Planning Committee or a part of the staff?

A. I do not.

Q. Dr. Nelson, I would like to direct your attention to a memorandum which you wrote to Mr. King under date of [fol. 569] August 14, 1942, Plaintiffs' Exhibit 16, and direct your attention to what I think is a numbered paragraph 2 at the bottom of the first page, in which you make the suggestion that there be a closing of certain non-essential industries in critical labor areas, particularly the Pacific Northwest, I believe you referred to. Is that correct?

A. That is correct.

Q. Do you recall that at or shortly after that date, the

War Production Board issued an order which, among other things, prohibited the operation of pulp mills in areas of critical labor supply, including the Pacific Northwest?

A. I think they did, but I would want to see documents to be positive of it.

Q. You referred in that memorandum to the fact that the gold miners were the last reservior and I may be paraphrasing you incorrectly—of skilled miners in the country.

A. I did.

Q. What do you mean or what did you mean when you referred to that?

A. I meant that if all of the gold mines were closed down, you would have available a reservoir probably of 600 skilled miners in metals. If they were dissipated, you had no other mining industry that could be classified or that you could afford or that could be closed down to give you [fol. 570] any other additional miners.

Q. Incidentally, in that particular memorandum, you didn't give any number of miners that were included.

A. No, I did not.

Q. Did you in any memorandum that you wrote prior to your memorandum of October 3, 1942, give an estimate of the number of miners available in the gold mines?

A. I did not give a detailed memorandum, but I did make statements that the figures given out by Mr. Lipkowitz were much too high.

Q. To whom did you make those statements?

A. I made them to Mr. Batt on the 30th of September, in a meeting in his room; and in numerous meetings when Mr. Lipkowitz made those statements, I contradicted him.

Q. And can you recall when those other meetings took place or who was present?

A. Well, he made those statements in some of the non-ferrous committee meetings. Whether they are part of the record or not, he made them.

Q. The minutes that have been introduced here do not show either his estimates or your contradiction of them; would that be your recollection?

A. I would have to check all of the minutes to be certain of that.

Q. You have been looking at them as they have been [fol. 571] introduced here, though, haven't you?

A. For only one purpose.

Q. What purpose is that?

A. To find statements made by Mr. Lester and Mr. King, I mean during the recess.

Q. But previously as they were introduced, you were examining them.

A. I have read them, but I have read hundreds and hundreds of documents, and it is impossible to keep all of the details without refreshing your memory.

Q. Will you just assume for the purpose of this question that the minutes which have been introduced in evidence do not show any statements by Mr. Lipkowitz as to the number of miners available in the gold mines, or any statements by you contradicting him, and assuming that fact, did you at any time take up with the persons charged with the responsibility for preparing minutes of these meetings, the omission of that data from the minutes?

Mr. Rigney: I think it is improper to set up a hypothetical question in that fashion.

The Commissioner: Objection sustained.

Mr. Barnes: I thought we might be able, Your Honor, to shorten this a little bit by that means.

By the Commissioner:

Q. Do you know of any important document that has [fol. 572] not been called to your attention here at the trial, having a bearing upon the close-down of the gold mines?

A. I know of this Lester memorandum or letter, in which he in August advocates closing all of the gold mines.

Q. That is the reason I asked the question. Do you know of any others?

A. I do not.

By Mr. Barnes:

Q. Professor Nelson, I am handing you Plaintiffs' Exhibits 77, 82, 97, 81, 22, 85, 37, 88, 89, 90, and 93, which are the minutes of all of the Interdepartmental or Interbranch meetings that have been offered in evidence bearing a date

prior to October 8, 1942, and I will ask you whether you find in any of those minutes, reference to estimates made by Mr. Lipkowitz as to the number of miners who will be released by the order, or references to a refutation or contradiction of that statement by you?

(Documents handed to the witness.)

The Witness: The minutes do not show any such statement.

By Mr. Barnes:

Q. Let me ask you this: With respect to the minutes of the interbranch meetings, you were the chairman of that committee, were you not?

A. Yes.

Q. Were the minutes normally submitted to you for [fol. 573] approval before they were distributed?

A. They were.

Q. Do you recall calling to the attention of the secretary of that committee the omission of any reference to estimates made by Mr. Lipkowitz or refutation made by you?

A. The committee meeting presided over by Mr. King——

Q. I am limiting myself to the interbranch meetings where you were chairman.

A. I thought you had gone to the interdepartmental meetings.

Q. I asked you first about the interbranch meetings.

A. I said that the minutes were presented to me for my approval.

Q. And my next question was whether you at any time called to the attention of the secretary of that committee, or any other person preparing the minutes, the omission of references in the minutes to estimates made by Mr. Lipkowitz or refutation of those estimates made by you?

A. You mean Mr. King's committee?

Q. I mean your committee.

A. Mr. Lipkowitz didn't attend any of my committee's meetings, as far as I can find out.

Q. So that it must have occurred at some of the interdepartmental meetings?

A. It occurred at Mr. King's meetings.

[fol. 574] Q. Did you at any time call to the attention of the secretary of that committee, or to the attention of the committee as a whole, the omission from the minutes of any reference to such statements made by Mr. Lipkowitz or by you?

A. I have no control over the minutes of that meeting, and they were prepared by Mr. King and mimeographed and sent out to us.

Q. Well, let me call your attention to Plaintiffs' Exhibit 100 for a minute, and particularly on the second page of that exhibit. That happens to be the minutes of the meeting under your direction, the interbranch meeting, is that correct?

A. No, this is another different meeting.

Q. It is the inter-division meeting of divisions concerned with mineral production?

A. It is the inter-division meeting of divisions concerned with mineral production.

Q. November 23, 1942. And you were the presiding officer, is that correct?

A. I was.

Q. The minutes of that meeting, and of other meetings of that group, were prepared under your supervision, and were mimeographed and sent out, is that correct?

A. When I presided over them.

[fol. 575] Q. Now, may I call your attention to the second pages of that document, under the heading "Elucidation."

A. Yes.

Q. Did a person who had been present at a prior meeting of that group raise a question as to the accuracy of the minutes of that prior meeting, and ask to have them corrected?

A. Mrs. Ethel Fuller did that.

Q. Did you ever take any similar action with respect to minutes of the King committee?

A. I did not. This is a meeting, a committee meeting entirely different from the other two you have presented.

Q. Going back to your memorandum of August 14, in which you referred to the gold miners as being the last reservoir of mining labor in the country, did you contemplate the necessity of what we might call tapping that reservoir at some undefined time in the future?

A. Not unless I was satisfied that proper arrangements were definitely completed for channeling those men to non-ferrous metal mines.

Q. In other words, it was your feeling that it would be better to have them continue working throughout the war, regardless of its duration, in gold mines, rather than to run the risk of their not getting into some other non-ferrous metal mine?

[fol. 576] A. I was looking at the over-all effect on the war effort of every action that was taken, and it was my firm belief that the harm that would be done by shutting down a few mines to get a few hundred men, which would hurt the morale of a large part of our western section, was much greater than the good that could be done through the few men going into copper, lead, or zinc mines.

Q. Was it your belief that the members of the War Production Board who took action on October 6 as shown by Plaintiffs' Exhibit 92, were not looking at the over-all interest of the war effort?

Mr. Rigney: Objection, if Your Honor please. I don't think it is proper to ask him to characterize the action of the Board.

The Commissioner: Sustained.

By the Commissioner:

Q. Did you ever make a written recommendation against the issuance of the order?

A. No, I did not, but I was credited by everyone, by holding them up for several weeks, hoping that they would put into effect machinery that would channel them properly.

By Mr. Barnes:

Q. Do I understand——

The Commissioner: Just a moment, please.

Mr. Barnes: Pardon me, sir.

[fol. 577] By the Commissioner:

Q. What was it you were driving at, from your own standpoint?

A. I did not want any order issued releasing these miners until I was thoroughly satisfied, and those men

around me, in the mining divisions, that the men could be channeled to the copper, lead and zinc mines, and we never reached a conclusion that that was true.

By Mr. Barnes:

Q. Do I understand, then, that if such machinery had existed, you would have been in favor of the issuance of this order?

A. I could not have opposed it.

Q. Is that the same as being in favor of it, or not?

A. Not necessarily, because I had never seen anything done at that time that would have made me thoroughly satisfied that they could be channeled properly.

Q. But I am asking you to assume that such machinery had existed.

A. You are asking me to assume something that wasn't in existence.

Q. I know, but aren't you able to make assumptions?

A. I don't think it is in order.

Q. Do you ever have to make assumptions in connection with work in geology?

[fol. 578] A. That is entirely——

The Commissioner: I don't think the question is proper.

Mr. Barnes: Your Honor, it seems to me in the absence of objections from counsel, I am entitled to ask any question I want to.

The Commissioner: You can ask it, but you might not be permitted an answer.

By Mr. Barnes:

Q. What information, if any, did you have as to the number of gold mines in the United States in 1941 or 1942?

A. I had general information throughout that entire time from numerous discussions with the gold operators, that the figures of all people in the gold mines was decreasing rapidly, and each month was getting much lower; and in August, the figures certainly that I had showed less than five thousand people in the gold mines.

Q. My question, I think, was directed to the number of mines rather than the number of miners.

A. Well; will you repeat the question?

Q. What information did you have as to the number of gold mines in the United States in 1941 or 1942?

A. We had our serial numbers that had been listed originally, issued originally, to all of the gold mines in the United States, in our files.

Q. Is it possible there were gold mines that had never [fol. 579] received serial numbers, and they were operating under P-22?

A. I know there were a number of small mines that did not bother to write in and ask for serial numbers, and they were getting along nicely under P-22.

Q. As an approximation, I am sure you wouldn't carry the exact figure, do you know how many serial numbers had been issued to gold mines, approximately?

A. No.

Q. Would it be over 500?

A. I can't answer. The only division I can answer on is the number of serial numbers to metal mines and nonmetal mines and coal mines, and that was as far as we classified them.

Q. Well, a minute ago you referred to the fact that employment had been dropping in the gold mines during 1942 prior to October, is that correct?

A. Yes.

Q. Had that resulted in the closing of any mines, to your knowledge?

A. It seems to me that Congressman Engelbright told me that one mine had closed down on the Mother Lode.

Q. That is the only information that you had?

A. That is all I can recollect at the present time, ten years later.

Q. What was the source of your information as to the [fol. 580] number of miners in the mines?

A. Those were figures——

Q. I am talking about prior to the meeting of October 1.

A. I know, but I have already answered that question, that from information given me by the different miners, it was less than 5,000.

Q. Where did you secure that information?

A. From our field offices and from individual talks.

Q. Did your field offices make regular reports to you with respect to the number of miners?

A. No.

Q. In what form did that information come to you from the field offices?

A. From my field offices reporting in to Washington about once a month, and we had informal discussions.

Q. You mean the men actually came in to Washington?

A. They did, or I met them in the field on my trips throughout the West.

Q. They told you about the number of employees in the gold mines?

A. We discussed everything that was going on, priorities, the mine situation; the gold mining problem was uppermost with everyone that summer, and naturally we discussed it.

Q. Copper mining wasn't uppermost?

A. Copper mining was uppermost, too, and the two were [fol. 581] very closely related.

Q. As a matter of fact, weren't all mines having manpower difficulties during the summer of 1942?

A. Everything connected with the mining division that was essential to the war effort was discussed, and they were all, you might say, they were all uppermost because they were all important.

Q. My question was, weren't all branches of mining, in the mining industry, having manpower difficulties during the summer of 1942?

A. Everybody in the United States was having manpower difficulties, as well as the mining industry.

Q. Was the mining industry aggravated in any way by factors peculiar to it, to your knowledge?

A. Yes, it was.

Q. Those factors were what? Wages?

A. Higher wages in the airplane and shipbuilding plants on the West Coast.

Q. Incidentally, in connection with or with respect to the number of employees that they would normally have, how would the gold mines rank among the metallic mines of the United States? Would they be large, small, or average, or are you in a position to tell that?

Mr. Rigney: I object only to the form of the question. I think it is ambiguous as phrased.

[fol. 582] The Commissioner: Let me hear it.

(The pending question was read by the reporter.)

The Commissioner: Overruled.

The Witness: We all know that gold mining in the United States is one of the smaller mining activities. It does not play the big part in the national economy that it does in Canada.

By Mr. Barnes:

Q. Would iron ore be larger, for example?

A. Very definitely.

Q. What about copper, would that be larger in the number of employees?

A. Very much so.

Q. And lead?

A. Well, in order to answer all of these questions, I would have to refresh my memory.

Q. Well, lead and zinc are the only other two I was going to ask you. Can you answer with respect to them?

A. Yes, there are more miners in those two industries.

Q. What other non-ferrous metallic products are mined, other than the group I have named and gold and silver, in any appreciable volume in this country?

A. Molybdenum. We produce about 80 per cent of the world's supply of molybdenum, but it is a ferrous alloy mineral, so that doesn't fall into the category of your ques-
[fol. 583] tion. We produce some vanadium, and you mean metallic minerals, I suppose.

Q. Yes. I said non-ferrous metallic minerals.

A. During the war, we produced considerable mercury, due to the high price we paid for it, and you have mentioned lead and zinc. There is no tin produced in this country.

Q. Well, I don't think——

A. Titanium, we produced some, and it can be considered either a ferro-alloy, depending upon its use; and we produced considerable tungsten due to the war effort. If I had sufficient time, I could go over the entire list.

Q. Incidentally, do you know what Homestake did after the passage of L-208?

A. They appealed.

Q. And they were granted some time extension, I take it?

A. I remember very distinctly that they were the one

company that had so much broken ore in their stopes that they appealed from the provisions of the order to permit them to remove that broken ore; that otherwise it would freeze in the stopes and would be a very bad situation to reopen.

Q. Do you know of an operation that is called the Sublett Division of Homestake?

A. I do not.

Q. You never heard of that?

[fol. 584] A. I never heard of that.

Q. You don't know, then, whether or not Homestake transferred employees and equipment to the Sublett Division for mining activities there?

A. I have no recollection of it.

Q. Did you ever hear of a company called Victoria Mines, in Sheridan, Montana?

A. I have heard the name, but I know nothing about the company.

Q. You don't know what that company did after the passage of L-208?

A. I do not.

Q. You don't know that company went into the business of the production of copper?

A. I said I don't remember anything about the company.

Q. Do you know whether any of the gold mining companies made any attempt to continue mining operations in the recovery of metals other than gold?

A. The Homestake Mining Company opened a manganese mine in Lower California. The Golden Cycle converted their mill into a custom mill, and I don't know how successful either one of those operations were, but I know that a start was made in each one of them.

Q. Do you know of any other gold mining companies that took action similar to that?

[fol. 585] A. I know that Grass Valley Company represented here they wanted to get time to prospect for tungsten, which was denied them. The Telache Gold Mine, at Atlanta, Idaho, I visited, at the request of the War Production Board, to see if they should be given an extension to see if they could find additional tungsten, and we gave them a 30-day extension, but they were unsuccessful and had to close down.

Q. Do you know whether any of them went into operations involving the mining of copper, lead or zinc?

A. Those are the only ones I remember.

Q. Were you still getting reports from your field force subsequent to October 8, 1942, and down to the end of December of 1942?

A. Yes, they were all handled by my deputy Director, Dr. Stow. He was in charge of the field division.

Q. When did he take that over?

A. He took it over some time before that.

Q. How long before that?

A. The records would have to show that.

Q. Well, you stated that during the summer you were in contact with the field division, during the summer of 1942?

A. When they came in to Washington, I met with them, and Dr. Stow met with them.

Q. Do you recall when it was, whether it was before or [fol. 586] after October 8 that he took them over?

A. I have no recollection. I know that he looked after all of the details, and I know that when the field men came in to the office we naturally had a conference with them, and as Director of the division, I naturally sat in on those conferences, and I ran my division by delegating authority to every man to handle his own branch, and only to come to me if he was in trouble.

Q. Do you know where Dr. Stow is now?

A. He is Professor of Geology at Washington and Lee University, Lexington, Virginia.

Q. Do you know whether or not any of the gold mining companies were able to use what, as a layman, I would call their processing equipment for processing of ores mined by other companies after October 8, 1942?

A. The only statement that I can make, answering that, I have already made in regard to the Golden Cycle mill converting. If the others could have converted, I am certain that they would have.

Q. At the meeting of the War Production Board on October 6, 1942, Mr. Batt read to the Board the statistics which you had given him with respect to your estimate of the number of miners who would be released by an order closing the gold mines?

A. That is an incorrect question.

[fol. 587] Q. What did he say?

A. He read the figures that had been prepared by the gold operators at the end of the meeting of October 1, and verified by additional information the morning of October 2, I prepared a memorandum on the basis of the information furnished me by the gold industry.

Q. He did read, however, your memorandum of October 3?

A. Yes, sir.

Q. Which gave the information you had secured from the gold industry?

A. That is correct.

Q. So that that information was submitted to the War Production Board before it reached its decision, is that correct?

A. The minutes show it to be correct.

Q. You were there, weren't you?

A. Yes.

Q. Did that take place?

A. I heard Mr. Batt read the figures.

Q. Do you recall whether or not Mr. Batt made any comment on those figures?

A. I do not recall.

Q. How many times were you at meetings of the War Production Board?

A. I know I was at that meeting, and I have a recol-

[fol. 588] lection that I was either at one other meeting, or a meeting rather similar to it.

By The Commissioner:

Q. Do you remember anything that took place at that meeting that wasn't in the minutes that we read?

A. I don't know whether they mentioned what Leon Henderson said or not, in the minutes, but I remember that distinctly.

By Mr. Barnes:

Q. The statement appears in Plaintiffs' Exhibit 92: "Mr. Leon Henderson reported the Canadian gold mining as being curtailed very sharply."

A. I have no recollection of what Vice President Wallace said at all.

Mr. Barnes: These is reference to a statement by the Vice President, Your Honor.

By Mr. Barnes:

Q. Do you remember whether any person spoke on the subject of the gold order, other than the persons whose names are given in the minutes?

A. I would have to refresh my memory on that.

Q. Well, let me hand you the minutes, Plaintiffs' Exhibit 92, and ask you whether you can recall whether any other person present at that meeting spoke on the subject of that order?

[fol. 589] A. I can't find what Leon Henderson said in here, and it must be in here.

Q. If you will look at the bottom of the second column of the first page, six lines from the bottom.

A. That is correct; I see it now.

A great deal of these minutes, I have no recollection of.

Q. I am limiting it now to the so-called Section 1 on gold mining, and I am asking you whether you recall whether any person present at that meeting, other than the persons whose names are listed in the minutes, spoke with respect to the gold mining order.

A. No, and I can't even remember what all of them listed in the minutes spoke about.

Q. Well, the minutes—I am referring now to the section marked "1, Gold Mining," and it refers to statements by Mr. Batt, Mr. Leon Henderson, the Vice President, Mr. Batt, and General Somervell. Do you recall whether anybody else participated in the discussion with respect to the gold mining order?

A. I do not, and I don't recall Mr. Batt's remarks, and I don't recall the Vice President's remarks.

Q. Do you recall who put the resolution that was adopted at that time?

A. We were requested to leave after the discussion on gold was completed, and I do not know whether any action [fol. 590] was taken while I was present.

Q. Specifically, Mr. A. I. Henderson was there. Do you recall whether he said anything?

A. I don't know.

Q. Lieutenant General Knudsen; do you recall whether he said anything?

A. I don't.

Q. Judge Patterson was there from the War Department. Do you recall whether he said something?

A. You mean the Assistant Secretary of War?

Q. That is right.

A. Yes, I remember what he said.

Q. What did he say?

A. I have already stated in the minutes.

Q. Will you state that again, your recollection of what he said at that meeting?

A. Can't that be checked so that there would be no variation?

Q. I would like to have your recollection on it, Professor.

A. Is that required?

The Commissioner: Yes.

The Witness: He backed up General Somervell in stating that if the gold mines were not closed, that the war effort could not go on as it should. As far as I can find out, [fol. 591] Secretary of War Patterson took the lead in this entire matter, and he probably talked before Somervell did.

By Mr. Barnes:

Q. Mr. Eberstadt was there. Do you recall whether he said anything?

A. I do not recall anything Mr. Eberstadt said at that meeting.

Q. Both John Lord O'Brian and Milton Katz were there. Do you recall whether any of them said anything?

A. I don't remember what they said.

Q. Mr. Charles Wilson; do you recall whether he said anything?

A. No.

Q. Mr. Kanzler, do you recall anything he said?

A. I didn't know he was there. It was a large room, and it was filled with a great many invited visitors.

Q. Mr. A. I. Henderson was there. Do you recall whether he said anything or not?

A. I do not.

Q. Mr. Nathan was there. Do you recall whether he said anything?

A. Well, according to these minutes here, I think we left the meeting before he said anything, but I don't recall him saying anything, because according to these minutes he came on after the gold order discussion was closed.

[fol. 592] Q. You said there was one other time when you either attended a meeting of the War Production Board or some similar meeting. When was that, do you recall?

A. When I presented the question of gold mining to one of the committees, or of mining machinery to one of the committees made up of a number of the leading men in the War Production Board. Whether that was—I am pretty certain that that was just a top policy committee and not the Board. That was the only other large meeting I attended, and Donald Nelson, I think, was present.

[fol. 593] Q. Let me show you Plaintiffs' Exhibit No. 73, minutes of a meeting of the Requirements Committee.

A. That was something; I had never attended any other meeting of the War Production Board. This was the other large meeting I attended.

Q. During your entire period of service in the War Production Board, is that correct?

A. Yes, sir.

Q. Now, in this meeting that was held in Mr. Batt's office on September 3, you have previously testified that Mr. Lipkowitz at that meeting gave certain estimates of the number of mining employees who would be released from the gold mines if the mines were shut down and that you stated that you felt his estimates were in error.

Mr. Rigney: I think that you meant to say the first.

By Mr. Barnes:

Q. September 3, the first meeting. Do you recall making any statements other than that at that meeting prior to the time Mr. Batt left, when I think you said you took over?

A. Oh, no, that meeting adjourned and Mr. Batt said he couldn't reach any decision and we all left.

Q. Did you say anything else other than refuting or attempting to refute Mr. Lipkowitz's estimates on manpower?

A. Well, it is my recollection that I backed up the state-[fol. 594] ments made by the senators and representatives on the dislocation and the hardship that would accrue to mining communities throughout the West, and I think I took a rather active part in the meeting on insisting that the overall economy of the country would not be improved by closing the gold mines.

Q. Why was that your position?

A. Because as the director of the Mining Division, it was my business to try to handle the entire mining situation of the United States for the best benefit of the war effort.

Q. But you stated that you would not have opposed the issuance of the order if you could have been assured that the miners would be channeled to the non-ferrous mines, is that correct?

A. But that condition never arose.

Q. Did you at any time give any consideration to the quantities of material used by the gold mines?

A. The quantities were so negligible that they couldn't have affected the war effort in any way.

Q. What was the source of your information on that?

A. Statements I received from gold operators, from mining machinery company representatives.

Q. Well, now, mining machinery company representatives would be largely concerned with expansion or new machines.

A. Not under the existing P-100.

[fol. 595] Q. Under P-100 could they sell new machines?

A. No.

Q. They would be concerned only with what?

A. Just repairs, supplies, and operating things.

Q. Did you have any idea of the magnitude either in dollars or tons or any other unit of measure, of the materials purchased and used by the gold mines?

A. When they were working at full capacity, figures were gotten up in my division, I think, showing the total was about fifteen million; but the capacity at which they were running before the gold mine order was put into effect,

I think some of my reports, whether they are in evidence or not, show the figure to be about $7,000,000.

Q. And the source of that was information you got from mining equipment or mining machinery concerns?

A. Mining machinery concerns, and the gold miners, and data that was worked up in the mining branch.

Q. From what source was that data in the mining branch worked up?

A. From the same sources, the sources where you can get source information for any statistics.

Q. Did the mining machinery companies give you any reports as to the volume of their sales to gold mines?

A. Well, I don't see how Mr. Rott could have gotten up his statistical——

[fol. 596] Q. You just answer my question.

A. The report gotten up in the mining branch was based on statistical data furnished the mining branch by the makers of mining machinery.

Q. Did you ever see any of that prior to October 8, 1942?

A. I saw that at the time I read Mr. Rott's report.

Q. That was in 1943 sometime, was it?

A. I would like to see the report.

Mr. Barnes: Was that put in evidence?

Mr. Rigney: Not yet, Mr. Barnes, no.

Mr. Barnes: It has been marked for identification, I guess.

By Mr. Barnes:

Q. I show you this document identified as Plaintiffs' Exhibit No. 13 for identification marked at the pre-trial conference, and I will ask you if that is the report to which you have reference.

A. I haven't been able to find the $15,000,000 in this report, and so I don't know whether it is the report I had reference to or not. I know Mr. Rott made me such a report that it was about $15,000,000, and I know that in consultation with the gold miners they said they thought $12,000,000 was nearer the correct figure than $15,000,000. But I don't see that figure in this report.

[fol. 597] Q. Have you during the past few weeks seen some other report of his that you may be recalling now?

A. Well, I have seen a report of Mr. Rott in which he estimated $15,000,000.

Q. Do you know when he prepared that report?

A. I can't say unless I could refresh my memory by looking at it.

Q. When did Mr. Rott come with the Mining Division?

A. The history of the Mining Division of which I have a copy tells the date at which each person joined the Mining Division.

Q. Do you have any independent recollection now when he came in to the Mining Division?

A. I know he came before L-208 was issued.

Q. How long before, do you know?

A. He came, I think, in the summer of 1942.

Q. Do you recall whether he had had anything to do with gold mines or gold mining prior to the issuance of L-208?

A. Yes, he had been interested in gold mining in South America and he is now back in South America in gold mining.

Q. Do you know whether or not in the Mining Division he had had anything to do with gold mines or gold mining prior to the issuance of L-208?

A. I would have to look up my organization chart.

Q. Do you have a copy of that here in the courtroom?

[fol. 598] A. No.

Q. Do you have a copy of the history of the Mining Division to which you just referred in the courtroom?

A. Yes.

Q. Can you refresh your recollection from that as to the date when Mr. Rott came with the Mining Division?

A. Do you wish me to?

Q. Yes, would you please?

A. All right. By the middle of March, 1942, Mr. Rott was a member of the Mining Division.

Q. In stating it that way, do you mean he came some time prior to the middle of March?

A. Some time prior to the middle of March, and he was Technical Consultant on Foreign Mines. That was his title as he came with the Board.

Q. Do you know whether or not prior to the issuance of L-208 when you testified you made him deputy adminis-

trator of that order, he had done anything with respect to domestic gold mines in the Mining Division?

A. No, he had been looking after material that was being sent to foreign gold mines.

Q. And other foreign mines?

A. Many foreign gold mines.

Q. And mines other than gold mines abroad, too?

A. I didn't understand.

[fol. 599] Q. And mines other than gold mines?

A. No, gold mines.

Q. Only gold mines?

A. No, he looked after the others, too.

Q. He looked after the others, too?

A. Yes, sir.

Q. To what other types of mines or mining industries in foreign countries were you sending equipment and machinery?

A. To the large copper mines in Chile and Peru.

Q. Any nickel mines or were you exporting material for nickel?

A. I don't know how much the Canadian nickel mines received in supplies from the United States, but I would say whatever they wished in the way of supplies would have been given to them very promptly.

Q. What about the tin mines in Bolivia?

A. The same thing would apply to that.

Q. And that was a practically new operation that was instituted during the war, bringing Bolivian tin ore out in large quantities and bringing it to this country for smelting.

A. We built a smelter.

Q. In Texas City?

A. That is right.

Q. And we also largely built the Bolovian mines, did we not?

[fol. 600] A. Well, I don't think I can say that, because Bolivia has been a source of tin, a major source of tin, in the world for many years.

Q. But their production was greatly increased during the war period, was it not?

A. I have not looked at those production figures.

Q. What was your responsibility with respect to that as head of the Mining Division?

A. To see that they got the necessary equipment.

Q. But you have no recollection now of whether or not their requirements for equipment increased during that period?

A. I would have to look at my records.

Q. Do you have any of those records here?

A. No.

Q. What about the tin mines in Africa, do you know whether or not we were shipping any equipment or material to them?

A. I would like to have you tell me where the tin mines are in Africa.

Q. West Africa.

A. You mean for merely the German mines?

Q. The Belgian Congo.

A. There are some placet tin deposits there that we got the output of.

Q. Did we send machinery?

[fol. 601] A. We had a Belgian Congo purchasing commissioner and we assisted them.

Q. And we gave them machinery and equipment and supplies that they required?

A. How much we gave them, I don't know, but I know we gave them some.

Q. Do you recall whether or not we shipped any mining machinery to Portugal?

A. That was not the responsibility of my division.

Q. What was the responsibility of your division?

A. The Board of Economic Warfare looked after much of that.

Q. Looked after what, now? Where was the line between their responsibility and yours on foreign mines?

A. I have never been able to know just where the line of division came on many of the things that happened during the war.

Q. You must have had some working arrangement with them as to where the line fell, did you not?

A. In many of the exports we had nothing whatsoever to do with them.

Q. You still had to authorize their manufacture in this country, did you not?

A. Yes, we were told to.

Q. You had to—who told you?

[fol. 602] A. Either the State Department or Lend-Lease or the Board of Economic Warfare.

Q. Did they have authority to direct a division of the War Production Board as to what it was to do?

A. They must have.

Q. You acted on their instructions without getting them confirmed. Did you take them up with Mr. Henderson?

A. Mr. Henderson and Mr. Batt and all of them realized that situation.

Q. Did you take any of those matters up with them at any time?

A. I took everything relating to foreign mines up with Mr. Batt, and I received my final instructions from Mr. Batt in regard to all foreign mines.

The Commissioner: We will adjourn until ten o'clock tomorrow morning.

Thereupon, at 4:35 o'clock p.m., a recess was taken in the hearing until 10:00 o'clock a.m., Thursday, January 29, 1953.)

[fol. 603] In the United States Court of Claims

[Title Omitted]

Transcript of Testimony—January 29, 1953

Colloquy

The hearing was resumed, at the time above indicated, pursuant to the recess previously taken.

Present: (The same appearances as previously noted.)

Mr. Connor: Your Honor, this case has progressed so rapidly that Homestake's case will be completed very quickly and we will not be able to go on this afternoon if we finish with Professor Nelson and Mr. Gurney. Therefore, I would like to request that we adjourn at whatever time of day we finish with Mr. Gurney and Professor Nelson. I assure you that beginning tomorrow morning with Senator Case, Homestake's case will then proceed to a conclusion.

Mr. Barnes: This is a very fortuitous request on Mr.

Connor's part because I have been trying since we dis- [fol. 604] covered how much more rapidly we have been moving to get in touch with my own witnesses to see if I could get them here, for example, to start the 9th instead of the 16th, as I originally had intended. But the hour that is available in the morning and the hour available in the afternoon after the hearings have been insufficient to allow me to be very successful in those attempts. I was intending to come here this morning with a request either today or tomorrow that we recess at lunch so I would have a full afternoon available so that I would be able to do my absolute best to have my proof ready to proceed, say, on the 9th rather than the 16th, and avoid what now looked like a possible gap of a week in these hearings.

The Commissioner: Do the other plaintiffs have any objection to Homestake's request?

Mr. Herrington: No, your Honor, we also are in the same situation. We have arranged to have our witness here Monday morning. Our testimony should not be very long, we should conclude in a couple of hours, I believe.

Mr. Barnett: No objection as far as we are concerned.

The Commissioner: All right.

Mr. Rigney: I spoke to Mr. Barnes yesterday afternoon, and he told me it would be agreeable to allow us to put former Senator Gurney on this morning for some rather brief testimony and withdraw Mr. Nelson temporarily.

The Commissioner: All right.

[fol. 605] TESTIMONY FOR PLAINTIFFS—RESUMED

Mr. Rigney: Senator Gurney, will you take the stand, please?

This is the Honorable Chan Gurney.

HONORABLE CHAN GURNEY, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct Examination

By Mr. Rigney:

Q. Senator Gurney, you are presently a member of Civil Aeronautics Board, is that correct?

A. That is correct.

Q. That is a board of five members who are presidential appointees?

A. With one vacancy at the present time. There are five in the number.

Q. And prior to becoming a member of that board you were, for a number of years, one of the United States Senators from the State of South Dakota, is that correct?

A. That is right, from 1939 through 1950.

Q. During your service in the Senate, sir, what were some of the committees on which you served?

A. Well, prior to the reorganization act I was on a number of committees. I think the assignment was to six committees. After the Reorganization Act of 1946 I was a [fol. 606] member of the Armed Services Committee and the Appropriations Committee. Prior to that time I was on the Military Affairs Committee, Public Land, Interstate and Foreign Commerce, and Foreign Affairs.

Q. I think that is sufficient.

A. That is all I can remember.

Q. You recall, do you not, that in the autumn of 1942 an order was issued by the War Production Board closing down domestic gold mines in the United States?

A. I don't remember the exact date.

Q. But you recall the issuance of the order?

A. Oh, yes, very well.

Q. Do you recall any meetings which you had with any officials of the War Production Board in which you discussed this proposed order prior to its issuance?

A. We had many meetings with the War Production Board officials. I don't mean hundreds, but I mean other Senators and myself, and I myself alone met with different War Production Board officials, and officials of other departments on the subject.

Q. And there were several of such meetings?

A. Oh, yes.

Q. Can you tell us specifically what members of the War

Production Board you recall discussing this proposed order with?

[fol. 607] A. Well, I am sure Mr. William Batt and Mr. Eberstaet were there, and then there was an engineer with them by the name of Fred Searls, as well as Mr. Nelson, who was in the picture there some place, I don't know.

Q. Mr. Donald Nelson, the head of the War Production Board?

A. That is right. I do not remember how many times I talked with him personally.

Q. But you do recall that on one or more occasions you did talk with Donald Nelson about this?

A. Yes, I am sure we talked across the table on it, and then I knew that I phoned him a number of times.

Q. In these conferences or conversations that you refer to now, what position were you taking with respect to the proposed order?

A. I was presenting the picture from the South Dakota side, the necessity for keeping the mines open.

Q. And you were advancing arguments as to why the order should not be issued?

A. That is right.

Q. Now, were you on some occasions at Mr. Batt's office in the WPB offices, for your meetings with him?

A. That is right, in their offices, wherever they asked us to meet with them. I believe it was over on Independence Avenue by the Census Bureau.

[fol. 608] Q. Can you recall, sir, substantially the reasons why you urged upon these WPB officials that you have mentioned against the issuance of the proposed order, and what arguments you gave them?

A. I can, I believe, remember the main reasons.

Q. Yes sir.

A. First, the proposed order, as soon as we learned of it, was based on the necessity for saving strategic minerals that would have to go into the making of drills and other machinery that Homestake used in their mining, and our plea was that Homestake was well supplied with that kind of needed tools, and had sufficient on hand that they could run quite a while without ordering new materials.

Then, I don't know that that was No. 1, maybe the No. 1 reason would be that it was our contention that the

miners were older men and would not like to go into the copper mines, for that is rather hot working in the copper mines, and we were convinced—and when I say we I mean the legislative group from South Dakota—that the Government would not get a transfer of these hard rock miners out of Homestake into the copper mines in sufficient numbers to warrant the order.

Q. Was anything said in these discussions by Mr. Batt or anybody else from WPB about any plan or thought on the part of WPB to effect a transfer of the miners? In other words, was the labor or manpower proposition discussed? [fol. 609] A. Oh, yes; it was going to be on a voluntary basis. They would tell them where they were needed in the war effort, but there was no legislation, as I remember it, to compel them to move. In other words, there was no selective service act except for war service. They couldn't transfer them by order.

Q. Can you tell us whether or not the manpower aspect of it was stressed by Mr. Batt or any other WPB officials as the reason for the order?

A. Yes. They felt they would get out of all the gold mines quite a few hard rock miners into the copper mines.

Q. Now, do you recall any other arguments which you advanced, as the Senator for South Dakota, with respect to Homestake's situation in relation to the State of South Dakota?

A. Yes, I do. There was an ore severance tax, and there still is, I believe, on the law books in the State of South Dakota. When the Homestake mine was in full operation South Dakota received a little over a million dollars per year in income. And without question that money was needed in supporting the State government, and that was proven by the fact that the sales tax had to be raised one penny in South Dakota when they lost that million dollars of ore severance tax.

One penny brought in about the same amount in the year as did the ore severance tax when Homestake was operating. It meant that much.

Another thing was that the only employment in the [fol. 610] towns of Lead and Deadwood, South Dakota, was the Homestake mine. The Homestake mine supports that whole area there. There is nothing else for them to do,

and they would all have to move, and the people had lived there for some years. I think it affected directly 12,000 or 16,000 people. Consequently, we were very much interested in keeping the mine opened if at all possible.

The Commissioner: I think it would be well, in developing the discussions that the Senator had, to distinguish between the people with whom these discussions were had. At least draw the line between the members of the board and subordinates to the members of the War Production Board.

Mr. Rigney: Yes, your Honor.

The Witness: I am glad of the interrpuption, your Honor, because I was under the impression that I was stating facts as I presented them to members of the War Production Board. I do not in any way want to state an opinion. I would like to have the record show, if possible, that I have no financial interest, nor does my family have any financial interest,—uncles, aunts or anybody that I know of—in the Homestake Mining Company.

By Mr. Rigney:

Q. You own no stock in the Homestake mine?

A. I never have.

The Commissioner: The only question I have is that you [fol. 611] suggested earlier your conferences with other people besides the members, and I thought that since the testimony was related to the general discussions, I wanted a line drawn between the members as distinguished from staff members.

Mr. Rigney: I will try to clear that up, your Honor, in just a moment.

By Mr. Rigney:

Q. You speak of the ore severance tax paid to the State of South Dakota by the Homestake mine. Would you be able to tell us in round figures approximately how much that annual tax amounted to at that time, 1942, in relation to the total annual budget, or the total annual revenues raised from taxes by the State of South Dakota?

A. My memory isn't good enough on that to tell you

how much the general tax totaled in South Dakota, but I do know that it was around a million dollars, or a little above, most every year that Homestake paid on their ore severance tax. I wouldn't want to test my memory as to what it is, but it has been above a million dollars almost constantly for a number of years.

Q. If I suggested that the total annual revenues of the State of South Dakota in 1942 were approximately $10,000,000 or $11,000,000 would that be in accord with your recollection?

A. It would be about right.

Q. So that Homestake's contribution by way of tax would [fol. 612] be somewhere in the neighborhood of nine or ten percent of the total budget of the State of South Dakota?

A. That would follow, yes.

Q. In order to clarify just a little bit these conversations that you had, you have testified that you had conversations or discussions with Mr. William L. Batt, the Vice-chairman of the War Production Board, and with Mr. Ferdinand Eberstaet, who was, I believe at one time, a Vice-chairman of the War Production Board.

A. I remember very clearly we talked to those two top men. Donald Nelson assigned them to this problem.

Q. And you have also spoken of having conversations with a Mr. Fred Searls. Do you recall what his position was in the War Production Board?

A. I am sure he was an engineer-advisor to Mr. Batt.

Q. Were there, aside from these four men now that we have mentioned, that is, Donald Nelson, Mr. Batt, Mr. Eberstaet and Mr. Searls, do you recall——

A. I wouldn't recall any others.

Q. You don't recall any conversations with anybody other than that?

A. There were others always around, but I don't remember any names.

Q. Incidentally, Senator Gurney, when you left the Senate, what became of your files that you had accumulated [fol. 613] over the years as a Senator?

A. I only kept personal files; all the rest were destroyed.

Q. Were they rather voluminous?

A. There was a few truckloads. They were thrown

into boxes and they went to the incinerator in the Senate Office Building.

Q. Do you recall whether or not you ever sent a letter to Mr. Donald Nelson expressing your views and arguments in connection with this proposed gold closing order?

A. I am sure I did. I don't remember exactly what the letter was, because we were writing everyone that had anything to do with the gold mine closing order.

Q. You would not remember, of course, now the date of such a letter, would you?

A. No sir.

Q. Let me show you Plaintiffs' Exhibit 21 in evidence, being a memorandum of September 15, 1942 from M. Creditor to Mr. Donald M. Nelson, and I draw your attention to the second paragraph of this letter which says: "You will recall that we received a letter from Senator Gurney on August 31 in which he set forth the harmful effects that such an order would have on the economy of the State of South Dakota. In your reply you stated in effect that we were confronted with a manpower problem," and so forth.

[fol. 614] Do you recall now, and does that refresh your recollection with respect to the approximate date of your letter to Donald Nelson?

A. Well, it would have been just prior to the issuance of the order, and I don't know how many months, but certainly I wrote him along those lines, as previously testified.

Q. Now, do you recall a meeting attended not only by you but by other Senators and Representatives, and certain representatives of the gold mining industry, with Mr. Batt and other WPB officials on or about October 2, 1942, or about a week before the order was issued? It was a rather large meeting.

A. Yes, there was a large meeting, but the exact date I wouldn't remember. Senators and gold mine officials called on the War Production Board officials. It was quite a meeting. It looked like a town meeting.

Q. You were in attendance there?

A. Yes, at every meeting, I believe.

Q. And without unduly belaboring the record with a recitation of the arguments that were advanced at that

meeting, would it be fair to say that these same arguments that you have testified about here this morning previously were the same arguments against the closing order that were advanced then by you or by others in the meeting in your presence, and in the presence of Mr. Batt and the [fol. 615] WPB officials at this large meeting that we speak of?

A. There was a general belief in and about the same story. I could say the same story or the same pleading was made by the members of Congress from States that had gold mines. It was their belief that the miners would not gravitate in sufficent numbers to the copper mines to warrant the closing of the gold mines. They were very vehement in their charges—all the legislators were—that the United States gold mines should not be closed when the United States was at the same time supplying these mining tools to gold mining firms in many other countries. I am sure that the record will show that these tools were continued to be sent to other countries that did not close their gold mines, and we did not want to receive poorer treatment than the allies—you might say—the allies of ours were giving to their gold mining people in their own countries, Africa, Canada, Mexico, and so forth.

Q. Do you recall a few of the people who were in attendance at this October 1st meeting.

A. Well, I don't know about the October 1st date, but—

Q. At this large meeting.

A. Senator McCarran, I know he was the chairman, he was the senior member that called the meeting together, and after the order was put out the members of Congress, or members of the Senate who attended that meeting sent [fol. 616] a letter of protest to the President. So the signatures on that letter of protest would about tell you who was at the meeting.

Q. I am speaking now of the meeting at which Mr. Batt presided, and at which the representatives of the gold mining industry were in attendance. Do you remember Mr. Bjorge being at that meeting?

A. Yes, he was there.

Q. At that meeting that Mr. Batt presided over?

A. Yes.

Q. Do you remember whether General Clay was there?

A. No, I do not.

Q. But anyway, the various arguments were advanced then and there in your presence to the WPB officials against the close-down order at this meeting that Mr. Bjorge attended?

A. General Clay runs through my mind. There was always a representative from the military on the manpower question. I couldn't remember if it was General Clay or not.

Mr. Rigney: May this be marked our next number, please?

(Said document was marked for identification as Plaintiff's Exhibit No. 126.)

By Mr. Rigney:

Q. I show you Plaintiffs' Exhibit 126 for identification and ask you if you will look at that and tell his Honor if that is a copy of a letter which was sent to President Roosevelt by you and several other Senators on or about [fol. 617] the date that it bears, October 10th?

A. Looking at it quickly——

Q. Take your time, sir.

A. Certainly it rings a bell.

The Commissioner: Is that different from the letter that has already been marked as an exhibit in pre-trial?

Mr. Rigney: Yes sir, I believe it is.

Mr. Barnes: That is addressed to the President, and the other is addressed to the War Production Board.

The Commissioner: All right.

The Witness: This is the letter that the group of senators sent after the closing order was issued by the War Production Board. There is no question about it, it is a copy, and it does set forth the names of the senators from the gold mining states, of which I am one of the ones signing. There are quite a few senators here, about twenty-one I would say in a hurried count. I think, twenty-one.

Yes, this is the letter.

Mr. Rigney: Plaintiff offers Exhibit 126 for identification in evidence.

Mr. Barnes: Mr. Rigney, from what source did this copy come?

Mr. Rigney: This was a copy which Senator Gurney sent to Homestake under a letter of transmittal of October 13, 1942.

Mr. Barnes: I have no objection, your Honor.

[fol. 618] The Commissioner: It may be received.

(Said letter, dated October 10, from Senator McCarran et al to the President, marked "Plaintiffs' Exhibit No. 126", admitted in evidence and made a part of this record.)

Mr. Rigney: Co-counsel has inquired of me if I could indicate through the witness the States that the Senators came from. Would your Honor permit me to do that?

The Commissioner: You may proceed.

By Mr. Rigney:

Q. Senator McCarran would be from Nevada?

A. Right.

Q. Senator Millikin from Colorado?

A. Right.

Q. Senator Langer, North Dakota; Senator Chavez, New Mexico; Senator Murray, Montana; Senator Hatch, New Mexico; Senator McNary, Oregon; Senator Nye, North Dakota; Senator Downey, California; Senator Gurney, of course, South Dakota; Senator Thomas of Utah; Senator Johnson of Colorado; and Senator Johnson of California; Senator Thomas of Idaho; Senator Hayden of New Mexico; ——

A. Arizona.

Q. Senator Wallgren of the State of Washington.

A. Yes.

Q. And Senator Bone, Washington; Senator Murdock [fol. 619] was Utah, was it?

A. Right.

Q. And Senator Holman——

A. Oregon.

Q. Senator McFarland was Arizona?

A. Yes.

Q. Senator Bulow, South Dakota.

A. That is right.

Mr. Rigney: May this be marked Plaintiffs' Exhibit 127 for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 127.)

By Mr. Rigney:

Q. Do you recall about the time Order L-208 was issued that you wrote a letter to General Somervell, who was Commanding General of the Army Service Forces at that time?

A. I wouldn't remember exactly. You would have to identify it further. Most anyone that had any authority over it——

Q. Let me show you Plaintiffs' Exhibit 127 for identification, and ask you to look at that and tell his Honor if this document is a reply which you received from General Somervell in response to a letter that you sent to him?

A. The War Department has the habit of sending two copies, an original and one copy, with their reply. I mean [fol. 620] their reply is an original and one copy. This is without a question a copy of a letter from the Pentagon. I have seen so many of them I know it is right.

Q. And specifically from General Somervell?

A. Yes.

Q. It is from General Somervell, isn't it?

A. Yes. I can identify it from my letter of transmittal.

Q. You sent this copy of General Somervell's letter to you to Mr. Chambers Kellar of Lead, South Dakota, is that right?

A. That is right.

Q. Under a letter of transmittal from you of October 12, 1942?

A. That is right. I say "that is right" because you do have my letter here with my signature.

Q. And Mr. Chambers Kellar was for many years attorney for Homestake at Lead, South Dakota?

A. That is right.

Mr. Rigney: Plaintiff offers in evidence Plaintiffs' Exhibit No. 127 for identification.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said letter, dated October 11, 1942 from General Somervell to Senator Gurney, marked "Plaintiffs' Exhibit No. 127", admitted in evidence and made a part of this record.)

[fol. 621] Mr. Rigney: May I call your Honor's attention to the fact that General Somervell's letter of October 11 to Senator Gurney, Plaintiffs' Exhibit 127, discusses in detail the need for labor in the copper mines and makes no mention of critical material being the reason why Order L-208 was issued.

The Commissioner: He was not a member of the War Production Board, though, was he?

Mr. Rigney: No sir, he was not.

The Witness: He was overall commander of the Services of Supply.

The Commissioner: Yes.

The Witness: For the military establishment at that time.

By Mr. Rigney:

Q. Do you know, Senator Gurney, whether or not the problem of production, military production, production for war, came within the purview of the Services of Supply at that time?

A. Yes, he was the top man, Somervell was over production of all things needed in the military.

Mr. Rigney: Your Honor will recall that the minutes of the October 6 meeting of the War Production Board recite that Geneal Somervell was at the meeting.

The Commissioner: Yes.

Mr. Rigney: Let me have this marked Plaintiffs' Exhibit No. 128 for identification, please.

(Said document was marked for identification as Plaintiffs' Exhibit No. 128.)

[fol. 622] By Mr. Rigney:

Q. I show you Plaintiffs' Exhibit 128 for identification and ask you to look at that and tell the Court if that refreshes your recollection as to whether or not you addressed a letter to General George C. Marshall, who was at that

time Chief of Staff of the United States Army, and received a reply from him?

Mr. Barnes: I object to the form of the question. There has been no showing that Senator Gurney's recollection needs to be refreshed.

The Commissioner: Sustained.

By Mr. Rigney:

Q. Senator, do you recall whether or not about the same time that you wrote to General Somervell you also wrote to General Marshall, Chief of Staff, about this subject?

A. I think I testified that I was writing to everyone in authority in the military, and anyone that had anything to do with the production of war materials, trying to put the gold closing order in South Dakota in front of them, in other words, South Dakota's plea.

Q. Are you able to recall from an independent recollection now whether or not you wrote specifically to General Marshall?

A. Well, not without some letter that I might have written to Homestake about my correspondence with this or that [fol. 623] man to refresh my memory.

Mr. Rigney: May I now submit to the Senator Plaintiffs' Exhibit 128?

The Commissioner: Yes.

By Mr. Rigney:

Q. I show you Plaintiffs' Exhibit 128, Senator Gurney, and also your letter of October 14, 1942, and ask you to look at them and tell us whether or not they refresh your recollection with respect to writing General Marshall?

A. This is my letter of October 14, it is my signature, to Kellar & Kellar in Lead. It says:

"For your information, I attach a copy of letter received from General George C. Marshall, Chief of Staff, in reference to the gold mine suspension."

Q. Will you look, please, at this Exhibit 128 and read it and tell us if that is a copy of the letter which you received from General Marshall in response to your letter to him?

A. Yes, without a question, this came from General

Marshall, and it is a form we used in our office in making copies of official letters.

Q. Was that copy made in your office at your direction from the original that you received from General Marshall?

A. Oh, yes, I am sure.

Q. Is the original of this letter among the files that you testified earlier were destroyed when you left the Senate? [fol. 624] A. I presume so.

Mr. Rigney: Plaintiff offers Exhibit 128 in evidence.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said letter, dated October 12, 1942, from General Marshall to Senator Gurney, marked "Plaintiffs' Exhibit No. 128", admitted in evidence and made a part of this record.)

Mr. Rigney: I again invite your Honor's attention to the fact that this letter from General Marshall discusses the labor and manpower problem and makes no reference to critical materials in connection with this order.

By Mr. Rigney:

Q. Directing your attention now to a time several months prior to the issuance of this order in October, 1942, specifically to the Spring of 1942, do you recall whether or not at that time you had some discussions with the War Production Board with regard to priorities, or priority ratings, under existing priority orders for supplies or materials needed in gold mining on behalf of Homestake?

A. Are you asking me as to whether or not I asked them for priority for——

Q. No, I am just asking the general question as to whether or not you recall conversations about the general subject of priorities for supplies and materials for gold [fol. 625] mines back in the Spring of 1942.

A. Well, I do remember saying that Homestake's needs should be considered along with other gold mine company needs in the United States, as compared with the priorities given the gold mining companies of other countries. As to whether it was in the Spring or any other time, I don't know. I don't remember.

Q. Can you say whether or not it was a time prior to the discussion of the general close-down order?

A. Oh, yes.

Q. In other words, at a time somewhat prior to the general close-down order——

A. Somewhat prior to the time when the Senators got together to call on the War Production Board in connection with their proposed closing order.

Q. And those discussions which you had at that time were not concerned with a complete shut-down order, were they? They related to priorities under existing priority regulations?

A. That is right. But I don't want to be quoted here as saying when that happened. That is eleven years ago, I think.

Q. No, I understand. I think that is good enough. It was several months, or at least some time prior to this discussion of the close-down order?

A. Yes, some time in advance of the close-down order. [fol. 626] Mr. Rigney: You may inquire.

Mr. Herrington: May I ask the Senator a couple of questions?

By Mr. Herrington:

Q. Senator Gurney, did you know Representative Harry Englebright from California?

A. Well, he was one of the men that came to the meetings I had in my office, and also came to the meetings in Senator McCarran's office. Whenever we met on the gold mine question I am sure he attended. He was very much interester in it.

Q. Did you also know Representative Clair Engle from California?

A. Yes.

Q. Were both of these men generally present at these meetings?

A. Well, didn't one follow the other in Congress?

Q. Yes.

A. I am sure that is so.

Q. Do you recall whether they were present at the meeting on or about October 1st?

A. One of those men, I can't tell which it was, but they were always in attendance because that area in northern

California, as I remember it, has quite a few gold mines, and they always attended those meetings.

[fol. 627] Q. Do you recall what representation they may have made to the War Production Board with respect to the closing order?

A. We were all focusing on the same general arguments, that is, we all had the same ideas, that they wouldn't get enough men going into the copper mines to warrant the impact on our economy that the closing of the mines would give us.

Q. The group that you represented, Senator, including the representatives of the other senators, more or less acted as a group on behalf of all the gold mines?

Mr. Barnes: I object to the form of the question as being leading.

The Commissioner: Overruled.

The Witness: We kept common counsel and talked among ourselves all the time.

Mr. Herrington: Thank you.

By The Commissioner:

Q. Senator, do you know of any Senate or House bill introduced to forestall the issuance of the order closing down the gold mines?

A. No sir, I don't remember. I presume there were some. I don't know if I introduced a bill. I don't remember that, but that could be ascertained. I don't remember whether there were bills introduced in the Senate or the House.

Q. I just wondered whether there was any formal legis-

[fol. 628] lative action other than this group action protesting before the War Production Board. I wondered if the House or Senate took any legislative action as such on the problem?

A. Well, there was no legislation that was passed and became a bill preventing the closing.

Q. I know that.

A. The only group action——

Q. I was wondering if any got started that may not have been passed.

A. That is too long ago for me to remember. I know it was war time and we, finally as a group, the senators, ap-

pealed to the President. That was our final effort, and we got turned down there. That letter was introduced in the record this morning.

Mr. Rigney: May I ask just one question?

The Commissioner: Yes.

By Mr. Rigney:

Q. Do you recall, Senator, whether any bills were offered in the Congress, or introduced in the Congress, during the period of World War II, to authorize the Government to draft labor?

A. Oh yes, those bills came before the committee of which I was a member, and they were never successful.

Q. And no such bill ever was passed by the Congress, is that right?

[fol. 629] A. That is right.

Q. And do you recall if the name of one of those bills was the Austin-Wadsworth Bill?

A. Very well.

Q. And Congress never passed any such legislation during the whole period of World War II?

A. That is right.

Cross-examination.

By Mr. Barnes:

Q. Are you appearing here pursuant to subpoena, Senator?

A. That is right.

Q. You referred to the fact that prior to the issuance of this gold mine order you not only talked to officials on the War Production Board but you talked to officials of other departments. Who were those officials of other departments; do you recall?

A. The military.

Q. Under-Secretary Patterson?

A. I presume I did.

Q. Do you have any recollection now?

A. Most of my talks would be with men like General Somervell, who was in charge of that particular effort for the military. I cannot remember whether I talked with Sec-

retary Patterson. My only means of saying that I did [fol. 630] confer with General Somervell or General Marshall was when I find here a copy of a letter that I have sent to Homestake, because they were South Dakotans and I was presenting South Dakota's argument.

Q. I was just interested in trying to define, so far as possible, the best you can recall now, who the people were in the military with whom you discussed this prior to the issuance of the order. Can you tell now whether you went as high as the Secretary of the Army and Secretary of the Navy, for example, Mr. Stimson and Mr. Knox? Did you discuss it with them at any time that you can recall?

A. I wouldn't remember.

Q. Do you recall whether you went to Mr. Patterson and Mr. Forrestall, for example, the next lower echelon?

A. No. I couldn't say that I did. By the same token, I couldn't say that I didn't.

Q. You used to phrase "members of the War Production Board". I was wondering, Senator Gurney, whether you were using that in its technical sense, and I will explain what I mean: by Executive Order the President established a War Production Board as a board and named certain members to that board. Those members were the Chairman, who was appointed by the President; the Secretary of War; the Secretary of the Navy; the Secretary of Commerce; the Chairman of the Board of Economic Warfare, who was at that time Vice President Wallace; the Director of Pro- [fol. 631] duction for the War Department, who at that time was Lt. General Knudsen; Mr. Harry Hopkins, who had various titles during that period; and the Administrator of the Office of Price Administration, Mr. Leon Henderson. Those were the members of the Board as appointed by the President: Is that what you meant when you said members of the War Production Board?

A. No, that is not right. As I remember it, Mr. Nelson was the Executive Director. Is that right?

Q. Chairman was his title.

A. Chairman, all right. A senator has a habit of going to the top man, and then we would be funnelled by the Chairman of that particular agency to the men that handled the problem, the top men that handled that particular problem. So when I say we talked to the War Production Board of-

ficals I mean the top officials in the War Production Board who were assigned the problem of minerals or manpower, and I remember vividly that we talked with Mr. Batt and Mr. Eberstaet and Mr. Searls, and those people who were there.

Q. When did you see Mr. Searls? Did you see him alone or in company with some of these others?

A. He was just there as an advisor to Mr. Batt.

Q. Had you known Mr. Searls before?

A. No, I had never seen him before. I am sure that is his name.

[fol. 632] Q. That is right, Fred Searls, Jr.

Incidentally, this letter of protest you sent to the President, did you receive any reply to that?

A. I do not know.

Q. Do you have any recollection now?

A. I know we were not successful. That is the only recollection I am sure of on my part. If the reply came in it probably would not have come to me, it would have come to the senior member who signed the letter, who was Senator McCarran.

By The Commissioner:

Q. Did this group of senators meet together down at the Senate?

A. Yes. There were quite a few meetings of western State senators who have like mineral problems; and that group still meets or it did as long as I was in the Senate.

Q. At any of these meetings was there any discussion of a proposal for legislative action to keep the mines open?

A. I couldn't say, but I know that that did not eventually happen, to single it out and pass it, but whether or not we introduced a bill, I do not remember. But I do know that it didn't go through.

Q. Beyond the introduction of the bill, I ask you whether or not there was any discussion among the group with respect to possible introduction of a bill.

[fol. 633] A. Yes, that was probably discussed. I am sure we went at every angle of it.

Q. But you don't remember the discussion, if there was any?

A. No, I do not. It is too long back, too much water has gone under the bridge.

By Mr. Barnes:

Q. Incidentally, Senator, what was your general background prior to your election to the Senate?

A. I grew up with a family business in South Dakota.

Q. What type of business was that?

A. Seed and nursery business, radio and gasoline distribution.

Q. What part of the State?

A. Yankton, South Dakota, in the southeast corner.

Q. What industrial activities are there in the State of South Dakota, generally, that are of substantial size?

A. Well, there is hardly any industry in South Dakota, outside of meat packing and flour mills, and they are small, fertilizer works, mostly concerns that distribute products that are made elsewhere.

Q. Are there any mining activities in South Dakota other than gold mines?

A. Yes; not of large size. Mica is found there and bentonite and a few other minerals. I lived about 400 [fol. 634] miles east of the Black Hills, so I am not too well acquainted with the mining, and that is where all the mining is done, in the extreme western part of South Dakota.

Q. During your discussions of this order with officials of the War Production Board prior to its issuance, do you recall hearing any of them make any estimates as to the number of men who were employed in gold mines?

A. All over the United States?

Q. Yes.

A. No, I do not. I remember, of course, about how many were employed in Homestake in South Dakota mines, in gold mining.

Q. In round number that was around 2,000?

A. A little more than that.

Q. You made the statement that 12 to 16 thousand people in South Dakota would be directly affected by the order. What did you mean by that? What group did you include there?

A. The population of the towns of Deadwood and Lead,

as these folks that live there were entirely supported by the men who worked in the gold mines. There was no other industry there, maybe a little logging, but that was minor.

Q. Did I understand you correctly to say that at some point you requested special consideration for Homestake because of the large inventory of materials and supplies which it had?

A. I don't know if it was large or not, but I was given [fol. 635] to understand that—and I remember that vividly—that they had enough materials so that they would not have to call on critical material stockpiles, shall we say, for new tools with which to continue operations.

Q. But didn't you testify that just a few months before you had been consulting the War Production Board about the level of priorities granted to gold mines?

A. Yes.

Q. If Homestake had an adequate supply of materials and supplies to keep going, why would they be concerned about the level of priority ratings? Did you ever inquire into that?

Mr. Rigney: Objection, if your Honor please. The question is argumentative in form.

The Commissioner: Sustained.

Mr. Barnes: Your Honor, I think that when I ask him if he ever inquired into that it is not argumentative.

The Commissioner: I permitted an answer as to the question did he inquire.

Mr. Barnes: You sustained an objection to that question.

The Commissioner: I sustained the objection to the question as to whether—well, let us read the question.

Mr. Barnes: Can the question be read, please, Mr. Reporter?

(The pending question was read by the reporter.)

The Commissioner: The objection, of course, is as to [fol. 636] why Homestake was concerned about something.

Mr. Rigney: Yes, he could not testify to that.

By Mr. Barnes:

Q. Did you have these discussions some time in the early part of 1942 with respect to priority ratings about which you testified at the request or instigation of Homestake Mining Company?

A. I wouldn't remember definitely when it was, but——

Q. Whenever it was, was it at the request or instigation of Homestake?

A. They probably needed some special tool, and I made the approach on the basis of the United States should get No. 1 priority, and gold mines in other countries should get No. 2 place.

Q. Do you recall whether or not in any of your discussions with officials of the War Production Board, when you mentioned the amount of materials that were held by Homestake, did they mention the possibility of redistribution of those materials to other mining activities other than gold?

A. No, I don't remember anything about it. I am quite sure that that matter never came up.

Mr. Barnes: That is all.

Redirect Examination

By Mr. Rigney:

Q. Senator Gurney, I would like to have you look at this [fol. 637] memorandum which I hand you and ask you to read it, if you will. Take a moment and then I will ask you a question. (Handing).

A. All right.

Q. Are you able to testify, Senator Gurney, fixing the time by month and year as near as you can, when you had any discussions with anyone in the WPB with respect to the priority situation as it affected the Homestake or other gold mines? That is, your first discussions with anybody in WPB regarding the general priority situation insofar as Homestake or other gold mines were concerned?

A. Well, a senator gets the problems of all the people in his State. If there was a problem I am sure they would have brought it to me, I do remember the order on priorities of course, of all the critical materials.

Q. And do you remember whether or not, when such priority orders were in effect, and at a time prior to any discussion of the close-down order L-208, whether or not you had discussions with anyone in the WPB regarding the priority situation as far as gold mines are concerned?

A. Well, that is asking me to remember and place it at a particular time. I am sure I handled——

Q. I realize it is a long time ago, and I don't expect you to detail any such conversation or even to identify the people. But I would just like to find out whether or not [fol. 638] you can say whether you had any discussions about the priorities situation so far as gold mines are concerned under existing priorities, at a time before any discussion was had about L-208.

Mr. Barnes: I think the witness has stated repeatedly he cannot remember. I think the counsel is merely arguing with him.

The Commissioner: I think he is trying to test his recollection of it.

Mr. Barnes: Is that proper on direct examination?

The Commissioner: I do not mean test, I mean aid.

By Mr. Rigney:

Q. Would you like to have that question read back to you? It is fairly long and cumbersome.

A. If is not necessary. The question was whether I talked with War Production Board about needs for priorities, where they had certain set-ups in certain industries that had priorities, and there is no question in my mind, and my memory is pretty good on that, that I did talk to the War Production Board about the need for tools for Homestake Mining Company. Whether it came before the gold mine closing order or not I couldn't remember, but I wouldn't imagine they would ask for a priority after the closing order.

Mr. Rigney: Very well, sir, thank you.

The Commissioner: Now, Senator, you have testified [fol. 639] concerning statements made on behalf of the gold miners at this meeting at which Mr. Batt presided, at which all of the senators and congressmen were present.

What was said in answer to those statements that were made on behalf of the gold miners?

The Witness: The need for manpower in the copper mines.

The Commissioner: Was that all?

The Witness: Yes. And, of course, as a secondary proposition, the shortage of critical materials that they would be using in the gold mine, but the main thing was manpower.

The Commissioner: All right. Is there anything further?

Mr. Barnes: Could I see the memorandum that was shown to Senator Gurney on his redirect?

(Document handed to Mr. Barnes.)

Mr. Barnes: No further questions.

Mr. Rigney: That is all.

The Commissioner: Thank you, Senator.

(Witness excused.)

The Commissioner: We will recess for five minutes.

(Whereupon, a short recess was taken.)

(The reporter, Willette Harkins, was duly sworn by the Commissioner.)

[fol. 640] Wilbur A. Nelson, a witness for the plaintiffs, was recalled to the witness stand, and was examined and testified further as follows:

Cross-examination.

By Mr. Barnes:

Q. Professor Nelson, isn't it a fact that at some date the title of the Mining Division was changed to Mining Equipment Division?

A. Yes.

Q. Do you recall when that was?

A. It is my recollection that that was about the time that Knoizen succeeded me.

Q. Which would be about the first of January, 1943?

A. Somewhere about that time.

Q. Do you recall whether in connection with that change of title there was any change in the functions of the division?

A. I left the division at that time and had no intimate contact with it, but, as far as my general knowledge is concerned, I noticed no change.

Q. Now, it would appear that the Mining Division and the other materials divisions made some kind of a concurrent jurisdiction with respect to the production of the raw materials. Would that be correct?

A. Mining Division had absolutely nothing to do with [fol. 641] production of raw materials except to see that each mine got all of the equipment, supplies, that it needed to keep up to maximum production on a basis of manpower.

Q. On that basis then, the title Mining Equipment Division might be a more accurate designation of the functions of the division, is that correct?

A. Well, it just depends on your psychology. As a geologist, I preferred the title Mining Division. Mr. Knoizen who is vice president of the Joy Manufacturing Company was not qualified as a miner so he wanted the title to fit his qualifications.

Q. Let me take a situation. Let us take the case of lead, for example. That was produced domestically in this country, was it not?

A. It large amounts.

Q. And the branch which was primarily responsible for lead production was the Tin and Lead Division headed by Mr. Vogelsang?

A. That is correct,

Q. Now, with respect to a lead mine, would it be correct to say that at all times that you were in the Mining Division your only function was to see that the lead mine had the mining equipment and machinery that it needed to operate?

A. And supplies.

[fol. 642] Q. And supplies.

A. And spare parts

Q. The determination, for example, as to the rate at which a group of mines would operate would be in the hands of the Tin and Lead Division?

A. No, I think that would be in the hands of the operators themselves.

Q. Well, except to the extent that, as a policy matter, it might be determined that some particular mineral be mined at 80 percent of pre-war production rate and some other at 150 percent of pre-war production rate?

A. I never heard of any mineral being requested to be mined at less than 100 percent

Q. Well, some had percentages aimed at goals higher than others, did they not?

A. Exceedingly higher. During the summer of '41 when I was making the study of the ferro-alloys we had meetings of all the different mine operators mining the different ferro-alloy minerals, and we had charts showing what the need for those minerals would be in 1942 and 1943, and we asked them if they could increase their capacity to meet those needs. So I would say that charts were drawn outside of those divisions or by an economist attached to the division where they had one, to anticipate the future need and try to build up to them.

[fol. 643] Q. Incidentally, in going over the transcript of the testimony, I notice that at various points you have referred, and in one point you refer to Mr. Lester being head of the Labor Division, and at one point to Mr. Lund.

A. Mr. Wengell Lund, I think, succeeded Mr. Lester.

Q. Do you recall when that change took place?

A. I do not.

Q. Do you recall whether Mr. Lester was present during all of the period up to the issuance of E.208 and participating in those discussions?

A. All I can recall is that during the summer of '42 he was the head of that division.

The Commissioner: What was their function?

The Witness: The Labor Division was to look after labor problems, I would say, as a liaison with probably Mr. McNutt.

By Mr. Barnes:

Q. Mr. McNutt was chairman of the War Manpower Commission, is that correct?

A. Yes.

Q. Actually, isn't it correct that the Labor Division of

the War Production Board was established prior to the War Manpower Commission? Do you recall?

A. I do not recall.

The Commissioner: You do not know any of the further details with respect to their function?

[fol. 644] The Witness: The only details I know were the personal contacts I had with them relating to the goals, manpower, and in relation to that.

By Mr. Barnes:

Q. Yesterday, Mr. Nelson, I showed you a group of minutes of the Interdepartmental Committee on Non-Ferrous Metals and of the Inter Branch Committee and asked you to examine those for any evidence in them of statements by Mr. Lipkowitz that 20,000 men would be released from the mines, I think was the statement you said he made?

A. Yes, I am still certain he made it.

Q. And for any rebuttal by you of that statement, and you were unable to find anything in those minutes?

A. In those minutes. But I am certain that he made the statement.

Q. Let me show you Plaintiffs' Exhibit 81, minutes of the Interdepartmental Committee on Non-Ferrous Metals, on September 3, 1942, and direct your attention to the last paragraph starting on the second page of those minutes. Does that paragraph indicate a statement made by Mr. Lipkowitz as to the number of miners employed in gold mines?

A. That is not the statement that I was referring to.

Q. What statement did Mr. Lipkowitz make at that meeting?

A. At this meeting he said that the gold mines which [fol. 645] had received serial numbers were large, a fairly large number of mines, whose gold production by volume exceeded 75 percent. They had received serial numbers entitling them to the use of mining equipment, and that there were some 2,000 men employed in these mines. That is the statement in these minutes.

Q. That does not say 20,000, does it?

A. That is not the statement I am referring to. This is a statement referring to a few mines which I consider an

erroneous statement. I know of only one mine whose gold output exceeded 75 percent, that was given a serial number. That was the Getchell mine in Nevada, which contained the largest amount of arsenic of any mine in the United States, and which the Chemical Warfare Service told us to keep open.

Q. Mr. Nelson, in response to a question by the Commissioner yesterday a page 576 of the transcript, you say that you had never made a written recommendation against the issuance of Order L-208. Do you consider that still to be a correct statement?

A. That I had never made a written recommendation against the issuance of Order L-208. I certainly opposed the issuance of a gold-closing order.

Q. Did you do it in writing?

A. I would have to be shown any such writing to refresh my memory.

Q. Do you have any recollection of one?

[fol. 646] A. I wrote letters to that effect, but I don't know where they are.

Q. Have you, during the last few weeks, in reveiwing documents in connection with this case, seen any such letters?

A. No.

Q. Did you make oral recommendations against the issuance of an order closing the gold mines?

A. Before it was issued?

Q. Before it was issued.

A. I did.

Q. To whom?

A. Well, I remember having talked with Mr. Donald Nelson, at which time I suggested to him that it was such a problem that I thought it should be handled by the Board much better than having him take the onus of issuing the order himself.

Q. When was that discussion? Do you recall approximately?

A. It was within a week previous to the issuance of the order.

Q. And that recommendation was accepted?

A. It would seem it was accepted because that matter was handled by the Board.

Q. Did you, during the course of that discussion with Mr.

Donald Nelson, tell him that you disapproved of an order [fol. 647] closing the gold mines?

A. I am certain I did.

Q. Did you state your reasons?

A. I did.

Q. What were those reasons? As you recall them now?

A. That the over-all economy of the war would be better served by not closing the mines because there would be so few men released that it would not compensate for the dislocation of industry in the West, and the psychological effect.

Q. Did you tell him at that time what in substance you repeated yesterday, that if machinery were established to channel these miners to the non-ferrous mines, your view would be different.

A. No, I think I told him I didn't believe such machinery should be channeled to mines in the United States.

Q. Do you recall any other official in the War Production Board to whom you made a similar oral statement?

A. I am very certain I made similar statements to Mr. Batt.

Q. When?

A. In the ten days preceding the order issuance?

Q. How many times did you see Mr. Batt during that period on this subject?

A. Well, I reported a resolution of the Committee I pre- [fol. 648] sided over to him asking him not to close the mines until the gold operators could come to Washington. He turned that down. We met again the next day, presented the same resolution. I went back to see him the second time and he reversed his decision. I saw him on the 30th in the meeting that he had in his own office which I have already testified on.

Q. Did you, in the course of that meeting, make statements to the effect that you did not believe the gold mines should be closed, the meeting of September 3?

A. I cannot at this length of time remember exactly what I said, but I certainly was opposed to the closing of the gold mines.

Q. I am trying to find out the degree of your communication of this opposition, Dr. Nelson.

A. I opposed the closing of the mines in every way I knew how.

Q. What I am trying to find out is to what officials did you communicate your opposition, and over what period of time?

A. Well, the record speaks for itself on that.

Q. Well, you stated that that was not done in writing, so I am trying to find out what your oral communications were. The record will not speak for that.

A. I have just given you my oral speakings and I will refer now to the position taken in the Inter Branch Meeting, [fol. 649] and whatever I said in any of Mr. King's meetings.

Q. I am particularly interested, however, in communications to your superiors, rather than communications to people on a parity with you, which is what we decided yesterday those two committees represented largely.

A. Well, Mr. Henderson very definitely knew that I was opposing the order, and about that time I was taken from the Mining Branch and given special assignments by Mr. Henderson.

Q. Just a minute. You say Mr. Henderson knew you were opposing the order. How did he know it?

A. General knowledge among everyone under Mr. Henderson.

Mr. Barnes: Your Honor, I object and move to strike the statement that Mr. Henderson knew it. It is surmise on the part of the witness.

The Commissioner: It may be stricken.

By Mr. Barnes:

Q. What experience of yours led you to the conclusion that the closing of the gold mines would be unwise, Dr. Nelson?

A. All of the accumulation of data which I had received, my knowledge of the way the channeling of labor had been handled in the past, and I might say my knowledge that there would be so few men available due to the closing of the mines.

Q. All right. Now, beginning on those three factors, that you have mentioned, what data had you received?

[fol. 650] A. Well, Mr. Lipkowitz in the summer of '42, had made statements that around 20,000 men would be dis-

placed and could be used by the mining industry. That figure we knew to be incorrect.

Q. Well, that is the point that you have also given as your first point, the knowledge of the man available. I noted from your comment three points, data which you had received, information and channeling of labor, and knowledge of the men available in the gold mines.

The Commissioner: Just a minute. There was a question being presented here.

Mr. Barnes: That is right, sir.

By Mr. Barnes:

Q. Limiting ourselves for the moment to the first of those three factors, the data which you had received, what type of data was that? Other than the manpower data? Was there any data other than the manpower data that you had received that led you to that conclusion?

A. Well, data that was available, that the amount of critical materials used by the gold mines was very small, that most of the critical material used by the gold mining industry was in the placer mines and they had been closed down, that over 50 percent of all your mining machinery in connection with gold was in the placer mines.

The Commissioner: What closed them down?

[fol. 651] The Witness: The paragraph on Order P-56 of September 22, the first amendment of P-56 which said these serial numbers cannot be given to placer gold mines.

The Commissioner: When you said they had closed down, did you mean they could not get additional materials?

The Witness: They could only get material on A-10 ratings.

By Mr. Barnes:

Q. They could operate under P-22 or P-100, which ever the order was at that time?

A. In a limited way.

Q. Instead of A-8 they got A-10?

A. As they needed steel alloy teeth for their buckets, they didn't get very far.

Q. How far did you get on getting steel alloy material on A-8?

A. I can't answer that right now.

Q. Now, in what form was that data on the use of critical materials by gold mines in 1942?

A. I would have to refresh my memory on when the March 2 amendment to P-56 came. That was in '42, wasn't it?

Q. Yes.

A. They took serial numbers away from all gold mines, and the ones that produced nothing but gold not used in smelter practice, did not have their numbers returned and so [fol. 652] they could only get maintenance and operating supplies and repair parts under P-100 which gave an A-10 rating. They couldn't possibly get very large supplies.

Q. I am interested in knowing in what form the data on the use of critical materials was available in the Mining Division or in the War Production Board in the summer of 1942?

A. Well, I would have to say that that was in most cases due to talks with the gold mine operators, and statements they made.

Q. To your recollection, there had been no formal study made?

A. No.

Q. Dr. Nelson, you referred yesterday to certain testimony that you gave at hearings held on the Hill in May, 1942, which led to the amendment of P-56?

A. I did.

Mr. Rigney: If Your Honor please, I think I should enter an objection to the form of the question, that the hearings led to the amendment. The hearings occurred just a few days before the amendment, but I do not think there was anything in the record to support the conclusion that the hearings caused the amendment.

By Mr. Barnes:

Q. I will modify the question to say that at the last day of those hearings, were you instructed by Donald Nelson [fol. 653] to instruct the committee that the P-56 had been amended?

A. That is correct.

Q. Do you recall stating in those hearings the following: "I have a list here of items bought by a number of gold

mines in the West before their numbers were taken away, and practically everything they bought is of a most critical nature today. For instance, there are machine bolts, chains, key stocks, files, pipe dies, fuse links, fuse plugs, a large amount of wire, bushings, lock nuts, cable and lead, things of that type are very critical." Do you recall making that statement?

A. I would have to see the minutes of the meetings.

Q. Do you have any independent recollection of having made that statement?

A. I said I would have to see the minutes of the meetings to refresh my memory.

Q. You have no independent recollection of that?

A. I have answered you.

By the Commissioner:

Q. No, you have not. He is entitled to an answer to that question. Apart from the minutes, do you remember the statement?

A. I do not.

By Mr. Barnes:

Q. Have you, in preparing to testify here, refreshed your [fol. 654] recollection by reading the minutes of those hearings in which you testified?

A. I have not.

Q. You did testify in several hearings on the Hill, did you not?

A. I did.

Q. And you have not gone back and refreshed your recollection by re-examining those?

A. I have not. I have reread the minutes of the Engel Committee report which took place in '45, I think, '46.

Q. I will show you a copy of the minutes of that hearing which has been furnished to me by counsel for the plaintiff, and direct your attention to page 531 where a check mark appears in the margin. Does that refresh your recollection, Mr. Nelson?

A. It does.

Q. Did you make such a statement?

A. The record shows that I made such a statement, but

I think the whole statement should be read and not just one paragraph of it.

Q. Well, that can be brought out in redirect examination by counsel for the plaintiff, if they desire to do so. The question now is this: You referred in that excerpt I read to a list of items. Do you know where that list is at the present time?

[fol. 655] A. I do not.

Q. Do you know from what source it was compiled?

A. I do not know from what source it was compiled.

Q. Do you know whether it sets forth any quantities, or just item descriptions?

A. There are no quantities set forth in my statement.

By the Commissioner:

Q. That was not the question. Read the question back.

(The pending question was read by the reporter.)

A. It sets forth just item descriptions.

By Mr. Barnes:

Q. Your testimony did?

A. Yes.

Q. Do you know whether the list did or not?

A. The only recollection I have is what has been refreshed in my memory by reading this testimony.

Q. Did you know Mr. Robert S. Palmer?

A. Robert S. Palmer?

Q. That is right, P-a-l-m-e-r?

A. Of Denver?

Q. Secretary of the Colorado Mining Association?

A. I did.

Q. Did you secure any information from Mr. Palmer as to the use of critical materials by gold mines?

A. Mr. Palmer was sending me information continually [fol. 656] from Colorado. I do not remember at this time what it was.

Q. Did you hear Mr. Palmer testify at the same hearing on the Hill in May, 1942?

A. I was at the hearings every day and, if he testified, I undoubtedly heard him.

Q. Well, will you look at page 623 of the transcript of

those hearings which is before you. Does that set forth a list of materials submitted by Mr. Palmer that were required by the Colorad. gold mines?

A. May I read this?

Q. Certainly.

A. I have read the statement.

Q. You heard that testimony given?

A. I must have heard it given.

Q. Would that have been one of the sources of your knowledge in August of 1942 as to the requirements of the gold mines for materials?

Mr. Rigney: Objection to the form. I think he should ask whether it was or not the source, not whether it would have been.

The Commissioner: Will you read the question?

(The pending question was read by the reporter.)

Mr. Rigney: My point is that I think he should phrase the question "was that one of the sources?"

The Commissioner: Will you read the question again?

[fol. 657] (The pending question was read by the reporter.)

Mr. Rigney: The question is "Would that have been" and I think that is speculative.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Was that one of the sources of your knowledge of the requirements of gold mines for materials?

A. At this late date, I cannot answer that positively, but I would feel that it probably was.

Q. Did that list of materials which is set forth there for the Colorado gold mines show something over 600 tons of drill steel?

A. The statement by Mr. Palmer states that this is a clear picture of 79 percent of the production of the state. He doesn't say whether it is gold or total production. He goes on to say "It shows how small our needs are but how important our production is to the welfare of Colorado."

Q. Did that hearing relate to any matters other than gold mines?

A. It related to the 30-percent clause.

Q. Which related to gold mines, did it not?

A. Yes, but in that 30-percent clause were tied in production of copper, lead and zinc and other metals.

Q. When they amounted to less than 30 percent?

A. No, if a mine produced more than 30 percent gold, [fol. 658] and produced copper, lead and zinc, they were in that order.

Q. Was that in dollar amounts, do you recall?

A. In dollar amounts, as I recall.

Q. That would not be a quantitative measure of the production of the mine, would it?

A. Well, it doesn't seem that it would.

Q. The price of copper at that time was 12 cents a pound, was it not?

A. I think either 12 or 12½ cents was the ceiling price, but then they had bonuses that they gave to certain mines.

Q. Do you recall whether that bonus plan was in existence in the early part of 1942?

A. I know the plan was put in existence. The date that it was put in, I do not know.

Q. But what was the price of gold, comparable to copper?

A. Gold was $35 an ounce.

Q. Do you remember what the price of zinc was at that time?

A. No.

Q. Do you remember what the price of molybdenum was?

A. No.

Q. Did you read only the portion of Mr. Palmer's statement that appears on page 623?

[fol. 659] A. I started at the beginning of his testimony on 622 and read down to the table on 623.

Q. His testimony actually starts on page 621?

A. Yes.

Q. I would like you to go back to page 621 and see whether that clarifies that reference to 79 percent?

A. On my reading of Mr. Palmer's testimony, it does not change my opinion that the 79 percent refers to the total production of all mines of the State.

By the Commissioner:

Q. Do you mean mines not necessarily limited to gold?

A. No, the entire metal mining industry of the state, including, copper, lead, zinc and molybdenum.

By Mr. Barnes:

Q. Going back, Dr. Nelson, what information was available to you in the summer of 1942 as to prior experience in channeling labor from one project to another?

A. The statement made by Donald Nelson, one of the exhibits, that there were no laws in the United States that permitted you to move labor from one place to another except voluntarily; the knowledge that people had been leaving the mines all during that summer to go to the West Coast for higher prices and not stopping at copper mines where they were considered to be more necessary than on the West Coast.

Q. Considered to be more necessary by whom? By you? [fol. 660] A. By our mining industry.

Q. Did you know whether or not any of the people who had left the mines had gone to copper or other non-ferrous mines?

A. I can't answer the question.

Mr. Rigney: I think the time should be fixed.

By Mr. Barnes:

Q. The same time that he was just talking about, during the summer of 1942?

A. All I have are the statements given me by the gold mine operators, that the men that left their mines went to the West Coast.

Q. There were on the West Coast certain mines that were producing, other than gold mines, were there not?

A. I didn't hear you.

Q. There were on the West Coast certain mines that were producing, other than gold mines, were there not?

A. There were a series of mercury mines rather close to the West Coast that might be considered in the West Coast area.

Q. There are materials other than gold that are mined in close proximity to the Mother Lode, are there not?

A. Magnesite used in the Las Vegas magnesium plant.

Q. Isn't there a mine in New Idria, California?

A. New Idria is separated from the Mother Lode by the [fol. 661] San Joaquin Valley.

Q. But they are in close proximity?

A. Oh, I thought you said they were close to the Mother Lode. They are definitely on the West Coast.

Q. Now, when you presented your objections to this order to Mr. Donald Nelson, for example, as you say you did within a week or ten days prior to the issuance of L-208, what comment, if any, did he make to you?

A. Mr. Donald Nelson as a rule always said he would take it under advisement, what you had told him.

Q. Is that your recollection of what he said at that time?

A. It is.

Q. When you presented your views on this order to Mr. Batt, what statements, if any, did he make?

A. Mr. Batt said the order had to be produced or issued.

Q. Did he give any reason that you recall now?

A. He just said it had to be issued.

Q. Now, do you recall any other official of the War Production Board to whom you submitted an oral objection to the order, an official who was your superior?

A. I talked the matter over a number of times with Mr. Fred Eaton who is one of the assistants to John O'Brien.

Q. Did Mr. Eaton express any opinion, that you recall? [fol. 662] A. He expressed some opinions but I think they are opinions that I would not care to repeat?

Q. Why not?

A. Well, I think they were more or less privileged opinions that he gave me.

Q. Privileged in what sense? Was he your personal attorney?

A. Well, what was the question?

Q. I asked you privileged in what sense? Was Mr. Eaton your personal attorney?

A. No, he wasn't, but the facts we discussed I think would be harmful if brought out.

Q. Harmful in what respect?

A. To thoughts that he and I had at that time.

Q. I am afraid I do not follow you. How could his opinions be harmful to thoughts that you had then?

Mr. Rigney: If your Honor please, I think counsel should ask him directly unless the witness answer what these considerations were.

The Commissioner: Sustained.

Mr. Barnes: I have asked directly and the witness says he does not think he should answer, your Honor. I am trying to find whether there is a valid reason for the statement that the witness has made.

The Commissioner: Well, over the objection, I am going [fol. 663] to instruct the witness that he should answer the direct questioning at this time, and I will at this time tell you to ask the question again.

By Mr. Barnes:

Q. What did Mr. Eaton tell you when you put this matter to him?

A. He felt that there might be a group of people that were doing this in order to make money on the stock exchange.

Q. Did he indicate who that group were?

A. No, but he checked all of the transactions for several months and could find no such activity taking place.

Q. When was that that you discussed that with Mr. Eaton? Do you recall?

A. In the 30 days preceding the issuance of Order L-208.

Q. Now, do you recall anybody else, any other superior or official of the War Production Board to whom you presented your views?

A. At this length of time, I do not.

Q. I think you made the statement yesterday, Dr. Nelson, that preparatory to testifying here you had examined several hundred documents, is that correct?

A. It certainly is.

Q. And you also answered a question put to you by the Commissioner by saying other than Mr. Lester's memoran- [fol. 664] dum which was referred to you did not recall any other documents that had not been produced here as exhibits which were material to this matter. Is that a correct statement?

The Commissioner: "Important" is the word I used.

By Mr. Barnes:

Q. Important.

A. I am still of the opinion that somewhere there is a statement of Mr. Lipkowitz made in the summer of '42.

Q. In memorandum form?

A. In either attending one of the meetings that you didn't show me the other day, or in memorandum form.

Q. Have you seen that during the last two or three weeks in your review of the documents, do you think?

A. Yes, I have seen it.

Q. Now, when you used the word "important", or when you answered the Commissioner's question that you could recall no other documents not introduced, what meanings did you ascribe to the word "important"?

A. The meaning, the way in which I used that word was that the document had some bearing on this particular case, some important bearing.

Q. Now, on what aspect of the case?

A. Well, on what Homestake is trying to prove.

Mr. Barnes: That is all.

[fol. 665] Redirect examination.

By Mr. Rigney:

Q. Professor Nelson, you recall that yesterday Government counsel asked you concerning your consulting work with regard to mines and, as I recall your testimony, you said that you had made two reports on gold mines specifically?

A. Yes.

Q. Now, in the course of your consulting work, have you made reports on other metallic mines?

A. I have made numerous reports on metallic mines of different metals.

Q. And does the science of geology embrace a study of all kinds of mines?

A. The phase of geology known as Economic Geology deals with all of the mineral deposits divided into two

classes, the non-metallic and metallic, in Economic Geology for 27 years.

Q. I wonder if you would define or describe briefly to us what you mean by Economic Geology?

A. Economic Geology is that branch of the general science of geology that deals with the origin, location, and size of ore deposits. That is a very general statement.

Q. Does your knowledge of mining generally comprehend a knowledge of gold mines as they fit into the general field of metallic mines?

[fol. 666] A. That is one of the branches of metallics in Economic Geology.

Q. And through the course of the years, since you have been in that field, has your reading and your study included mining textbooks, and journals, and other scientific writings in the field?

A. It has, and it also included visiting as many of the important mining districts in the United States as possible so as to have first hand information on those.

Q. That is all types of metallic mines, is that right?

A. All types of metallic as well as all types of non-metallic mines.

Q. Now, I think you were asked yesterday about the Appeals Board which was set up following the issuance of Order L-208. There was a provision in L-208 permitting appeals under certain circumstances?

A. Yes.

Q. And I think that you said that you were a part or a member of that first Appeals Board, is that correct?

A. I was.

Q. And who were the other members

A. T. Munford Boyd, and Allen Buchanan representing labor.

Q. Do you recall at this time how that Board was set up? Who issued the order? How did it come about?

[fol. 667] A. I think it came from Professor Eaton.

Q. He was then the assistant general counsel?

A. He was.

Q. Do you know whether or not he was the number two man; in other words, Mr. John Lord O'Brien's first assistant or chief assistant, if you can determine that?

A. I know he was close to the top, but I don't know whether John Lord O'Brien's first assistant.

Mr. Barnes: As the Solicitor of the War Production Board, the number two man is Milton Katz whose name appears in the October 6, 1942, meeting as being the Solicitor. There were under him some half-dozen assistant general counsel of which Mr. Eaton was one.

By Mr. Rigney:

Q. Did Mr. Eaton become general counsel at a later time when Mr. O'Brien left?

A. I don't know.

Mr. Barnes: I will so stipulate.

Mr. Rigney: And Mr. Katz was never general counsel?

Mr. Barnes: Mr. Katz by that time was in Europe.

By Mr. Rigney:

Q. How soon after October 8, the date of the issuance of the order, did appeals begin to come in from the order?

A. To my recollection, they came in as quickly as the mails could bring them in.

[fol. 668] Q. Well, can you fix a time? I am not talking about a precise date, but I would like to have an idea.

A. I would say within less than a week.

Q. Do you recall in approximate figures how many appeals came in, say, in the first month after the order was issued?

A. All that I know is that we met each afternoon right after lunch and that, if we could process three appeals in an afternoon, we felt we were doing a big job. Very often there were two.

Q. When you say, "we", you can mean the Appeals Board?

A. The Appeals Board. They piled up on us and, after a few weeks, arrangement were made to transfer all appeals to the General Appeals Board.

Mr. Barnes: Was the process of appealing those appeals in any way delayed by Mr. Boyd's infirmity?

The Witness: Certainly not.

Mr. Barnes: Mr. Boyd is blind. Wasn't it necessary to read papers to him?

The Witness: I have never known any work that Mr. Boyd has done to be impeded by his blindness and I have known him for 30 years.

By Mr. Rigney:

Q. So that while you were sitting on this Appeals Board, I believe you testified yesterday you were also carrying on your regular duties otherwise in the Mining Division?

[fol. 669] A. I was.

Q. And can you fix the time as near as possible when you ceased to sit on this Appeals Board?

A. I don't think the Appeals Board lasted much over a month, somewhere a little less or more than a month.

Q. And then you ceased to have anything to do with appeals, is that correct?

A. Yes.

Q. Now, was a new Appeals Board established at that time?

A. No, it was turned over to the existing Appeals Board.

Q. It was turned over to the regular Appeals Board for the War Production Board?

A. For appeals on all orders issued by the War Production Board.

Q. I see. Was that the board headed by Dr. Holcomb? Was he the chairman?

A. Mr. Holcomb was chairman at that time.

Q. And do you know the number of members on that Appeals Board?

A. It seems to me there were five. I am not certain. We were called before them occasionally to answer questions on certain appeals that came up.

Q. So that you think it was a month, I believe you said?

A. Somewhere of the magnitude of one month.

[fol. 670] Q. The early part of November, perhaps, of 1942 that your Appeals Board stopped functioning and the other board took over?

A. It had to be before the first of December.

Q. Now, there is testimony here, I believe, to the effect that Homestake took an appeal. I wanted to ask you

whether or not you sat on the appeals board at which the Homestake appeal was considered?

A. The Homestake appeal did not come before the board that T. Munford Boyd was chairman of.

Q. So you had nothing to do with the Homestake appeal?

A. Nothing.

Q. You testified a few minutes ago, as I recall, that you had looked over numerous documents in connection with the preparation for your testimony in this case?

A. I did.

Q. What is the fact with respect to that? Is it the fact that following the pre-trial you received copies of the exhibits which were marked for identification?

A. I did.

Q. To look over, Then, some time in December, did I submit to you certain additional documents that you had not seen, so far as any preparation in this case is concerned, before?

A. It was around somewhere between the first and tenth [fol. 671] of December that you met me in Charlottesville and spent a day and a half with me and turned over to me a number of additional documents which I had not seen heretofore.

Mr. Rigney: May this be marked Plaintiff's Exhibit No. 129?

(Said document was marked for identification as Plaintiff's Exhibit No. 29.)

By Mr. Rigney:

Q. Now, Professor Nelson, I show you Plaintiff's Exhibit No. 129 for identification, being the minutes of the Interdepartmental Committee on Non-Ferrous Metals, dated August 25, 1942, and I ask you to look at that. I particularly direct your attention to the paragraph at the bottom of page 3 beginning, "The gold curtailment order," and ask you to read through from the bottom of page 3 and down through page 4. I am going to put a question to you.

A. "Gold curtailment."

Mr. Barnes: Your Honor, I think the witness misunderstood about reading aloud.

Mr. Rigney: I did not mean to read it aloud, sir. I meant to have you read it to yourself.

By Mr. Rigney:

Q. Have you finished, sir?

A. Yes, sir.

OFFERS IN EVIDENCE

Mr. Rigney: Plaintiff now offers in evidence Exhibit [fol. 672] No. 129 for identification.

Mr. Barnes: I have no objection.

The Commissioner: Admitted.

(Said minutes, of Interdepartmental Committee on Non-Ferrous Metals, dated August 25, 1942, marked "Plaintiff's Exhibit No. 129", admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Now, Professor Nelson, you see this reference on page 4 of these minutes. The middle of the page refers to a Mr. Raushenbush, and the covering sheet listing those present, state that he was a representative of the Bureau of Mines. Do you remember him?

A. Yes, I do.

Q. Do you see the reference here on page 4 of these minutes of the statement: "Data from the Bureau of Employment Security as of March 31, 1942, indicated that there were some 12,000 workers employed in lode gold mines and probably an additional 6,000 in placer operations but these totals have to be revised because there has been a heavy withdrawal of workers from the gold mine industry since then." I ask you if that is the reference in these minutes to which you referred yesterday in the course of your examination? Is this the set of minutes?

A. This is the set of minutes which I had read and from [fol. 673] which I got the information which prompted me to state "20,000 men." It seems that I was 2,000 too high.

Q. When you said yesterday that you knew that there was much a set of minutes somewhere available, referring

to some 18,000 or 20,000 men employed in gold mines, it was this particular document that you were referring to. is that right?

A. It was.

The Commissioner: We will recess to 2:00 o'clock.

Whereupon, at 12:30 o'clock p.m., a recess was taken in the hearing until 2 o'clock p.m.)

[fol. 674] AFTERNOON SESSION

(The hearing was resumed, at the time above mentioned, pursuant to the recess previously taken.)

WILBUR A. NELSON, resumed the witness stand and was examined and testified as follows:

Redirect Examination (resumed)

By Mr. Rigney:

Q. Professor Nelson, at the time we recessed for lunch I had shown you Plaintiffs' Exhibit 129, the minutes of October 25, and I hand them to you now. Or let me put it this way: were you at this meeting of August 25, to which these minutes, Plaintiffs' Exhibit 129, relate?

A. Yes.

Q. Was Mr. Samuel Lipkowitz there?

A. He was.

Q. Now, Professor Nelson, I show you Plaintiffs' Exhibit 15 for identification, being a memo of August 3, 1942, from you to Mr. A. I. Henderson, and I ask you if you wrote that memorandum and transmitted it to Mr. Henderson?

A. I did.

Q. Mr. Henderson was your——

A. Superior.

Q. Superior in the WPB at that time, is that correct?

A. That is correct.

[fol. 675] Mr. Rigney: Plaintiff offers Exhibit No. 15 for identification in evidence.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

Said memo dated August 3, 1942, from Mr. Wilbur A.

Nelson to Mr. A. I. Henderson, marked "Plaintiffs' Exhibit No. 15", admitted in evidence and made a part of this record.)

Mr. Rigney: May this be marked Plaintiffs' Exhibit 130, I believe, for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 130.)

By Mr. Rigney:

Q. Now, Mr. Nelson, I show you Plaintiffs' Exhibit No. 130 for identification, being a memorandum dated July 31, 1942, from Richard A. Lester to Mr. A. I. Henderson, and I ask you if that is the memorandum to which you refer in your memo of August 3, 1942, which has just been received as Plaintiffs' Exhibit 15?

A. It is.

Mr. Rigney: Plaintiff offers Exhibit No. 130 for identification in evidence.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said memo dated 7-31-42 from Mr. Lester to Mr. Henderson, marked "Plaintiffs' Exhibit No. 130", admitted in evidence and made a part of this record.)

[fol. 676] By Mr. Rigney:

Q. Do you know what position Mr. Harry King, the Chief of the Copper Branch, took in the summer of 1942 with respect to the proposal to order a shut-down of the gold mines?

A. He was in favor of it.

Q. And did you send him this memorandum of August 14, which is Exhibit No. 16, and for what purpose did you send that memorandum to him?

A. To bring to his attention the fact that proper steps had not been taken to channel any miners made available through a closing of the gold mines to copper mines.

Q. Now, Professor Nelson, you remember that you and I discussed in December, for a day and a half or so, the exhibits here in preparation of this case for trial, is that right?

A. I did.

Q. And again late in December, is that right?

A. In New York.

Q. Right. Then you next saw me, am I correct in this that you next saw me last Friday afternoon when you arrived from your home in Virginia?

A. That is correct.

Q. And we had further discussions in preparation for your appearance here?

A. Yes. That is not all the time I have spent on preparation for this case.

[fol. 677] Q. Yes, I understand.

Now, showing you Defendant's Exhibit No. 2——

The Commissioner: For identification?

Mr. Barnes: For identification.

By Mr. Rigney:

Q. ——for identification, showing you Defendant's Exhibit No. 2 for identification, I will ask you when you and I had our first discussion with respect to the existence of that particular piece of paper that you are looking at?

A. Last Friday night or Friday afternoon.

Q. And did I show you at that time this photostatic copy? (Handing).

A. You did.

Q. And we had some discussion about it?

A. We did.

Q. And prior to that time you had not mentioned to me the existence of any such documents as this; is that right?

A. Prior to that time I did not know the document existed.

Q. And I had not asked you anything about it?

A. You had not.

Q. Do you recall this morning that Mr. Barnes interrogated you with respect to some of your testimony before Senator McCarran's committee in May of 1942?

A. He did.

[fol. 678] Q. And do you recall his reference to a portion of your testimony there?

A. I do.

Q. Now, I don't suppose that you can recall now the

questions which were asked you there and the answers which you gave?

A. I do not, except one.

Mr. Rigney: Your Honor, may I read a brief portion of the testimony at this very point in order that the record may reflect the entire testimony on this point that Mr. Barnes interrogated Mr. Nelson on this morning?

By Mr. Rigney:

Q. Let me ask you if you were asked this question by Senator Johnson: "I would like to have you develop something along the lines of what these other mines may expect if they do apply for relief."

Were you asked that question?

A. Yes.

Q. And did you give the answer which appears here: "We will be glad to review each case very critically and very fully and very sympathetically"?

A. Yes.

Q. And then were you asked: "Are you acting sympathetically and generously with these applications where they produce vital and essential and critical materials?" Were [fol. 679] you asked that question?

A. I was.

Mr. Barnes: In what tone of voice were you asked it; do you recall?

The Witness: Well, it is quite remarkable, but that particular question I seem to remember very vividly. Now, Senator Johnson has a very delightful delivery.

By Mr. Rigney:

Q. Did you give the following answer to that question: "We are acting sympathetically with every one. A person can not act generously during a war effort if they are going to carry out the duties they are supposed to have imposed upon them. We have to be sympathetic, but we have to hew to the line and do what is best to the war effort"?

A. I did.

Q. Were you next asked the following question by Senator Johnson of Colorado: "Of course, priority takes in the

element of preference just naturally, but you weigh your priority against their performance"?

A. Yes.

Q. Were you asked that question?

A. Yes.

Q. Did you make the answer: "Yes; we do"?

A. I did.

Q. Were you asked then by Senator Johnson: "Now, we [fol. 680] have, as Senator Millikin pointed out, exclusively gold operations in Colorado. There are very few of them. I was quite pleased to hear you say a moment ago that you had not shut the door on any kind of mining operation as yet. Did you mean where only gold is mined?" Do you recall that question?

A. Yes.

Q. And did you give in answer: "I mean that any operator operating a 100-percent gold mine is still operating under PD-100 and has the privilege of sending in PD-1-a ratings for items that need a higher priority rating than he can get under P-100." Did you give that answer?

A. I did.

Q. Were you then asked by Senator Johnson: "Is he actually able to get priority assignments?"

A. Yes.

Q. Did you reply as follows: "They have in the past, but remember this: that if they were operating under P-56 they could buy, in a blanket way, repair parts without having them scrutinized and clearing them through Washington. Today they have to come in to us for each item they need as they need it, and they have to show that they actually need it.

"We have got to know that the pooled resources of a gold-mining district can not take care of a needed part when it is needed. I have a list here of items bought by a number of gold mines in the west before their numbers were taken [fol. 681] away, and practically everything they bought is of a most critical nature today. For instance, here are machine bolts, chains, key stock, files, pipe dies, fuse lengths, fuse-plugs, a large amount of wire, bushings, lock nuts, cable, and lead. Things of that type are very critical."

Did you give that answer that I have just read?

A. I did.

Q. Were you then asked by Senator Johnson: "When were these purchases made?"

A. Yes.

Q. Did you give the answer that appears here as follows: "These were purchased in January and February. They had a right to purchase them, but in going over the list of things purchased by those mines when they could purchase them directly from their supplier and just report to us each month what they purchased, they were purchasing critical materials; and we have a definite feeling that if a mine operator has to come in to Washington on a PD-1-a Form for each repair part he needs, he is going to be much more careful in the amount of critical materials he uses.

"I feel that we have made great strides in California since March 2, due to the fact that the gold-mine operators have gotten together and pooled their resources, have made available their repair shops to each other, and I think they are doing a fine job of conserving critical material and still [fol. 682] keeping their mines going."

Did you make that answer that I have just read?

A. I made that answer, and I might say that we had a representative of the Mining Division in San Francisco, a Mr. Goudvis, who was in a great part responsible for working out this pooling arrangement on the mother lode.

Q. These purchases of critical items which you mentioned here in your testimony before this Senate committee in May of 1942 related to a time in January and February of 1942?

A. They did.

Q. And at that time these mines possessed serial numbers, is that correct?

A. Correct.

Q. And their serial numbers were taken away after the March 2nd amendment, is that correct?

A. That is correct.

Mr. Rigney: That is all.

Re-cross examination

By Mr. Barnes:

Q. What is the Bureau of Employment Security; do you know?

A. Nothing more than its name. I don't know really whether there is such a bureau.

Q. Its name appears in Plaintiffs' Exhibit No. 129, does it not, directing your attention to the last paragraph on [fol.683] page 4? (handing).

A. Yes, I remember reading the Bureau of Employment Security got up these figures; but I do not know what that bureau is.

Q. Had you ever heard of it before?

A. I had not.

Q. Dr. Nelson, when counsel for the plaintiff showed you a photostatic copy of a document that is now marked Defendant's Exhibit 2 for identification, did you indicate to Mr. Rigley whose handwriting you thought that was that showed your name there?

A. I told him I was not a handwriting expert, and I was not going to indicate to anyone who I thought wrote it.

Q. Did you authorize anybody in the Mining Division to sign your name on your behalf?

A. Only with my initials, my two deputies.

Q. Who were they?

A. Marcellus Stow and Ed Rott.

Q. Have you seen documents they have signed with your name?

A. You showed me some this morning, or late last night, I have forgotten which.

Q. They were signed by Mr. Stow, and I believe one was signed by Mr. Rott?

A. One was signed by Mr. Rott.

[fol. 684] Mr. Rigney: Exhibit 8.

Mr. Barnes: That was Plaintiffs' Exhibit 8, nothing I showed you.

That is all.

Mr. Rigney: May we have this marked as the next number, No. 131?

(Said document was marked for identification as Plaintiffs' Exhibit No. 131.)

Redirect examination.

By Mr. Rigney:

Q. I show you Plaintiffs' Exhibit 131 for identification and ask you what that is.

A. That is a copy of a telegram sent to the Central Eureka Mining Company on March 2nd, similar to the telegrams sent to all gold companies on that date.

Q. Pursuant to the March 2nd——

A. The March 2nd revision stating to them that they are removed from the benefits of Order P-56. And if the total output in their mine involves 70% or more in dollar value of strategic minerals their reclassification will be reconsidered.

Q. Is this a typical telegram of many others?

A. Typical of all others sent.

Mr. Rigney: Plaintiff offers it in evidence.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

[fol. 685] (Said telegram dated March 2 from WPB to Central Eureka Mining Company, marked Plaintiffs' Exhibit No. 131, admitted in evidence and made a part of this record.)

Mr. Barnes: I have one additional question.

Re-cross Examination

By Mr. Barnes:

Q. Referring to Defendant's Exhibit No. 2 for identification, whether or not you signed this particular document, did you ever sign a document of this type with respect to the issuance of Order L-208?

A. I did not sign anything of that type until after L-208 had been issued.

Mr. Barnes: That is all.

Mr. Rigney: That is all.

(Witness excused.)

The Commissioner: As I understand it, counsel would like an adjournment at this time?

Mr. Rigney: That is correct, your Honor. I think both counsel would like an adjournment.

Mr. Barnes: Both counsel.

The Commissioner: We will adjourn until ten o'clock in the morning.

(Thereupon, at 2:20 o'clock p.m., a recess was taken in the hearing until 10:00 o'clock a.m., Friday, January 30, 1953.)

[fol. 686] IN THE UNITED STATES COURT OF CLAIMS

Transcript of Testimony—January 30, 1953

TESTIMONY FOR PLAINTIFFS (Resumed)

The hearing was resumed, at the time above indicated, pursuant to the recess previously taken.

Present: (The same appearances as previously noted.)

Mr. Rigney: Senator Case.

HONORABLE FRANCIS CASE, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct Examination.

By Mr. Rigney:

Q. You represent the State of South Dakota in the Senate of the United States, is that correct?

A. That is correct.

[fol. 687] Q. And you have been in such position for the past two years?

A. That is right.

Q. Prior to that time you were, for a number of years, in the House of Representatives?

A. Yes, from 1937 until I was elected to the Senate.

Q. You appear here this morning pursuant to a subpoena that was duly served upon, you, is that correct?

A. That is correct.

Q. Let me ask you, Senator, do you or any member of your immediate family own any stock in Homestake Mining Company?

A. We do not.

Q. The district which you represented in the House of Representatives for some 14 years or thereabouts was in the Western part of the State of South Dakota?

A. Yes, the Western half, you might say. The districts I divided by the Missouri River which flows north to south.

Q. And the Homestake mine was located in what was your home district?

A. As a matter of fact, about 60 miles from my home town of Custer.

Q. Now, Senator, did there come a time in 1942 when you learned of a proposal being sponsored within the War Production Board to issue an order ordering the complete [fol. 688] closedown of domestic gold mining in the United States?

A. Yes.

Q. Would you recall approximately when that knowledge came to your possession?

A. I think about August or September of 1942.

Q. Following that, what did you do? Did you get in touch with anybody within the Government, or take any action?

A. Yes, I did. I attempted to find out where the order was being considered and got in touch with Mr. Dudley L. Batt, and had some talks with him about it.

Q. And Mr. Batt was with the War Production Board?

A. Yes. I am not sure what his exact title was, but I think he was deputy administrator. He was one of the chief men in the War Production Board.

Q. Can you tell us when it was that you got in touch with Mr. Batt the first time, the date? Do you have anything that would aid you?

A. I have my files on the matter with me. If I can consult them, I think I can give you the exact date of a conversation I had with him.

Q. All right, sir.

A. I had a telephone conversation with him on the 29th of September, 1942, and attended a meeting the following day.

Q. Now, does your memory serve you to tell us what was said by Mr. Batt and by you in the course of this telephone [fol. 689] conversation of September 29th?

A. I remember the general tenor of the conversation, but

I do have notes on the telephone conversation.

Q. And would they assist you in refreshing your recollection?

A. They would.

Q. I think you may consult them.

A. As a matter of fact, my notes indicate the telephone extension number I used at that time to talk with him. It was Extension 2212. I asked Mr. Batt whether the order had actually been issued, and he told me that it had not but was going to be issued before very long, and in our discussion I asked him the background of it and where it was being considered and he said that the problem was how to get that labor into something more useful to war. He said that General McSherry wanted to set up machinery to move General McSherry wanted to set up machinery to move the men when the order comes out, that there would be a meeting Thursday of the gold mine operators to see about moving the men to other operations. We had some discussion about the things that Homestake was doing in gathering up scrap, purchase of farms, and things like that.

Q. In that connection, were you advancing arguments to him against the closedown order?

A. Yes, I was pointing out to him that the Homestake was making a contribution to the war effort and that a great [fol. 690] many men had gone into the service, and that employees were buying bonds and things of that sort. He said he realized it was pretty difficult but he felt that all labor would be much more useful in something else. Then I arranged the meeting for the following Wednesday afternoon.

By the Commissioner:

Q. How long before this conversation, Senator, did you first learn of the possibility of this order?

A. I have in my files a newspaper article, an Associated Press dispatch from Washington, which appeared in the Rapid City Daily Journal, Rapid City, South Dakota, on August 13, 1942, which has the paragraph: "One controversial phase of the plan before the Committee is a proposed gradual shutdown of some 300 of the largest gold and silver mines to divert some of their miners into copper." And the fact that that is in my file and was put in my file

under the heading of Homestake Mining Company, I must have known about it at least on the 13th of August, or shortly thereafter, through the Rapid City paper.

By Mr. Rigney:

Q. Then following the telephone conversation you just testified to with Mr. Batt, what next happened so far as you are concerned, in connection with this matter?

A. Well, I attended that subsequent meeting.

Q. I think you testified that in your conversation with [fol. 691] Mr. Batt on the 29th, a date was made to see him on the 30th, was it, the following day?

A. Yes, or was it the 29th or the 1st of October?

Q. There is testimony here that there was a meeting on the 5th of October attended by a number of people including representatives of the gold mining industry. I am wondering whether or not you recall any meeting with Mr. Batt on the 30th of September which would be the day after your telephone conversation with him, or whether your notes reflect any meeting with him on the 30th?

A. I do not think I took any notes when I was meeting with him directly. My notes that I referred to a moment ago were of a telephone conversation.

Q. What is your best recollection as to whether or not you did see him on the 30th in his office or anywhere else?

A. I have a copy of my weekly report which I made of practice of writing back to the districts of the state once a week every week since I have been in Congress. It is dated October 5, 1942. It was generally written in advance of that. I do not know whether that was the Monday following, but ordinarily we write them for the Monday following the weekend on which they are written.

Q. I see.

A. But, in any event, I do have a reference in there to what happened on several days of that week.

[fol. 692] Q. Of that previous week?

A. Of the previous week, and in that, I have, "On Wednesday a conference was arranged by Congressman Case in the office of W. L. Batt, director of the Raw Materials Division of the WPB. It was attended by Dr. Wilbur Nelson, Chief of the Mining Section, Samuel Lipkowitz, labor adviser of WPB, Samuel Hill of the War Manpower Com-

mission, Senators McCarran of Nevada, Gurney of South Dakota, Congressmen Englebright and Case.". I also have "On Thursday, gold mine operators came in by plane, from all the Western states."

Q. Just at this point, directing your attention to the September 30 meeting to which you have just referred, do you recall at that meeting any discussion on the part of Mr. Lipkowitz of WPB or anyone else on behalf of WPB of the question of number of gold miners that could be made available for copper mining if the gold mines were closed down?

A. Yes, I do. I recall some conversation on that little note that both Mr. Lipkowitz who was labor adviser of the War Production Board and Samuel Hill, adviser to the War Manpower Commission, were present, and we had quite a discussion about whether or not such an order would be effective in getting miners for the copper mines. There was some discussion as to whether or not gold miners accustomed to working in the temperature conditions they had in gold mines, would work in copper mines with differ- [fol. 693] ent atmospheric conditions and temperature, but the thing I do remember which rather amused us at the time was the discussion of the numbers involved. I knew something about the employment at Homestake. I think there was something over 2,000, perhaps up to 2300, but whatever the figure was at that tie Mr. Lipkowitz wanted to use that entire figure as the prospect of number of miners going into copper mining. I laughed because from my own knowledge I have been at the timber operations at Nemo, and they also had an operation over at Moskee, Wyoming, and a great many of the Homestake employees are engaged in cutting logs and trimming them, and originally the Homestake mining operations were for getting logs for mine timbers, but in cutting timber economically and efficiently they had other uses for part of the lumber so they conduct quite a logging operation. So a great many employees were engaged in logging operations and operating the sawmill. In addition to that, Homestake operates a hospital at Lead and I knew that some of their employees were nurses and some doctors. I have been in Homestake's general offices at Lead and they had a great many bookkeepers and people of that sort. Then I have known a great many employees of Homestake personally. They run in

two classes, those who work at the mine, those who work above ground and those who work underground. Homestake has several large buildings and considerable property above ground and a great many employees are engaged [fol. 694] in that kind of operation. So I knew that it was ridiculous to suggest that the total number of employees at Homestake would be miners and such who would go underground working in a copper mine.

Q. Did you state, in effect, what you said now with respect to the knowledge of the categories of employees?

A. I was a little amused, but I did try to say it reasonably respectfully under the circumstances.

Q. Do you recall further discussion on your part and on the part of other senators and congressmen in attendance at this meeting with Mr. Lipkowitz and other government people about his over-all figure for the country as a whole?

A. Yes. That, of course, precipitated some discussion and the observation was obvious that if his figures were no more accurate with regard to the industry as a whole, then they were with regard to Homestake where I have personal knowledge that it was an inaccurate figure and anybody who had been led to believe that the copper mines would get anything like 20,000 miners—I think he figured they would get that—whatever the figure was, if it was based upon comparable use of figures as used on Homestake, the whole thing seemed out of reason to me.

Q. Was there anything further at that meeting of September 30, or have you told us in substance about everything that occurred that day?

A. Well, we did bring out the things involved, and, re- [fol. 695] ferring again to my report dated October 5, I recite there all the conferences of that week, and there were conferences that I referred to on three different days.

Q. Was there any discussion at the September 30 meeting on the part of any of the government representatives about the necessity for issuing this order in order to save critical materials and supplies? Was that argument advanced in support of the proposed order?

A. I don't recall that at all, and I have six different things that were brought out as facts at the several conferences, and none of them refers to that.

Q. Now, with respect to the October 1 meeting, would you tell us about that, who was in attendance so far as you recall or so far as your notes refresh you?

A. Referring to my notes, "Gold mine operators came in by plane from all the Western states and a five hour conference was held with Mr. Batt. General McSherry of the War Manpower Commission, experts from several sections of WPB, and senators and congressmen." I also in my notes, have some newspaper reports of that meeting, I think. I have given a clipping from the Rapid City Daily Journal of October 2, 1942, which carries a Washington October 2 dateline headed AP. "The War Production Board had notice from congressional spokesmen from gold mining states today that they would protest vigorously any [fol. 696] order of closing gold mines as a means of producing labor," and in that it quotes Senator McCarran as saying that the gold delegation itself convinced officials that WPB officials headed by William L. Batt had been told that few gold miners would take jobs in other mines where methods differ, but most would be attracted to shipyards, and war plants paying higher wages; that Representative Case, R-S.D., protested that mines such as Homestake in South Dakota would be ruined by such operations.

Q. Now, again with reference to the October 1 meeting, would you by reference to your October 5 memorandum tell us now what arguments or reasons are set forth there as constituting background of this order?

A. Well, I have this summary in the October 5 report: That at all of these conferences, these facts were brought out: One, that not over 2500 underground miners were available and that many of these were men of middle age who owned their own homes; that reference to underground goes to the distinction to the general employees of the mining company; two, that gold mines when shut down are reopened only at good expense from water seepage and cavein loss; three, that communities built around gold mines would suffer out of all proportion to the possible labor supply that could be recruited for copper mines; that the same things that draw men out of copper mines to Army and defense plants would take the released gold miners; four, [fol. 697] that coal miners working but 35 hours a week, or some of the unemployed people in New York City would

yield several times more miners than the thrown out gold miners; five, that gold mines have been and are contributing to the war effort in addition to producing the only metal that speaks in international language at all times. Homestake has sent men to the Armed Services, collected 100 carloads of scrap iron and several carloads of rubber, brass, and manganese steel scrap, provided a stand-by force, etc. Six, that every gold mine, Homestake included, is branching into strategic mineral production.

I point out that at weeks ended the order originally considered might be modified or even held in suspense pending solution of the over-all problem of manpower supply; that authorities said the administration was considering a general manpower draft act to permit assigning workers wherever needed.

Q. Then was the next thing that happened, so far as your knowledge goes, the issuance of the order the following week?

A. Well, my notes also indicate that a senatorial conference was held, sort of a showdown conference, in the Senate Office Building with Mr. Batt, General McSherry, and Paul McNutt, chairman of the War Manpower Commission. That was one of the group of meetings that week on which the summary is based.

By the Commissioner:

[fol. 698] Q. Did you attend that meeting?

A. It is not indicated that I did in my notes, and I do not remember it. The fact that I designated it as a "Senatorial conference", and I was a member of the House at that time, makes it seem probable that I did not.

Q. I was wondering if they may have invited some members of the House?

A. I don't recall. I think maybe I did not attend.

By Mr. Rigney:

Q. Now, Senator, when you were in the House of Representatives, were you a member of the Appropriations Committee of that body?

A. Yes, sir, for 12 of the 14 years.

Q. Now, do you recall having attended a meeting of the Appropriations Committee of the House of Representatives

in November, 1943, at which time Under Secretary of War Patterson was a witness before your Committee?

A. Well, a meeting of the Subcommittee on the War Department. I was a member of the Subcommittee for the War Department. That is, the Appropriations Committee breaks down into various subcommittees, and between 1940 and 1949, I was a member of the Subcommittee for War Department and I do recall Secretary Patterson coming before us on many occasions, and on one or two occasions, he was before us and I questioned him with reference to this man-[fol. 699] power problem as it applied to the closing of the gold mines.

Q. Now, do you have a record of questions which you put to Under Secretary Patterson at this subcommittee meeting in November of 1943, and the answers which he gave with reference to the closing of the gold mines in 1942?

A. Yes, I have in my file a copy of the transcription of the hearings which was placed here by my secretary, Mrs. Maud Sparks.

Q. Would you be good enough, sir, to read the questions and answers which you put to Under Secretary Patterson, answers which he made to those questions regarding the shutdown of the gold mines?

Mr. Barnes: Your Honor, I object to this on the grounds that the transcript of those hearings would be the best evidence, rather than selective excerpts read from some document in the personal copy of the witness.

By Mr. Rigney:

Q. Is there a printed transcript in existence now, Senator Case, as far as you know?

A. Frankly, I do not know whether the hearings, the transcript of that particular hearing, is printed or whether it would be in manuscript form. During the war there were many times when we had hearings with officials from the War Department where we simply kept a transcript and did not print it, so that they wouldn't be available for gen-[fol. 700] eral circulation. So, I am sure there is a transcript which corresponds with this, and whether it is in printed hearings or not, I do not know.

Q. Have you endeavored within the last day or two to ascertain that?

A. Yesterday, I asked my assistant, Mr. Charles Gardner, to see if he could find the printed hearings which correspond to this copy of the transcript. He was not able to find it in my files. He did find the printed hearings of some open hearings that were held at another time when I interrogated Secretary Patterson about that, and these are hearings of June 10, 1943, when Mr. Patterson appeared and we questioned him. He did not in my files nor in the files at the Committee room find a copy of the printed hearings. The man who was the clerk of the Committee at that time was John Pugh who is no longer clerk of the Committee. The present clerk is Bob Lambert, and Bob Lambert was home with the flu or something yesterday so it was impossible to find whether or not in the files of the Committee they have the transcript. All I can say is that I do have these in my files. These files have been in my possession for a long time.

Q. Are these questions and answers accurate and correct copies of the questions which were put to Under Secretary Patterson at the time, the questions and the answers which he gave?

[fol. 701] A. They were a direct copy of the transcript of the hearings made at my direction to Mrs. Sparks. At the time of the June 10, 1943, hearing, Mr. Patterson was the Under Secretary of War.

Mr. Rigney: I submit, your Honor, that the Senator should then be permitted to testify to the questions put to the Under Secretary, and the answers which he gave. It will be offered in the nature of an admission by the Under Secretary of War concerning a subject with which he was connected in his official capacity, of which he had full knowledge, and I think under Judge Wyzanski's decision in the United Shoe decision, it would be permissible.

The Commissioner: I think that it would be. However, I think also that counsel for the defendant at the proper time should be permitted to see the entire portion of the transcript which the Senator has before him.

Mr. Rigney: I, of course, raise no objection to that and I do not think the Senator has an objection.

The Witness: I have no objection.

Mr. Barnes: My objection goes to that very fact, that the Senator has here only a portion of those hearings, your Honor, selected by him or by his secretary. There has been no showing that the complete transcript of those hearings is not available; merely that because of the absence of a man from his office yesterday they were not able to look in [fol. 702] the Committee files does not establish unavailability.

Mr. Rigney: More than that, your Honor, the Senator tried to locate them and was unable yesterday to locate them and to determine whether they are in existence.

By Mr. Rigney:

Q. Let me ask you this, Senator: Does your transcript there contain all of the questions which were asked and all of the answers given by Under Secretary Patterson on the day in question concerning this subject, concerning the closing of the gold mines?

A. That was my instruction to my secretary at the time and, to the best of my knowledge, includes everything on the subject of gold mines.

Q. And you base that conclusion on having read this transcript now, and on your recollection of the hearings on that day?

A. Yes, sir.

The Commissioner: He may answer.

By Mr. Rigney:

Q. Now, would you be good enough, Senator, to read the first question which you put to Under Secretary Patterson? Do your notes show what date in November that was?

A. Monday, November 15.

Q. 1943?

A. Yes.

[fol. 703] Q. Now, would you go ahead, sir, and read the questions which you put and the Under Secretary's answers?

Q. "Mr. Case. Going back, Judge Patterson, to the question we were discussing with General McInerney this morning in connection with the closing of a munitions plant

all because of denial of priorities for the completion of the aluminum plants program, who gives the death sentence in determining what particular plants should be closed?

"Mr. Patterson. If it is a specific plant in the Ordnance Department, for instance, it is in some cases with my approval. As to plants like small arms, ammunition plants, TNT plants, and sometimes powder plants, that is a direct War Department responsibility. If it is aluminum, that is a basic material. We do not buy aluminum as such. We get the benefit of aluminum principally in aircraft. That is a base material and the responsibility for the supply of aluminum rests upon the War Production Board."

Then, in my transcript there are some stars. Probably indicating further discussion of the aluminum.

"Mr. Case. What about the mines that were shut down the other day?

Mr. Patterson. Which mines?

"Mr. Case. There was a statement in the press that a good many so-called war baby mines were being shut down.

"Mr. Patterson. Those are war production board mate-
[fol. 704] rials, they are basic raw materials.

"Mr. Case. What about the closing of gold mines?

"Mr. Patterson. That was the War Department. The War Department recommended that and the War Production Board adopted that recommendation.

"Mr. Case. What about lifting the restriction to get them back into production? Will the War Department take the lead in recommendations there?

"Mr. Patterson. I do not know. The reason we did that was this: This last fall we recommended to them, impressed them, both myself and General Somervell, to cut down the production of gold in this country. We did it because there was a shortage of production in the copper mines. They were pressing us to release soldiers from the Army to mine copper and we had to do it. They came back again this summer and asked for more soldiers to be released. We opposed that. We were directed to do it but it seemed folly for us to release trained soldiers to operate copper mines when there were many high grade gold miners to produce copper.

"Mr. Case. Was there not another reason, that the machinery running the mines was easily destroyed and had to be replaced?

"Mr. Patterson. That involves critical materials but we did not think gold mining had anything to do with the running of the war.

[fol. 705] "Mr. Case. How does it happen that the War Production Board had permitted the export of machinery to operate the gold mines in other countries?

"Mr. Patterson. We have protested that every time the question has come up.

"Mr. Case. Gold production in those countries in many cases is running ahead of what it was before because we are supplying the materials.

"Mr. Patterson. In the War Department, we have always taken the position that that should not be permitted."

I might add that the reference to the so-called war baby mines grew out of the situation which was current then in November.

Mr. Barnes: November, what year, Senator?

The Witness: November of 1943. This interrogation took place in November of 1943 and my reference in "What about the mines that were shut down the other day?" and Patterson's "Which mines?", and the statement in the press that a good many so-called war baby mines were shut down had reference to the directive which Homestake had received advising them to close down all the investigations. That was advice from the Metals Reserves; as I recall it, I used that as a lead because Patterson was before us and I understood he had a part in the shutting down of the gold mines and I took the opportunity to inferrogate him on these war baby mines and to interrogate him on the [fol. 706] gold mines.

Mr. Rigney: Thank you, sir. I have no further questions, sir.

By the Commissioner:

Q. Was there any discussion among the legislators concerning a possible legislation to forestall the issuance of the order closing the gold mines?

A. I don't recall any. I don't know that there was much opportunity for it. *The thing came on rather sud-*

dently. I think the first I heard of it was indicated by that item in that paper of August, 1942. Of course, we were in a war and the general procedure at that time was that if you didn't like something that the War Production Board was doing or some agency was doing, that you sought to forestall the issuance of the order by presenting the situation to them. I think also there was this suggestion in this one conference, that they were considering a general war manpower draft act. I think a lot of us really did not think that they could do it. Of course, the way they implemented the order was to use the employment service to direct that they shouldn't make any referrals of persons in a certain part of the country, east of the Mississippi River, things of that sort.

In other words, to prevent the released gold miners from getting jobs in the East, they directed the employment service not to give any referrals east of the Mississippi. I re- [fol. 707] member that in talking with Mr. McNutt, that was implicit.

Q. After they did get the order, was there any suggestion of legislative action to change?

A. To countermand the order?

Q. Yes, sir.

A. I don't recall any.

The Commissioner: All right.

Cross-examination.

By Mr. Barnes:

Q. Specifically, did you ever introduce a bill either to stop the issuance of an order or to countermand it?

A. No, I did not. I think my attitude was perhaps that of Congress as a whole, although perhaps a little more so. I was quite familiar with the war effort as such, and was serving on this Appropriations Committee for the War Department which handled both the Army and the Air Force at the time, and I think that all of us were sensitive to any suggestion that we were impeding the effort in any way and, while we tried to question the wisdom in this particular case, as to the matter of legislation, I do not recall that it was proposed. At least, I did not introduce such a bill. Some others may have suggested it. I do not recall it.

Q. Senator Case, prior to your election to Congress, what had been your business background?

A. I was in the newspaper business. I published the [fol. 708] Custer County Chronicle at Custer.

Q. Over how long a period of time?

A. I went to Custer in the fall of 1931.

Q. And you were elected to Congress when?

A. In 1936.

Q. Do you know how this clipping from the Rapid City paper came to your attention in August of 1942?

A. Just in the general practice of our office, followings things of interest. I think that if counsel were to come to my office, he would be interested in seeing the way in which we try to develop files on all activities in the district then or now in the state, and matters of the welfare of the general area. We try to follow them and represent the state the best we can.

Q. Could I see that August 13 clipping that you referred to? The paragraph you read is the one starting "One controversial phase". Is that correct?

A. I believe it is. I do not know.

Q. I wonder if the reference to "committee" refers to the preceding paragraph which starts "A WPB official which declined to permit use of his name said a five-agency committee deliberating a sweeping but tentative plan to bring fresh labor into the copper mines and prevent present workers from deserting their jobs in favor of shipyards and war plants where they can get higher pay", is that correct?

[fol. 709] A. Yes.

Q. At this meeting in Mr. Batt's office that you referred to, the first one, which I think was about September 30, do you recall Mr. Batt saying at the conclusion of that meeting that if a use for gold could be found in the war program, the gold mines probably would not be closed?

A. I do not recall it.

Q. You have no recollection of that?

A. No. He might have said that. I just don't remember.

Q. Now, at this meeting, the succeeding day, the later meeting when representatives of the gold mine companies

were present, do you recall whether or not reporters were present at that meeting?

A. I do not.

Q. You referred to a newspaper clipping that set forth some of the discussion at that meeting. Does the clipping itself show the source of the information that the reporters had?

A. I will see. This is the clipping. It is an Associated Press dispatch. There could have been a reporter present. They quote Senator McCarran and quote myself and quote Representative Engelbright.

Q. In quoting Senator McCarran, they say this: "Senator McCarran said the gold states delegation had sought to convince Board officials that an order closing gold mines [fol. 710] would fall far short of the desired result." Doesn't that sound like a statement Senator McCarran made to a reporter after the meeting rather than a statement that a reporter heard at the meeting?

A. I would not say so. I was in the newspaper business for a number of years and I do not think that that would necessarily follow. I do not recall discussing the matter with reporters afterwards. In fact, I seldom do. But it could have been either way. I just don't know and I don't see anything in the story which proves one way or the other. That is the only clue as to how it was reported is that it carries the AP right after the date.

Q. But referring to the last four paragraphs, they start with the phrase, "After the conference, McCarran suggested that miners now in the Armed Forces," and so forth, is that correct?

A. That is correct. At the conclusion of the article or in the latter part of it, they say, "After the conference, McCarran suggested that miners . . . .".

Q. And then it later on states that McCarran disclosed he had filed with the Board a formal letter of protest. Don't those references, at least, indicate the statements made by McCarran to a reporter after the conference?

A. As to that, yes, but I do not even read into "McCarran disclosed that he filed with the Board a formal of [fol. 711] protest," whether that was referring to a filing at the time of the meeting or a filing on his own part.

Q. Do you recall his filing anything at the meeting?

A. I do not.

Q. Did you ever write any letter of protest, formal or informal, Senator?

A. If the Court will pardon me, I am looking through my files. I do not recall offhand writing such a letter. The best evidence I could have in this is a copy here in the files. There are other notes of conferences here with Wilbur Nelson and other persons with whom I had personal conferences on the subject protesting it.

By the Commissioner:

Q. What did he say about it?

A. Here are the notes of a talk with Wilbur Nelson, apparently a telephone talk. At least, I see 3314 which I think is probably his extension number.

By Mr. Barnes:

Q. Do they give a date for that, Senator?

A. I do not see a date on it. It is in the file there presumably in sequence of time. These are catch notes, apparently, of a telephone conversation. In one place, I have this: "Somervell is the man raising most of the cain." Somervell was General Somervell. The notes are very fragmentary. I have this note: "Just wondering what percentage will be willing to move particularly if trans-[fol. 712] portation is paid and including a family."

Q. Does that indicate a question you asked or a question Wilbur Nelson asked? Do you know?

A. My interpretation of that would be that that was one of the questions we discussed at the time. I had been raising the question about how many would move. I see I have "Not send 500 miles if find job within 50." I think probably I could interpret some of these notes a month afterwards more easily than I can now. It wasn't a shorthand reporter, just catch notes, as we were talking. There was another conference I had with John Carson on Extension 2884, head of the United States Employment Service, and with a Mr. Stephen Wood, Extension 2981, Social Security Building, who had a good deal to do with the gold order. That was on what jobs would be open: "What about guards for the homes of men who have gone? Who will de-

termine the type of job?" Then one note, "Almost any other than clerical, broad term. Would the hospital men go?" "Recreation? No. Timber, that is a borderline question." I was trying to determine which of the Homestake employees would be affected by the order. That is a note from Hiram Walker.

Q. Who is Hiram Walker?

A. He was assistant general manager of Homestake. Those are notes of a telephone conversation I had with him, and apparently Mr. Walker said that he was convinced [fol. 713] that after all the advertising they wouldn't go to copper; they would go to the shipyards.

Q. Chronologically, when did these notes appear in your file? Are they before or after October 8? Can you tell us that?

A. They are just on top of the telephone conversation I had with W. L. Batt on the 29th of September.

Q. They probably covered that same week covered by your report of October 5, approximately?

A. Probably so.

Q. In that report of October 5, Senator, you had a reference to the fact that Homestake was branching into the production of critical materials, I believe was the phrase you used? What information did you have on that subject?

Mr. Rigney: I am not sure whether the word was "critical" or "strategic", your Honor, that was used.

Mr. Barnes: My catch notes probably suffer from the same deficiency that Senator Case's do, and I may have written down the wrong word.

The Witness: The word is "strategic mineral production."

By Mr. Barnes:

Q. What information did you have on that subject?

A. Without going through quite a few notes here, I don't know whether I could be too specific, but in general, I might [fol. 714] say this: During World War I, there was some tungsten production in the Black Hills, I think in the Wasp mines, and some other mines in the general area where the Homestake was located, and it was my understanding that the Homestake people were looking into the possibility of

permitting the miners to live at home and experiment on whatever they could for some investigation into possible tungsten production right there, and then later—and I do not know about the chronology of this but perhaps at that time Homestake was given an exploratory project in connection with the Navy. Whether that was right at that time, I do not recall. If it is important, I can probably trace it down in going through the files I have here.

Q. That is not necessary to do that now. I think that will probably come out in testimony later on. After Wilbur Nelson indicated to you that General Somervell was putting most of the push behind this order, or whatever the phraseology was that you had there, did you communicate with General Somervell or anybody in the War Department?

A. I did with Secretary Patterson a couple of times.

Q. When?

A. Well, in these hearings, when he was before the Committee.

Q. But that was in November of 1943.

A. Also at an earlier hearing in the spring I discussed [fol. 715] the matter with Secretary Patterson.

Q. Did you, at any time, between receiving that information from Mr. Wilbur Nelson presumably some time in late September or early October, 1942, and the date of issuance of the order, communicate with anybody in the War Department?

A. I might add that the investigation of an arsenic project to those strategic propositions, was under consideration for Homestake at the time. General McSherry was present at the conference we had. He was the War Manpower man under Patterson and Somervell.

Q. Are you sure that it was General McSherry detailed to the War Manpower Commission under Mr. McNutt?

A. He might have been detailed to McNutt, but in any event, on this Commission I suppose he would be subject to Patterson and Somervell. I do not find any notes indicating a conference with Somervell at the time. The decision, apparently we felt the place to register complaint was with the WPB people.

Mr. Barnes: That is all I have.

Redirect Examination:

By Mr. Rigney:

Q. Do you remember, Senator Case, if General Clay was at the first meeting of WPB, this large meeting with the operators and you people?

A. I do not recall and I do not see it in my notes. He [fol. 716] might have been. I know General Clay.

Q. Lucius Clay?

A. Yes. I do not recall it.

Q. Directing your attention to all of the conferences to which you have testified here this morning that you had with anybody and any branch of the government in connection with this proposed closedown order, did any of these government officials say to you in connection with this proposed order that its purpose was to save critical materials?

A. No, the suggestion was that they wanted men for the copper mines.

Mr. Rigney: Thank you, Senator Case.

By Mr. Herrington:

Q. Senator, did you know Harry Engelbright, representative from California, in his lifetime?

A. Quite well. Harry Engelbright was the Republican Whip when I went to the House.

Q. I believe you said he was present at this meeting on October 1?

A. He was quoted in the article as having been present.

Q. Do you recall the statement that he may have made?

A. Not that I can make a direct quotation on. Harry Engelbright was the Republican Whip when I came to Congress, when there were only 89 Republicans in the House, and I got to know Harry quite well. Harry represented a district which I felt had a great many things in common [fol. 717] with mine, and he was very kind. If you look up the remarks that I made after Harry died, I think you would find that he meant much to me. After Mr. Engelbright was succeeded by Clair Engle from the same district in California, it was Clair Engle that I worked at some length with at the time the order was lifted. We went

to see Mr. Nathan at the time the order was lifted. It was probably the background of somewhat similar interests in the district that added to my interest in both Harry Engelbright and Clair Engle.

Q. Generally speaking, were the Representatives and Senators opposed to the order closing the gold mines?

Mr. Barnes: I object to the form of the question, your Honor.

The Commissioner: Sustained.

By Mr. Herrington:

Q. To phrase it another way, did the Senators and Representatives express the same views generally that you yourself have stated you expressed at this meeting?

Mr. Barnes: Your Honor, I object to that as not being the best evidence, what the Senators and Representatives said.

The Commissioner: You really object to the form of the question?

Mr. Barnes: I really object to the form.

By Mr. Herrington:

[fol. 718] Q. I will change the form. Do you recall what the Senators and Representatives from the Western states said at these meetings to the War Production Board concerning the action being taken at the time?

A. The representations of Congressman Hill of Colorado, present at one conference, and Congressman Engelbright at another conference, were similar to the point of view I expressed.

The Commissioner: Are there any other questions?

Mr. Barnes: I have just one more question.

Re-cross examination.

By Mr. Barnes:

Q. You referred to the fact that when the order was lifted, you and Congressman Engle saw Mr. Nathan. When was that?

A. I have another file, may I say to counsel, which I did not bring with me. That had to do with the lifting of the order. I did not bring that one along with me but it was immediately prior, it was within a few days before the order was lifted. We saw Mr. Nathan together on one occasion. I think we had some telephone conversations with him and possibly saw him more than once, but I remember definitely going with Mr. Engle to see Mr. Nathan a few days immediately prior to the lifting of the order.

Q. Was that with Mr. Robert S. Nathan?

[fol. 719] A. I am not sure that I recall his initials.

Q. What was his position?

A. He was a solicitor, I believe, to either Mr. Byrnes or Mr. Vinson. If that becomes important, I would be glad to return with the other file. Names of agencies change rather frequently, and titles, and I would hesitate to hazard a guess. I think that that is determinable.

Mr. Barnes: That is all right. That is all.

The Commissioner: Is there anything further?

Mr. Rigney: No, sir. I call Mr. Bjorge.

Guy N. Bjorge, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Rigney:

Q. Mr. Bjorge, what is your full name?

A. Guy N. Bjorge, B-j-o-r-g-e.

Q. Now, Mr. Bjorge, you are the general manager of the Homestake Mining Company, is that correct, sir?

A. I am, yes.

Q. And you have occupied that position as general manager since about 1936?

A. Since 1936.

Q. Now, what is your educational background, sir?

[fol. 720] A. I was educated in the public schools in Minnesota and the University of Minnesota from which I re-

ceived a degree of Engineer of Mines in 1912. Then, I proceeded to the Messaba Range in Minnesota and worked for Pickands-Mather and Company. I then went to Venezuela on reconnaissance work for oil, from which I had to return because I finished in a hospital down there. I returned to Pickan-s-Mather and Company the following spring.

Q. What year would that be?

A. 1913, as Assistant Chief Engineer. I remained there for six months and then went to Arizona and joined Mr. John M. Boutewell in an examination of the Old Dominion copper mine at Globe, Arizona.

Q. What kind of mine was that?

A. A copper mine.

Q. How long were you connected there?

A. After completion of the examination, I remained as Chief Geologist until 1917.

Q. And then did you go to San Francisco in 1917?

A. I then went to San Francisco and engaged in mine examination work as a consultant. That was interrupted for a short time by service in the Army. I was called to service and went to the Enginers Officers Training Camp at Camp Humphreys, Virginia, near the end of the war, and was promptly discharged after the armistice. I then re- [fol. 721] turned to San Francisco and continued the consulting work until 1932.

Q. So that you were in San Francisco for approximately 15 years, from 1917 to 1932, is that correct, sir?

A. That is correct.

Q. And during a good part of that time, or perhaps during all of that time, were you doing consulting work for private clients?

A. Yes.

Q. And would you name some of these clients?

A. Well, I did work for the Old Dominion Company, the Arizona Commercial Copper Company, and Iron Cap Copper Company, all at Globe, Arizona. I worked for the Phelps-Dodge Corporation in an examination of the Montezuma Copper Company mine in Mexico.

Q. Is Phelps-Dodge a large company?

A. One of the three largest copper producers in the United States. And I worked for the Lucky Tiger in the

examination of their El Tigra property in Mexico; extensive work for Calumet and Heckla in the examination of prospects, and I examined the North Star mine at Grass Valley, California, and later a joint examination of the North Star and Empire at Grass Valley, California, and an examination of the mine of the St. John Del Rey Mining Company in Brazil; and others.

Q. Now, when did you become connected in any capacity, [fol. 722] with the Homestake Mining Company?

A. I went to the Homestake in July of 1932.

Q. And your position with them then was what?

A. In December of that year, I was made assistant general manager, in which I continued until 1936.

Q. And it was in 1936 that you became general manager?

A. Yes.

Q. Counsel has asked that I inquire if you represented Central Eureka at any time when you were in private consulting work?

A. No, I did not.

Q. Did you ever visit the Central Eureka mine?

A. I visited the mine once.

Q. Now, have you also, in addition to your duties as general manager of Homestake since 1936, been vice president of the company since 1940?

A. I have been a director and vice president since 1940.

Q. Are you a member of any professional society, Mr. Bjorge?

A. Yes.

Q. Would you name some of those?

A. American Institute of Mining and Metallurgical Engineers, Mining and Metallurgical Society of America, The Society of Economic Geologists.

Q. Now, during the last war, World War II, Mr. Bjorge, [fol. 723] were you asked by the Government to undertake any assignments on behalf of the United States?

A. Yes, on three occasions.

Q. Would you tell us what those were?

A. The first was an assignment from the War Production Board, and then the Board of Economic Warfare, to go to Nicaragua for a study with regard to production and inventories and supplies in the gold mines of Nicaragua.

Q. When was that, sir?

A. That was in May of 1942.

Q. And did you go there and make that investigation?

A. Yes, I went there and visited seven of the eight producing gold mines in Nicaragua.

Q. And did you render a report to the government?

A. Yes.

Q. What were the other assignments that you undertook?

A. The second was a request by the War Production Board and the OPA for work at Anaconda in connection with the premium price plan, which was in January, 1943.

Q. And that was a survey to be made at Butte, Montana?

A. Yes, to report on certain matters that had to do with the preliminary price planning.

Q. Did you undertake and complete that assignment?

A. Yes. When we requested to make that examination, I said that it sounded like a very extensive job and I didn't [fol. 724] see how I could have time to do it all alone, and requested authority to take Mr. Noble, our chief geologist, and Mr. Kravig, our assistant mine superintendent with me. They accompanied me to Butte and we made the examination and report.

Q. Then what was the last one of these?

A. The third was also for the War Production Board and the office of Price Administration in connection with the United Verde Copper Company at Jerome, Arizona, and also on the premium price plan.

Q. And what minerals are produced in these mines that you speak of?

A. I might add one thing to the previous question. In that case, I asked permission and authority to take Mr. Kravig to assist me in that work, which I did.

Q. And are these copper mines?

A. These are copper mines. Anaconda and United are copper mines.

Q. Are you familiar, sir, with copper mines and the method of mining used in such mines?

A. Quite generally.

Q. Now, from your experience with the Homestake Mining Company, can you tell us what the fact is with respect to the stability of employment of the employees of that company, and the continuity of their employment. What has been the company's experience in that regard?

[fol. 725] A. The company has had a very remarkable experience as to the stability and continuity of service of

its employees. That has been the history of the company throughout the years. There have been numbers of men that have exceeded 40 years of employment with the company, a few more than 50, and the record of employment service was one man who served from 1880 to 1942, 62 years.

Q. Does the Homestake Mining Company maintain any sort of medical service for its employees?

A. Yes. The Homestake Medical Service for employees was begun in 1879 and it has continued up to the present time. I think that their service is unique in the mining industry in that they render complete medical and hospital service to the employee, his wife, and direct dependents living with him without any cost to the employee. The company bears the cost. There is no medical fee paid by the employee.

The Commissioner: We might recess for about five minutes.

(Thereupon, a five minute recess was taken.)

[fol. 726] By Mr. Rigney:

Q. I think you were speaking of the hospital at the recess, and I don't know whether there was anything you wanted to add with respect to the hospital, that is, in your testimony with respect to the hospital, or have you completed what you wanted to say about that, sir?

A. As I remember it, I think I completed my testimony with regard to it.

Q. Does Homestake have any plan for group insurance for its employees?

A. Yes. In a number of these things, as well as with the hospital, Homestake was definitely a pioneer and established an employee insurance plan in 1910 which paid sick benefits and death benefits to employees, and it was a plan to which the employees contributed.

Q. What about a pension, Mr. Bjorge? Does Homestake have any such plan?

A. It does. The pension plan was initiated in 1917, and has been entirely at the cost of the company, and has what is termed a non-contributory plan. It was a completely informal plan with no fixed retirement ages until 1949, when

a formal plan was set up with a trustee fund to guarantee future payments of pensions.

Q. Reference has been made in testimony here to the existence of an organization, a social organization, I believe, [fol. 727] of Homestake employees. Could you say just a word about that?

A. Yes. A social organization of older employees has been in existence for many years. According to the records, it was organized in 1906, and they set up their requirements for membership, in which eligibility was based on having been in the service of Homestake for 21 years. And that organization in 1942 had approximately 440 living members.

Q. Does that organization have a name, a formal name?

A. It is the Homestake Veterans Association.

Q. Are its activities exclusively social?

A. Yes.

Q. What about the situation so far as recreational activities are concerned?

A. Again, Homestake was a pioneer in that they built a recreation building which was opened in 1914, which included a library, pool and billiard tables, bowling alleys, swimming pool, and that building has ever since been open without charge, not only to employees but to everyone in the community.

Q. Do you know what that cost?

A. It is on the records as having cost $250,000.

Q. Now, does it frequently happen, Mr. Bjorge, that you have two or more generations in one family working for Homestake?

A. We frequently have had two generations, and in some cases three generations at the same time.

[fol. 728] Q. In other words, continuity of employment within families there in Lead. Homestake is about the only thing there in the way of any kind of industry, isn't that true?

A. Yes, it is a one-industry community.

Q. Now, would you tell us, sir, what your duties are as general manager, what they comprehend and include?

A. As general manager I have complete supervision over the operations. The organization is divided into two production departments, the Mine and the Metal-urgical Department. The two production departments each have a superintendent, and there are several service departments,

a mechanical department, electrical department, the engineering and construction and maintenance departments, a supply department, a geology department, each with a head, and, of course, the employment department. And then there are the subsidiary operations of a logging and lumbering operation, with a manager, and a coal mine with a manager.

Q. Are all of these department heads that you have mentioned under your general supervision.

A. They are under my direct supervision, and I have frequent conferences with them individually and collectively to go over all phases of the operation.

Q. And do they report to you not only verbally or orally but in writing?

A. There are a great variety of daily, weekly and [fol. 729] monthly and annual reports on production, metallurgy, ore reserves, supplies, and everything that has to do with the operation.

Q. Where is the coal mine in reference to the gold mine?

A. The coal mine is operated by a wholly-owned subsidiary, of which the corporate name at that time was the Wyodak Coal and Mfg. Co. It is a combined name of Wyoming and Dakota, Wyodak. And it operates the coal mine which is located five miles east of Gillette, Wyoming, about ninety miles airline west of our gold mine.

Q. And what about the lumbering and timbering operations? Whereabouts are they carried on?

A. The lumbering and timber operations are carried on in the northern half of the Black Hills. The sawmill was originally at Nemo, South Dakota. We had a second small one which was designated as Camp Five, and one at the Wyoming side of the hills at Moskee, which was operated by a wholly-owned subsidiary. The then name of that was the Golden Gate Mine & Timber Co., which was organized because the operation was in Wyoming.

And in 1940 we centralized our sawmill operations at a new sawmill located just outside of the town of Spearfish, South Dakota, about twenty miles from Lead.

Q. How far generally are the lumber and timbering operations from Lead, or from the mine?

[fol. 730] A. Well, the sawmill is twenty miles from Lead, and the logging operation is within a fifty-mile radius of the sawmill.

Q. Now, would you take just a moment, Mr. Bjorge, to tell us in a little more detail of the reports which come to your desk as general manager from the various divisions or department heads under you? What do they consist of?

A. Well, there are various daily and weekly reports on production, and monthly reports on the number of men employed, the reports of the metallurgical plants as to the quantity of ore treated and the recoveries, mine reports on production, and labor supply, and any out-of-routine things that may have happened during the month, reports from the geological department on the results of development, annual reports prepared by the geological staff on ore reserves, and there are also annual reports from each department covering the year's activities in their department.

Q. Now can you tell us, Mr. Bjorge, when you first learned of a change in priorities, so far as gold mines were concerned, at or about the beginning of World War II?

A. The first intimation we had that there would be a different treatment for gold mines than for any other type of mines was with the amendment to Order P-56 in March of 1942.

Q. And when did you first obtain knowledge or hear anything about the possibility, or any proposal to close down the gold mines in the United States, a complete shut-down? [fol. 731] A. I think we began to hear rumors and newspaper reports of that about the middle of August, 1942.

Q. Now, do you recall what you did, the first action of any sort that you took, following your learning of this proposal for a shut-down in domestic gold mining?

A. Well, the reports became more numerous with the result that late in August I came to Washington and spent a few days here interviewing various people to see what I could find out about the situation.

Q. And do you recall now some of the people that you saw when you came to Washington at that time?

A. Yes.

Q. Who were they?

A. I first went to see Wilbur Nelson, the head of the Mining Branch of the War Production Board, and he was kind enough to give me sufficient time to present our story, and various arguments that we thought should be presented.

Q. You had a conference with him at that time, with Mr. Wilbur Nelson?

A. Yes.

Q. You went into this thing in some detail?

A. In some detail, yes, giving figures as to the number of men that might be released to copper mines by such an order, and my very definite opinion as to the ineffectiveness of the order because the men who had left us during 1942 [fol. 732] had gone to west coast, mainly to aircraft and ship yards, and it seemed very definite that men had left the copper mines for the same reason. Our men were a stable crew, a large percentage of home owners, and it seemed hardly probable that they would go to another mining camp to take the place of men who had left because they were attracted by higher wages in the defense industries.

Q. In the ship yards and aircraft plants?

A. The ship yards and aircraft factories. And going to a new community, regardless of the quality of that community, they would be forced to take the leavings in the way of housing and would have to live under poor conditions.

Q. Now, are you telling us of statements that you made at that time to Wilbur Nelson?

A. Yes. And that the nearest copper mine, the one they were talking about most with relation to Homestake, was Anaconda, which is a hot mine.

Q. How far is that from Lead, South Dakota?

A. About 300 miles.

Q. In addition to seeing Wilbur Nelson in August of 1942 did you see anyone else in the Government here in Washington at that time?

A. Yes.

Q. Who else?

A. I was practically new in Washington and was check- [fol. 733] ing around with various people to try to find out who to see. I interviewed Congressman Case and Senator Gurney, and I talked with a number of old mining friends that I had that were working in various divisions of the War Production Board, like Frank Ayer, Harry Havies, they were in the Copper Division, Phil Wilson in the Light Metals Division, and a number of others.

I then arranged appointments and had interviews with Donald Nelson and General McSherry of the War Production Board. My interviews with them were, of necessity, short because they were busy men.

Q. But they did see you, however?

A. They permitted me to summarize the arguments that I had presented more fully to Wilbur Nelson.

Q. Do you remember whether or not at that time you saw General Somervell?

A. Yes.

Q. You did see him, is that so?

A. I received the information—I wouldn't be sure whether it first came from Wilbur Nelson or Senator Gurney or Congressman Case—that the demand for the closing order was coming from General Somervell's office. And Senator Gurney made an appointment for me to see General Somervell, and went with me to see him.

Q. Now, do you have any recollection of what was said or what transpired in this meeting with General Somer- [fol. 734] vell in substance?

A. I summarized the arguments against the closing order, and he reviewed the great need of men for the copper mines, and I think he also referred to the plan of furloughing men from the army to the copper mines. And I cannot say that he gave me any encouragement. When we left he said they would give consideration to the statements that we had made.

Q. Now, I wonder if you have told us of all of the people that you saw in this August trip, that is, Wilbur Nelson and Donald Nelson, General Somervell and General McSherry, as I recall. Was there anyone else?

A. I am not certain.

Q. You don't recall.

A. I have not been in the habit of keeping a diary or an extensive memo of things.

Q. You don't recall anyone else?

A. I probably saw others, but I do not recall the conversations with others.

Q. You spoke about the reduction in your working force among your miners which had occurred in the year 1942 prior to August. Was that reduction in force particularly predominant in any age group?

A. That was mainly in the younger age group, and the men who had been with us a very short time. In August, 1942, in contrast to our previous very stable labor force, we [fol. 735] had begun to have a very heavy turnover.

Q. And particularly among the younger men? I suppose that would be made up of losses to the west coast war industries that you mentioned, and undoubtedly to Selective Service also; is that right?

A. Yes. Many of the men that we hired as replacers for those who had left us remained only a short time, so that there was a revolving portion of our labor force during that year.

Q. In addition to the Anaconda mines at Butte, which you have mentioned, what other copper mines are there in that general area of the country out there?

A. The next nearest are near to Salt Lake City.

Q. How far would they be from Lead?

A. About 650 miles.

Q. I think you said Butte was about 500 miles from Lead?

A. That is right.

Q. Would that be the nearest copper mine to Lead, the Anaconda mine?

A. Yes.

Q. So that there are no substantial copper mines of any sort any closer than those at Butte or Salt Lake City?

A. No, there are not.

Q. Now, what other mines, non-ferrous mines, are there in the general area of Lead, South Dakota?

[fol. 736] A. In the immediate vicinity of Lead and the Black Hills there is one other gold mine than Homestake, and it is a small operation, at times producing a variety of minerals. There is an area around the Black Hills producing bentonite.

Q. What is that?

A. That is a non-metallic mineral that has its principal value in the fact that it has great ability to absorb water. And in the southern end of the hills there is feldspar.

Q. What is the bentonite used for?

A. It is used for mudding oil wells, and for foundry sand in making moulds, and a great variety of uses. They even go to the extent of making bread and candy with it.

Q. What is the feldspar that you mentioned?

A. Feldspar is produced down at Keystone, South Dakota.

Q. Are either one of those operations of any size?

A. No. There are a number of relatively small operations. The bentonite is entirely surface mining. And then there is at times production of some rare minerals from pegmatites down in the region around Custer.

Q. What about the mines at Climax, Colorado, Mr. Bjorge?

A. The mines at Climax, Colorado produce molybdenum, and that is the other large mining operation within a reasonable radius of Lead.

Q. When you say other you mean in addition to Homestake?

A. Yes. Well, in addition to Anaconda and the copper [fol. 737] mines in Utah.

Q. What is molybdenum?

A. It is a metallic element that is used for alloying with iron to make moly-steels.

Q. How large an operation is that?

A. That is quite a large operation. I am certain they have produced as much as 15,000 or 16,000 tons a day down there.

Q. How far is that from Lead, Climax?

A. About 500 miles.

Q. Now, taking you just a moment back to the situation of your employees, can you tell us what the fact is with respect to the percentage of your people who are married men, that is, your employees in the year 1942?

A. Yes; a very large percentage of them were married.

Q. And was there a very large percentage of them who had a long period of service with Homestake?

A. Yes.

Q. Now, in addition to the reasons which you have mentioned heretofore as constituting the arguments that you made against the closing order on the gold mines, were there any other reasons which you advanced having to do with the community of Lead and the surrounding area?

A. I definitely advanced the facts as to the drastic effect on a one-industry community when that industry was [fol. 738] closed down and forced to lay off a substantial portion of its employees.

Q. What did you say along this line in your talks with any of the officials of WPB that you did talk to?

A. I recited the long service of the employees with us, and that a large percentage of our men were home owners, and they were married men who had lived in the community a long time. It is a very attractive and desirable community, being very definitely a tourist area now, and living conditions were good, recreational facilities were good.

Q. Did you make reference to the almost complete dependence of the immediate community upon the Homestake Mine?

A. Yes. The community which constitutes the——

Q. What would be the population of Lead at that time?

A. About 7,500, and the adjoining town of Deadwood, about 4,000.

Q. And what percentage of those people would you say were dependent at that time upon the operations of the Homestake mine, directly or indirectly?

A. I should think that they were almost all directly or indirectly dependent upon employment with us. There were normally a little over 2,000 employees with Homestake, and their families who were directly dependent, and the business men that serve the community, all of the other facilities of the community were dependent on the [fol. 739] patronage of our employees. The city and county school districts were very largely dependent on taxes received from Homestake.

Q. These are local taxes?

A. Local taxes, yes.

Q. What was the significance in 1942 of the Homestake gold mine's operation to the economic life of the State of South Dakota, that is, the State government?

Mr. Barnes: I object, unless the qualifications of the witness on this subject are shown.

By Mr. Rigney:

Q. Do you know, Mr. Bjorge, how much annual taxes the Homestake Mine was paying to the State of South Dakota at this time, 1942?

A. Homestake was paying a State tax in the amount of about $1,100,000 a year.

Q. What sort of a tax was that?

A. That was a severance tax, a percentage tax on the value of the gold produced.

Q. And do you know of your own total knowledge what the total budget of the State of South Dakota was at that time, how much money they raised annually by taxes from all sources?

Mr. Barnes: I object, unless the sources of the witness' knowledge are also shown.

By Mr. Rigney:

Q. Do you have knowledge on this point, Mr. Bjorge? [fol. 740] A. We always followed the affairs of the State, and the State expenditures, because of the tax problem. And I do not have the exact figures, but in the middle '30s when the severance tax was first initiated, that tax——

Mr. Barnes: Your Honor, I object to estimates on the part of the witness, because he said he does not have the exact figures. It could be nothing but estimates.

Mr. Rigney: I think he could testify to the approximate figure, your Honor, within reasonable limits.

The Commissioner: Well, I thought you were asking questions in an effort to overcome the earlier objection. I have in mind that I have to rule on that earlier objection.

Mr. Rigney: Yes.

The Commissioner: I am going to sustain it. The figures with respect to taxes are matters which can be precisely tied down, if they should become important.

Mr. Rigney: Yes, your Honor, I appreciate that.

The Commissioner: I think in order to make it easier to rule on an objection you should state what you are doing, whether you are withdrawing the question or proceeding to answer the objection, so that I will know when I am called upon to enter the ruling.

Mr. Rigney: Well, now, I take it that your Honor has sustained the last objection?

The Commissioner: I did indeed.

[fol. 741] Mr. Rigney: Now, does your Honor want me to except?

The Commissioner: You do not have to.

Mr. Rigney: I did not think you had to.

The Commissioner: You do not have to. My point was, I am going back into the problem that was presented for my—we can go off the record here.

(Here followed discussion off the record.)

The Commissioner: Very well.

By Mr. Rigney:

Q. Now, Mr. Bjorge, what can you say about the comparable working conditions as between the Anaconda mine at Butte and the Homestake mine at Lead?

Mr. Barnes: Your Honor, I object to the form of the question as being indefinite. The question asked the witness: what can you say about——

Mr. Rigney: I will withdraw that. I am only trying to develop the facts here, and perhaps I am doing it too informally in that kind of a question.

By Mr. Rigney:

Q. Are you familiar with the Anaconda copper mine at Butte, Mr. Bjorge?

A. Yes.

Q. You have knowledge of that from having visited that mine?

A. I have knowledge of it from having visited it. My [fol. 742] first visit to it, however, was in January, 1943. Prior to that I was familiar with it from reading technical articles on the mine in the technical press, and I knew with regard to many mines and mining districts.

Q. But you have also been there personally and been physically present on the premises, have you not?

A. Yes.

Q. It goes without saying that you are thoroughly familiar with the Homstake mine, does it not?

A. Very.

Q. Now, can you compare for us the working conditions in the copper mine at Anaconda with the working conditions in the Homestake mine at Lead?

Mr. Barnes: I object to this on the grounds it is completely immaterial. There is no showing that these facts known to Mr. Bjorge were known to the employees of the mines and that they would have in any way an effect on whether they took employment or did not take employment.

The Commissioner: Overruled.

Mr. Rigney: Would you read the question back so Mr. Bjorge has it in his mind?

(The pending question was read by the reporter.)

The Witness: The working conditions in the Homestake mine at Lead are exceptionally good. The mine is a hard rock mine where the great majority of mine openings stand [fol. 743] well without timber. The mine is relatively dry, the temperature is comfortable, the increase in temperature with depth is slow, and the mine is cool and well ventilated. The principal drawback of the mines at Butte are that they are high-temperature mines, they are very definitely hot and uncomfortable.

By Mr. Rigney:

Q. Are they what is known in the mining industry as a hot mine?

A. Yes.

Q. Now, are the facts to which you have just testified common knowledge within the mining community so far as employees of Homestake are concerned?

Mr. Barnes: I object, unless the qualifications of the witness to answer that question are shown.

By Mr. Rigney:

Q. Have you ever discussed these facts with employees of Homestake at any time prior to October of 1942?

A. I have discussed it with many people in discussing the comparison of different mines.

Q. And do those many people of whom you speak include Homestake miners at a time at or prior to October 8, 1942?

A. Certainly on occasions underground in the mine, stopping in a working place to talk with miners, I have talked

to them about the fact that it was a cool, comfortable place in which to work as compared to the mines at Butte or [fol. 744] other mines that I have been in, in a variety of places.

Q. Had you had such conversations as you have just testified to on several occasions with Homestake employees before October 8, 1942?

A. Yes.

Mr. Rigney: Your Honor, I think he is qualified to answer the question that I put to him earlier, if it is not the fact that these comparable conditions as between these two mines was generally known within the mining community so far as Homestake miners are concerned.

Mr. Barnes: Your Honor, all that we have got from the witness so far is that from time to time he told miners at Lead that their working conditions were better than at Butte. That does not establish common knowledge on the part of the miners at all.

The Commissioner: I do not think there is enough there to establish common knowledge.

By Mr. Rigney:

Q. Well, have you ever heard any Homestake miners prior to October 8, 1942 make any statements with respect to the conditions within the Anaconda mine at Butte, working conditions I am speaking of now, with particular reference to temperature?

A. Yes.

Q. And are you able to say on how many occasions you [fol. 745] have heard statements on that subject from Homestake miners?

A. Not the number, no, but on several occasions.

Q. Would you say that it was on numerous occasions?

The Commissioner: Well, he didn't.

Mr. Rigney: Well, several might be two or more.

The Commissioner: If you want to get away from the relative term used by the witness, pin it down by numbers.

By Mr. Rigney:

Q. Over how long a period of time did you have any such conversations with various Homestake miners?

A. That is very difficult to state. Probably a number of times during that year when there had been men who had gone to Butte to work and had returned to Lead.

Q. Had that occurred on some occasions, that Homestake miners had gone to Lead prior to October 8, 1942?

A. Yes.

Q. Had gone to Butte, I meant to say, and had subsequently returned to Lead?

A. There were some that had gone to Butte and returned to Lead.

Q. And did you have conversations with them about these things?

A. I cannot name specific men, but I did meet such men and they gave as their principal reason for returning the temperature in the Butte mines.

[fol. 746] Q. Now, can you tell us whether or not this subject of the comparable working conditions between Homestake and Butte was a matter of common knowledge to the Homestake miners in the summer of 1942?

Mr. Barnes: Your Honor, I feel I have to press my objection. The witness' only statement has been that on several occasions he had discussions with some men.

The Commissioner: Sustained.

By Mr. Rigney:

Q. Now, how does the Climax mine compare physically with the Homestake mine at Lead, Mr. Bjorge? Would you say that there was one distinguishing characteristic between these two mines, at Climax and Lead?

Mr. Barnes: Your Honor, I will concede that Climax produces molybdenum and Lead produces gold. That is a distinguishing characteristic, I will agree to that.

Mr. Rigney: That was not the one I am seeking to develop, your Honor.

The Witness: We are discussing living and working conditions, and the one important factor is that Climax is located at an elevation that ranges from 11,000 to 13,000 feet.

By Mr. Rigney:

Q. Above sea level?

A. Above sea level.

Q. As compared with what elevation at Lead for the [fol. 747] Homestake mine?

A. A little over 5,000 feet.

Q. Does that difference in altitude have an effect upon miners working in the two mines?

Mr. Barnes: I object, unless the source of the witness' knowledge is shown, your Honor. It seems to me we are getting into a medical question.

Mr. Rigney: Your Honor, Mr. Bjorge has been in this field all his life.

The Commissioner: Overruled.

The Witness: I think anyone that has ever been in high altitude knows the discomfort of any effort at high altitudes.

By Mr. Rigney:

Q. Labor or work becomes much more difficult at the higher altitudes; is that right?

A. Yes, indeed.

Q. Do you recall from your knowledge in this field whether or not there were any gold mines in operation in September of 1942 which would not be affected by the close-down order L-208, which was under consideration by the WPB?

Mr. Barnes: Your Honor, I have to object to that. The evidence here already shows that prior to October 8, 1942, in September, the period to which this question is addressed, the terms of the order had changed several times in successive drafts. The question is too indefinite.

[fol. 748] The Commissioner: What was that question?

(The pending question was read by the reporter.)

The Commissioner: You are asking him to——

Mr. Rigney: I will withdraw that and put it a different way.

The Commissioner: All right.

By Mr. Rigney:

Q. From your conversations with WPB officials in August and September, 1942, did they state to you that under the proposed order there would be some gold mines which would not be closed down?

A. No, I don't think we went into that in those meetings.

Q. And do you know from your own knowledge if there were gold mines operating at the time of the issuance of the order on October 8 which continued to operate which were exempted from the order by the terms of the order?

Mr. Barnes: Your Honor, it seems to me that now we are getting into a question of interpretation of the order. If he knows whether gold mines, any gold mines, continued to operate, that is one thing, but if we are getting into the question of the terms of the order that is something else. I do not think the witness is qualified on that.

Mr. Rigney: I will withdraw it, your Honor.

By Mr. Rigney:

Q. Were there gold mines in operation in September of [fol. 749] 1942 which continued to operate after the issuance of the order of October 8, 1942?

A. Yes.

Q. Now, can you tell us the several largest gold mines which were affected by the order, closed down by the order of October 8?

The Commissioner: Wait a minute. I am not going to let him testify to that. If they did close down, and he knows, he can testify. But I don't think that he can testify that the order closed them down, because there may have been some other factor that entered into it. And, as has been suggested, there was authority given to some of the mines to operate for limited periods.

Mr. Rigney: All right. I wanted to show the principal mines which were directly affected by this order and were immediately closed down, but we can do that a different way.

The Commissioner: All right.

By Mr. Rigney:

Q. Do you recall in your conversations with the WPB people that you talked to in August and September of 1942, Mr. Bjorge, having any discussion with them with regard to the shipment of gold mining machinery and supplies abroad to gold mines in foreign countries?

A. Well, I included in the arguments that I presented to them the unfairness of taking drastic action with respect [fol. 750] to the gold mines in the United States when the gold mines in all of the other countries of our allies were still operating and getting machinery and supplies from this country.

Q. And did you have some personal knowledge of that by reason of your trip to Nicaragua that you have testified to?

A. I personally was familiar with the situation in Nicaragua.

Q. Directing your attention to the latter part of September, 1942, Mr. Bjorge, what next happened after the events that you have covered in your testimony up to now?

A. I received on the Monday before October 1st, which I think would be September 28, a telephone call from Wilbur Nelson. The call came in the late afternoon when I was the only one left at our office.

Q. Proving that the boss always works the longest hours, I guess.

A. And he told me that a meeting had been called for Thursday, October 1st, and suggested that I come to it. I replied that I had my reservations to leave on that Thursday for San Francisco to attend a directors' meeting on the following Tuesday, and he said that he would advise me to change my plans and come to Washington.

Q. Now, did you ask him why, or what it was all about?

A. Yes, I asked him what it was all about.

Q. What did he say?

[fol. 751] A. He said he was not at liberty to tell me, but that he thought it would be definitely desirable for me to be present at this meeting. I then told him that in order to get to Washington by train in time I would have to leave within about two or three hours, and that I couldn't leave without making some arrangements with some of our staff

on pending matters. And he replied that he would get priority for me so that I could come by plane. So I put in the next day at work and left in the late afternoon and drove to Cheyenne, got a plane out of Cheyenne at 2:00 a.m. and arrived in Washington Wednesday afternoon.

Q. Would that be the 30th of September?

A. That would be September 30th.

Q. Do you recall what happened upon your arrival in Washington on the 30th, sir?

A. Yes. Congressman Case's secretary met me at the airport, and brought a message from Mr. Case that a meeting was being held at the War Production Board, I believe it was, in Mr. Batt's office that afternoon, and he suggested that I go with him to that meeting. I arrived just as the meeting concluded so that I had no part in that meeting. The meeting that I had been requested to come to Washington for was scheduled for the afternoon of the following day.

Q. Do you recall seeing anyone who was at this meeting of September 30, or had they all left by the time you got [fol. 752] there?

A. No, I met Case. Case was waiting for us because his secretary was at the airport, and I saw him for a few moments there.

Q. You did not see any of the WPB people that day?

A. I am not sure.

Q. All right now, the meeting then of October 1st was the following day, is that right?

A. That is right.

Q. Now, tell us to your best recollection about this meeting of October 1st that began in the afternoon, I believe.

A. That meeting convened at, I think, about 2:30 in the afternoon.

Q. At Mr. Batt's office, was it?

A. No, I don't believe so. It was in a rather large conference room.

Q. I see, but Mr. Batt was presiding?

A. Mr. Batt was presiding.

Q. And who else was there, to the best of your recollection?

A. Well, General McSherry, Wilbur Nelson, General Clay, and there were a number of men from various divi-

sions of the War Production Board, Mr. Hill, Mr. Lipkowitz, Mr. Harkison, Mr. Ayer, Mr. Hayes, Mr. Heikes, Mr. Hatch; and then there were Senators McCarran, Gurney, and I believe Johnson of Colorado, and Congressmen Case and Englebright.

[fol. 753] Q. Did you make notes at the time of this meeting of October 1st of some of the people in attendance?

A. I made no notes, no memorandum of the meeting, but I jotted down the men whose names I got because they spoke, or men that I knew that were in the meeting.

Q. And your listing of these names just a moment ago is predicated upon your having refreshed your recollection from this memorandum, is that right, that you are looking at now?

A. Yes.

Q. That was a list made at or about the time of the October 1st meeting, is that right?

A. Yes.

Q. And do you see on the list anyone in attendance whose name you have not mentioned?

A. Yes, Mr. Stow, Mr. Kennefee, Mr. Smith.

Q. If you know what particular branch of the WPB or the Government they were connected with, would you mention that as you mention their names?

A. Just those additional ones or all of them?

Q. Mr. Kennefee, do you happen to know what branch he was with?

A. I am not sure whether he was Service of Supply or War Manpower.

Q. How about Mr. Stow? Do you remember?

[fol. 754] A. He was in the Mining Branch of the War Production Board.

By Mr. Barnes:

Q. You referred to a Mr. Heikes, Heikes I think the name was.

A. Yes.

Q. What division was he with?

A. He was with the Lead and Zinc Division, I believe.

By Mr. Rigney:

Q. Now, have you given us the names of practically every one that was at the meeting as far as you know?

A. Except I did not give the industry representatives that were there.

Q. No. Would you do that, please?

A. There were myself, Carroll Searls, Errol MacBoyle, Mr. Shoup and Mr. McCormack.

Q. Mr. MacBoyle was president of Idaho Maryland, is that right?

A. Yes.

Q. He is deceased now?

A. Yes.

Q. How about Mr. McCormack, what was his company?

A. Mr. McCormack was with Natomas Company, a dredging company in California.

Q. Do you know whether he is living or deceased?

[fol. 755] A. I think that he is deceased. I haven't seen him personally for many years.

Q. Mr. Shoup's company is what or was what?

A. The Gold Cycle in Colorado.

Q. And Carroll Searls was connected with what company?

A. He was attorney for the Newmont Corporation which operated the Empire Star Mines at Grass Valley, California.

Q. Now, can you tell us, as near as you recall, Mr. Bjorge, what transpired at this meeting from the time it opened until it broke up, in substance, as near as you recall?

A. Mr. Batt presided and opened the meeting, and stated that an order to suspend operations of gold mines was under consideration and that they had called the representatives of the industry in order that they might be heard before a closing order was issued. I am not quite certain of the order of the procedure after that, as to whether the industry representatives were called on first or the others, or the congressional representatives. General McSherry made a statement with regard to the great need for miners in the copper mines.

Q. And did each one of the representatives of the industry have something to say?

A. Yes. The five representatives of the industry all presented their statements.

Q. Now, tell us what you had to say.

A. I presented the arguments that I had previously given [fol. 756] in oral conversations in summary with Donald

Nelson and General McSherry and General Somervell, and at greater length with Wilbur Nelson, with regard to all of the arguments for the ineffectiveness of the order, there was no machinery, no legal machinery for drafting labor, and it seemed entirely unreasonable to expect that if the miners—I was talking mainly about our own mine—were forced out of their jobs and out of their homes there that they would go to other mines to take the place of men that had left there. It was general information that there had been a great turnover of labor in all of the mines and that if they were forced to leave our place that they would go to the jobs they considered the most desirable.

I also emphasized the effect on the community, on the business in the community, the State's from the tax angle, and the fact that we were singled out for special treatment and that we at no time had objected to treatment that was applied equally to all.

Q. Is it fair to say that at this time you repeated substantially all of the arguments that you have testified to here this morning as having been advanced in your previous meetings with the various WPB officials that you had seen prior to October 1st?

A. Yes.

Mr. Rigney: Off the record.

(Discussion off the record.)

[fol. 757] By Mr. Rigney:

Q. Now, did the other representatives of the other gold mining companies who were present make statements there that day?

A. They made similar statements of account, as I recall, and they argued about the ineffectiveness of such an order, and that it wouldn't do what was proposed, would not get the men for the copper mines, and the unjustness of the order for their respective communities.

Q. Now, do you recall anyone speaking in support of the proposed order on behalf of the WPB or on the Government's side at all?

A. Yes. I recall that in addition to General McSherry of the War Manpower Commission, General Clay spoke strongly in favor of the order, Mr. Hill, Mr. Harkison and

Mr. Lipkowitz spoke favorable to the order; and Mr. Hatch, Mr. Heikes and Mr. Ayer raised questions as to the possible effectiveness of the order or possible ineffectiveness.

Q. Were those last three gentlemen that you named at that time connected with the WPB in some capacity or other? That is, Mr. Hatch and——

A. Mr. Ayer was in the Copper Division, I think Mr. Heikes was in the Lead and Zinc Division, and I don't know which division Mr. Hatch was in.

Mr. Barnes: Ferro Alloys.

[fol. 758] By Mr. Rigney:

Q. Mr. Ayer was in what division?

A. Copper.

By Mr. Barnes:

Q. What about Mr. Hill that you mentioned speaking in favor of the order? What was his position?

A. He spoke in favor of the order.

Q. What was his position?

A. I do not know.

Q. Do you know his initials, or do you have any other identification of him?

A. I just have the name Hill here in my notebook.

The Commissioner: We will recess at this time until two o'clock. Did you finish your answer?

The Witness: I was just going to say that the only indication that I had of the tone of the talks made by the different people is that I have a small cross in front of the names of Lipkowitz, Hill and Harkison as being adverse, and a check mark in front of Hatch, Heikes and Ayer.

(Thereupon, at 12:30 o'clock p.m., a recess was taken in the hearing until 2:00 o'clock p.m.)

[fol. 759] Afternoon Session

2:00 p.m.

(The hearing was resumed, at the time above mentioned, pursuant to the recess previously taken.)

GUY N. BJORGE resumed the witness stand and was examined and testified as follows:

Direct examination (Resumed).

By Mr. Rigney:

Q. I think, Mr. Bjorge, that when we recessed for luncheon you were testifying about this October 1 meeting and, as I recall it, you said that Mr. Heikes, Mr. Hatch and Mr. Ayer, who were there among others on behalf of the government, had raised certain questions as to the possible effectiveness of the proposed gold mine closing order. Now, I ask you if those three men whom you mention were men of previous mining experience prior to coming with the government?

A. I do not know Mr. Hatch's background, but I know that Mr. Heikes and Mr. Ayer had broad mining experience and were familiar with mining communities.

Q. And were those two gentlemen, Mr. Heikes and Mr. Ayer, emergency employees, if we might use that term, who were in WPB during the war period like many other people were?

A. Yes, Mr. Ayer was in the Copper Division and I think that Mr. Heikes was in the Lead-Zinc Division.

[fol. 760] Q. Now, do you recall any comment or statement at this October 1 meeting by Mr. Samuel Lipkowitz whom you testified was there?

A. Yes.

Q. Will you tell the Court what your recollection is as to what Mr. Lipkowitz had to say?

A. He gave the estimates of the number of men that were in gold mining and would be made available by the closing order as a total of 10,000 to 12,000, of whom 4,000 to 5,000 were miners.

Q. And was there discussion on that subject? Was there discussion on the issue of the figures which Mr. Lipkowitz advanced?

A. Yes, the meeting later developed the figures of the number of men.

By the Commissioner:

Q. When you say "later", do you mean at the meeting or after the meeting?

A. No, at the meeting.

By Mr. Rigney:

Q. And were those the figures that were referred to in one of the exhibits that went into evidence here, in that memorandum of October 3, 1942? Do you remember seeing that memorandum, or do you remember seeing the official minutes of the WPB meeting of October 6? Supposing I [fol. 761] show you the original of these October 6, 1942, which are in evidence here.

Mr. Barnes: Plaintiff's Exhibit 92.

By Mr. Rigney:

Q. And I ask you if the figures referred to here in this first paragraph which starts out "Mr. Batt reported . . .", are the figures that you speak of as having been the figures which were developed at this meeting?

A. Yes, except that I think the figure of 3,270 was probably corrected in the figure developed at that meeting the following day.

Q. I see.

A. At that meeting, Mr. Batt stated at five o'clock that he had other commitments, and there was a recess, and Mr. Batt had asked Wilbur Nelson to preside. And it developed from the mining industry members present the number of men that might be released if such an order were issued.

Q. Now, was there any discussion at all at this October 1 meeting on the part of anyone representing the government of the necessity of issuing this order for the purpose of conserving critical materials?

A. No.

Q. Now, have you told us as best you recall, Mr. Bjorge, of the substance of what transpired at this October 1 meeting?

A. Yes.

The Commissioner: Let me see Exhibit 92.

[fol. 762] The Witness: Yes, I have a very definite recol-

lection of the substance of the discussion, but naturally do not remember details.

By Mr. Rigney:

Q. Now, what did you next do following this meeting of October 1?

A. Well, I left Washington on Saturday evening and went to San Francisco, and on the following Tuesday afternoon I received a telephone call from Senator Gurney that the order closing the gold mines had been approved, and he gave the terms of it to the extent that breaking of ore had to be completed within one week.

Q. And after learning that the order L-208 had been approved by the War Production Board, what did you next do?

A. Then after discussion of the question with our Board which was in session when this telephone call came, I left to return to Lead as soon as I could in order to proceed with complying with the order.

Q. And this Board meeting was taking place in San Francisco?

A. Yes.

Q. What was the first official notification that you received of the issuance of the order?

A. The first official notification in other than the telephone call was a telegram from Mr. Patterson.

[fol. 763] Mr. Rigney: May this be marked as Plaintiff's Exhibit next in order.

(Said document was marked for identification as Plaintiff's Exhibit No. 132.)

By Mr. Rigney:

Q. I show you Plaintiff's Exhibit 132 for identification and ask you if this is the telegram to which you just referred as coming from Under Secretary of War Patterson?

A. This is the telegram that came to Mr. Edward H. Clark, president of the Homestake Mining Company in San Francisco.

Q. Has this been produced from the files and records of the Homestake Mining Company?

A. Yes.

Mr. Rigney: I offer it in evidence.

Mr. Barnes: Do you know when this was received?

The Witness: It is the 10th of October.

Mr. Barnes: No objection.

The Commissioner: Admitted.

(Said telegram, dated October 10, 1942, from Robert P. Patterson, Under Secretary of War, to Mr. Edward Clark, President, Homestake Mining Co., marked "Plaintiff's Exhibit No. 132," admitted in evidence and made a part of this record.)

[fol. 764] Mr. Rigney: May I read this into the record?

The Commissioner: Not if it is in evidence.

Mr. Rigney: I will call your Honor's attention to the fact that the telegram from Under Secretary of War Patterson stating the issuance of L-208 cites the need for miners in the non-ferrous metal mines, and makes no reference to critical materials as constituting any reason for the issuance of the order.

By Mr. Rigney:

Q. What was the next thing you did after the formal notification to the company of the issuance of L-208?

A. We proceeded to discontinue the breaking of ore by October 15 as specified in the order, and the layoff of men with the discontinuance of mining began at about that time.

Q. Were notices posted in that connection?

A. Yes, we posted notices on the bulletin boards in the several departments of the company.

Mr. Rigney: May this be marked Plaintiff's Exhibit 133 for identication?

(Said document was marked for identification as Plaintiff's Exhibit No. 133.)

By Mr. Rigney:

Q. I show you Plaintiff's Exhibit 133 for identification, Mr. Bjorge, being a document which purports to bear your signature. Is that your signature?

[fol. 765] A. It does bear my signature.

Q. And is this a copy of the notice to employees about which you just testified?

A. Yes. It is dated October 15, 1942.

Q. And were several copies of this notice posted at various places in the Homestake operation in the mine?

A. Yes. We have bulletin boards in every department, in some departments in several places, and notices to employees are posted on those bulletin boards.

Mr. Rigney: Plaintiffs offer Exhibit No. 133 in evidence.

Mr. Barnes: No objection.

The Commissioner: Admitted.

(Said notice, dated October 15, 1942, to employees of Homestake Mining Company, signed by Guy N. Bjorge, general manager, marked "Plaintiff's Exhibit No. 133," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. And was this announcement which you have just identified here also published in the newspaper in Lead?

A. Yes, it was published in the Lead Daily Call.

Q. Now, can you tell us what steps were taken in an effort to secure gold miners from Homestakes for the nonferrous metal mines?

A. Yes, we received a request to meet with certain officials that were coming to Lead, and we did so. The meeting was [fol. 766] in Mr. Chambers Kellar's office. He was our senior counsel at the time.

Q. And when you say "we", whom do you include in that?

A. Well, for the company, Mr. Kenneth Kellar and I were present, and there arrived seven men from the government.

Q. Perhaps you would like to refresh your recollection with respect to them?

A. I think I have the names of the men, but by refreshing my memory I can give their connections.

Q. They were representatives of the War Manpower Commission?

A. War Manpower Commission, U.S.E.S., Selective Service.

Q. Let us have those.

A. Mr. McCusker, War Manpower Commission, Denver;

Colonel Andrews, Selective Service, Washington; Major Hutchinson, Services of Supply, Washington; Major Ryan, Selective Service, South Dakota; Mr. McCullen, Employment Service from Minnesota; Mr. McDonald, Employment Service from South Dakota; and Mr. Bjerke, Publicity from Washington. His name happens to be very close to mine but it is B-j-e-r-k-e.

Q. And did those gentlemen stay in Lead for several days?

A. We met with them on October 14, with five of them on October 14, and all seven of them on October 15.

Q. And then, if you know, can you tell us what followed [fol. 767] so far as the efforts to obtain miners from Homestake to go elsewhere?

A. Mr. McCusker was the principal spokesman in the thing, and he outlined the plans for the work of the U.S.E.S. which proceeded to set up an office in Lead, and Mr. McCusker stated that it would be their aim to refer our men to nonferrous metal mines with Anaconda as number one, and Climax Molybdenum as number two in order of choice.

Q. And do you know how long those recruiting efforts went on, how long they were there?

A. I think that the U.S.E.S. office in Lead was open for about two months.

Q. I see.

A. Mr. Sandell was placed in charge of this office.

Q. Can you say of your own knowledge whether or not these U.S.E.S. people interviewed any considerable number of Homestake miners?

A. Well, Mr. Sandell conferred with us a number of times during that time, and he gave us the information that substantial numbers were interviewed in their office, many of whom were referred and some were not, and that on the basis of the number of men that we had laid off and the number that came to their office, there was over 100 that never went to the U.S.E.S. office.

Mr. Barnes: Your Honor, I object and move to strike that [fol. 768] as being a conclusion on the part of the witness.

The Commissioner: Will you read that back?

(The pending answer was read by the reporter.)

The Commissioner: Overruled.

By Mr. Rigney:

Q. Would you be able to give us a figure as to the approximate number of men who were interviewed by the U.S.E.S. people?

Mr. Barnes: Your Honor, I object unless the source of the witness' knowledge is shown.

The Commissioner: He has already testified that Mr. Sandell made certain statements to him. If he knows, he may be permitted to answer.

By Mr. Rigney:

Q. Do you know from your conversations with Mr. Sandell or any of the other officials of U.S.E.S. how many were interviewed?

Mr. Barnes: Your Honor, this is bringing in a new element now.

The Commissioner: Yes, it does. Sustained.

By Mr. Rigney:

Q. Do you know from your conversations with Mr. Sandell how many were interviewed?

A. I don't remember without refreshing my memory as to the number of men that were interviewed.

[fol. 769] Q. Do you know of your own knowledge whether at a period within a few days prior to October 8, 1942, recruiters were in Lead from other industries interviewing laborers, miners?

A. There had been recruiters prior, a recruiter from Anaconda, and during the period that the U.S.E.S. office was open, there was a recruiter there from Basic Magnesium.

Q. Now, Mr. Bjorge, can you tell us what the fact is from your own knowledge with respect to the Homestake labor force after October, 1942?

Mr. Barnes: Your Honor, I object to this on two grounds: One, I fail to see the relevance and materiality of the October 1 date; in the second place, I object on the grounds that the employment records would be the best evidence.

The Commissioner: Sustained.

Mr. Rigney: We have some records here, Your Honor.

By Mr. Rigney:

Q. Do you have some data with you, Mr. Bjorge, relating to the labor force at Homestake about this time, October, 1942?

A. Yes, I have a summary of the number of men that were separated from our employment between the time of issuance of L-208 and December 31, 1942. That summary is developed from the full list of men laid off which is here and was prepared under my direction by our employment office from the records, routine records kept there.

[fol. 770] The Commissioner: Is this the kind of testimony that it was anticipated would be discussed between counsel ahead of time and that a stipulation would be entered?

Mr. Rigney: There have been discussions between Mr. Barnes and Mr. Connor, your Honor. I think we may be able to expedite it.

Mr. Connor: That covers a little different phase.

Mr. Barnes: I am not sure what the situation is here. Shortly after the first of the year, Mr. Connor submitted to me a schedule dated by the company December 18, 1952. That has been sent to the FBI with a request for audit. It does, as has been indicated here, include some 2,000 names. I spoke to you informally about it and indicated to you that it was going to be, in my opinion, absolutely impossible for the FBI to complete an audit for that prior to the date set for the commencement of this hearing. I have received no report from the FBI as yet as to the results or progress of that audit.

Mr. Connor: Just parenthetically, we intend to offer that compilation which we handed Mr. Barnes on January 5, but I think that we are now attempting to introduce on matters which are not actually covered by that report, in our proof here. As far as the compilation goes, it was prepared promptly and delivered to Mr. Barnes assoon as I could get to see him after I received it.

[fol. 771] The Commissioner: Well, with respect to the "promptly", it was the distinct impression that I had at pre-trial that any of those matters about which stipulation was contemplated would be submitted to counsel for the defendant 60 days prior to trial.

Mr. Connor: Excuse me, your Honor. I think it was six

weeks. There was a discussion of six weeks prior to trial.

The Commissioner: I believe so.

Mr. Connor: But you will recall at the hearings in Seattle on Alaska-Pacific Consolidated Mining proof, we discussed and decided that we would use social security records to prove at least where the men went to after closedown. We all decided that would be a good way to do it. We attempted to check in Seattle at the Social Security office in the same building, as you may recall, and they could not tell us definitely what facts would be learned from those records, and we promptly started to get our records together on social security numbers. And I believe that Mr. McGuire either conferred with Mr. Barnes or with you, or all three of you conferred together and it was found that social security records were unavailable for any purpose.

The Commissioner: Because of the statute.

Mr. Connor: Because of the statute itself which makes them unavailable for any purpose. And as a result the [fol. 772] work which we had started on preparing the form of proof which we finally submitted to Mr. Barnes was not carried forward because we thought we were going to get it through social security records. I do not think that Mr. Barnes has really any serious doubt that these were prepared from our records, and my suggestion is that when we get around to offering this exhibit which gives him details, it be taken subject to verification by the FBI and, if it is shown that the facts are not as we have set them forth, then we will have to reopen the hearings and submit other proof, or be bound accordingly.

Mr. Barnes: With one exception, your Honor, that is a satisfactory agreement to me as Mr. Connors stated. I am afraid that he has shifted the burden of proof, in effect, by putting in the unaudited schedule, as he stated it, he is casting on me the burden of proving error. I will not assume that burden. I am willing to accept the schedules subject to verification, but upon my notice to counsel for plaintiffs that we have been unable to verify the schedule, it seems to me that then it is subject to motion to strike.

Mr. Connor: Then I will repeat what I said at the Seattle hearing, and then we will have to proceed to Lead and either take testimony by interrogatories or depositions, or hold hearings out there over whatever is necessary to complete this proof, which we think is very important from the

standpoint of our case. I do not think that we should have to do that. I think that we are all sensible people.

[fol. 773] (Here followed discussion off the record.)

Mr. Barnes: It seemed to me we had gotten away from the question which was immediately before us. The document which they are now offering seems to me to be some other employment record which has never been submitted to me for verification.

The Commissioner: That is why I asked the question. I thought that there had been some decision with respect to some efforts toward stipulation being made, if not concluded.

Mr. Connor: This was a record which was in the Homestake office at the time I arrived in Lead and, as a result of these preparations which they had, the exhibit here which Mr. Barnes has a copy of and which we intend to offer was prepared from it. This is in summary form and sets up the various figures which are in here. That is the situation.

The Commissioner: Well, I just asked a question so that I would know what the situation is with respect to employment records.

Mr. Connor: All this is a summary.

The Commissioner: Do not interrupt.

Mr. Connor: I am sorry. I beg your pardon.

The Commissioner: I just asked the question so that I would be able to understand what the situation was with respect to the efforts toward stipulation concerning employment records and the manner in which that might re-

[fol. 774] late to the present line of testimony and the exhibit which counsel has in his hands.

Mr. Rigney: May I suggest, your Honor, that we defer this for the moment. I am ready to go on to a different topic and at the recess perhaps counsel can agree upon some arrangement which will resolve the problem.

Mr. Connor: What I started to say, your Honor, is that this is simply a recapitulation to refresh Mr. Bjorge's recollection as to what actually appears in those records.

The Commissioner: I did not mean to alter the course of the examination. I merely wanted to get information. If you want to defer it until the recess, it is all right. That is up to you.

Mr. Rigney: All right, sir.

May this be marked Exhibit 134 for identification?

(Said document was marked for identification as Plaintiff's Exhibit No. 134.)

By Mr. Rigney:

Q. Mr. Bjorge, will you look at Plaintiff's Exhibit 134 for identification, please, and tell us what that is.

A. This is a recapitulation of the total number of Homestake Mining Company employees by departments who were laid off or quit as a result of the War Production Board Order L-208 up until December 31, 1942.

Q. What is the basis for the figures which appear on [fol. 775] here? Where are they taken from?

A. From employment office records, which has an individual card for every man with his record of date of employment, date of separation, and any other information with regard to his employment or his marital status, number of dependents.

Q. And are those cards and records kept in the regular course of your business?

A. They are kept in the regular course of business.

Q. Is it the regular course of your business to keep those records?

A. For 40 years I think they are entire and complete. They are incomplete prior to 1912 but since then are complete.

Mr. Rigney: Plaintiffs offer Exhibit 134.

Mr. Barnes: I object on the grounds that it is not the best evidence.

The Commissioner: Sustained.

By Mr. Rigney:

Q. Mr. Bjorge, did the Homestake Mining Company take an appeal following the issuance of L-208 on October 8?

A. Yes.

Q. Do you recall how soon after the issuance of the order the appeal was taken?

A. About ten days, I think.

Mr. Rigney: May this be marked Plaintiff's Exhibit 1[illegible] [fol. 776] for identification?

(Said document was marked for identification as Plaintiff's Exhibit No. 135.)

By Mr. Rigney:

Q. I show you Plaintiff's Exhibit No. 135 for identification, and ask you if that is a copy of the appeal which Homestake submitted to the War Production Board following the issuance of L-208?

A. That is the copy of the appeal, signed by me.

Q. And was this the return receipt which you received from the WPB?

A. That is the receipt for a registered article.

Mr. Rigney: Plaintiffs offer in evidence Exhibit No. 135.

Mr. Barnes: Your Honor, I was showing some amusement here. I picked up the WPB appeals file and find a file several inches thick not in chronological order. I will have no objection to this, subject to verification.

The Commissioner: It may be admitted.

(Said document, dated October 17, 1942, appeal of Homestake Mining Company from War Production Board Limitation Order L-208, with accompanying receipt for registered article number 997, marked "Plaintiff's Exhibit No. 135," admitted in evidence and made a part of this record.) ord.)

[fol. 777] By Mr. Rigney:

Q. Now, do you recall that the War Production Board granted Homestake a hearing on this appeal?

A. Yes, it did.

Q. And you attended that hearing?

A. Yes.

Q. And Homestake was represented by counsel there?

A. That is right.

Q. And testimony was taken, or at least statements were made by people appearing there on behalf of Homestake, is that correct?

A. Yes.

Mr. Rigney: May this be marked Plaintiff's Exhibit No. 136 for identification?

(Said document was marked for identification as Plaintiff's Exhibit No. 136.)

By Mr. Rigney:

Q. I show you Plaintiff's Exhibit No. 136 for identification, Mr. Bjorge, purporting to be the verbatim transcript of the hearing by the W.P.B. Appeals Board and Homestake Mining Company's appeal, November 12 and 13, 1942, and ask you if you have examined that document recently?

A. Yes, I have.

Q. You have read it through, have you, within recent weeks?

[fol. 778] A. Yes.

Q. And is that a transcript of the proceedings of the appeal on the 12th and 13th of November by Homestake from Order L-208.

A. Yes.

Mr. Rigney: Plaintiffs offer Exhibit No. 136 for identification in evidence.

Mr. Barnes: Go back a minute, your Honor, I have found the original of Plaintiff's Exhibit No. 135 and made a hasty check of it. That is a correct copy of it.

The Commissioner: Very well.

Mr. Barnes: From what source did you get that transcript, Mr. Bjorge? Do you recall?

The Witness: I think our counsel obtained it in Washington and sent it to us.

By Mr. Rigney:

Q. Do you know if he obtained it from the War Production Board or through the War Production Board?

A. I would certainly assume so, but I don't know of first hand knowledge.

Mr. Rigney: I notice on page 2 the notatiey of who reported it. You will be better familiar than I, Mr. Barnes, with some of the symbols there. I think it was an official WPB reporter.

The Witness: It was obtained shortly after the hearing.

[fol. 779] Mr. Rigney: It is my understanding that this was a reporter there employed by the WPB, and that is

the report. I cannot make that absolute statement to your Honor, but that is what I understand.

Mr. Barnes: Subject to verification, I have no objection.

The Commissioner: Admitted.

(Said volume, dated November 12 and 13, 1942, verbatim transcript, Appeals Board, WPB, Homestake Mining Company, marked "Plaintiff's Exhibit No. 136", admitted in evidence and made a part of this record.)

Mr. Rigney: May this be marked Plaintiff's Exhibit No. 137 for identification?

(Said document was marked for identification as Plaintiff's Exhibit No. 137.)

By Mr. Rigney:

Q. I show you Plaintiff's Exhibit No. 137 for identification, Mr. Bjorge, being a letter dated November 25, 1942, from the War Production Board, which carries the name of Ernest Kanzler at the bottom, addressed to the Homestake Mining Company, Lead, South Dakota, and ask you if that communication was duly received by Homestake?

A. That was duly received. It has the notation initialed by me that it was received on November 29, 1942.

Q. Does this represent action of the Appeals Board on your appeal?

[fol. 780] A. Yes.

Mr. Rigney: Plaintiffs offer Exhibit 137 for identification in evidence, your Honor.

Mr. Barnes: The typing that appears under Mr. Kanzler's signature is apparently a different typewriter. It was not on there when you received it, the parenthetical note there?

The Witness: I think it was.

By Mr. Rigney:

Q. Is it possible that that was put on by someone in Homestake's office for the information of Homestake?

A. It may have been. It may have been subsequent to a modification that we received later, but it wouldn't be customary to make such notation on the original letter in

our office. I only state that from the manner of our custom, not direct memory.

Mr. Barnes: Your Honor, I have the original file copy, the document here, which does not have that notation on it.

Mr. Rigney: May the exhibit be received with this typing underneath Mr. Kanzler's name, physically excided from the document?

Mr. Barnes: I do not care if it is physically excided but just with the understanding that it was not in the document of the War Production Board?

The Commissioner: It may be received.

[fol. 781] (Said letter, dated November 25, 1942, from War Production Board, to Homestake Mining Company, signed Ernest Kanzler, marked "Plaintiff's Exhibit No. 137", admitted in evidence and made a part of this record.)

Mr. Rigney: May this now be marked Plaintiff's Exhibit 138 for identification?

(Said telegram was marked for identification as Plaintiff's Exhibit No. 138.)

By Mr. Rigney:

Q. I show you Plaintiff's Exhibit 138 for identification, Mr. Bjorge, being a telegram to you as general manager of Homestake Mining Company from Washington, D. C., bearing the name Wilbur A. Nelson, Administrator of Order L-208, and the month November in the year 1942. The date has been torn off. I will ask you if that telegram was received by Homestake?

A. Yes, that telegram was received.

Q. With reference to the appeal?

A. Yes.

Mr. Rigney: Plaintiffs offer Exhibit No. 138 for identification in evidence.

Mr. Barnes: Subject to verification, no objection.

The Commissioner: Admitted.

(Said telegram, bearing identification time 1942 Novem-
[fol. 782] ber, from Wilbur A. Nelson, Administrator of Order L-208 to Guy N. Bjorge, general manager, Homestake Mining Company, marked "Plaintiff's Exhibit No. 138," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Can you tell us now, Mr. Bjorge, by looking at Plaintiff's Exhibit 137, the letter from Mr. Kanzler about the appeal, and Plaintiff's Exhibit 138, the telegram that you have just identified, if this notation at the bottom here was placed down there as a result of receiving this telegram? I do not know whether you know or not, but if you do know, I would like you to tell us.

A. This was permission to employ an additional 60 men in addition to the number that had been stated in our hearings required for proper maintenance of the property.

The Commissioner: That does not go to this.

By Mr. Rigney:

Q. I just want to know if you now recall whether or not the notation here——

A. Is the substance of that telegram?

Q. —was placed on there at Homestake's office as a result of having received this telegram?

A. I think it probably was.

Q. Now, Mr. Bjorge, when did the Homestake gold mine shut down completely except for maintenance by a standby crew?

[fol. 783] A. The decision on our appeal permitted us to continue in operation for an additional six months after December 8, 1942, for the purpose of drawing and milling previously broken ore. It finally ceased that operation near the end of May, 1943, and the final bullion shipment was made on June 2, 1943.

By the Commissioner:

Q. When did you stop breaking ore?

A. By October 15, seven days after the date of the order. That was specified.

By Mr. Rigney:

Q. Will you now describe, Mr. Bjorge, what the situation was so far as the operations of Homestake were concerned from June, 1943, to the rescission of Order L-208 on June 30, 1945?

A. During that period all production was suspended, the mine was maintained in good condition, and all of the surface plant was maintained. The power plants were operating of necessity for the production of power for the operations that were continuing: the operation of the sawmill, the operations in our shops, pumping the water out of the mines, pumping water for the City of Lead.

Q. You refer to pumping water out of the mines. Could you tell us just a little bit how extensive an operation that is in order to maintain the mine?

A. Well, I stated previously that Homestake was a relatively dry mine. That term is purely relative. All mines [fol. 784] make some water, and pumping was continuous in operation at about 500 gallons a minute.

Q. 500 gallons a minute?

A. Yes, pumped from various depths in the mine down to the 5,000 level.

Q. And is that a continuous process, 24 hours a day?

A. Yes.

Q. What about hoists and underground maintenance?

A. Well, the hoists have to operate as long as there are men under ground.

Q. Would you explain what you mean by "hoists"?

A. Well, the hoist is the engine that operates cages and skips in the shaft for handling men and materials into the mine and out again. The mine is very extensive. It has upwards of 200 miles of level workings on which there are upwards or were at that time upwards of 80 miles of narrow gauge track on 29 levels. The shafts and shaft stations are timbered and the timbering must be replaced at times whether it drops or breaks from pressure, and all of the pillar stopes are timbered and the access to them. Certain portions of the drifts are timbered and must be repaired from time to time.

Q. You referred to 29 levels. Did you expand on that just a little bit as to just what you mean by that?

A. Well, from the surface to the 1100 level, there are mine levels at 100 foot intervals. From the 1100 level to [fol. 785] the bottom of the mine, they are at vertical intervals of 150 feet, so that there are actually down to the 5,000 level 37 levels, but 29 were active at that time. Some of the upper levels were mined out and not active.

Q. Do I understand by that that there were mining operations being conducted on 29 levels at that time?

A. Yes. The levels are openings. A tunnel would be a better lay term than the terms drifts and crosscuts that we use in mines, that are driven out from the shafts to the places where the ore occurs, and beyond that doing exploration for new ore bodies.

Q. What can you tell us about the metallurgical department after the closedown order?

A. Well, the metallurgical department has a large plant, at that time consisting of a 180 stamp mill, two cyanide sand plants which had a total of 27 leeching vats of 700 tons capacity each, in which the sand fragment was leeched, and a slime plant in which the slimes, which is the very finest product after grinding, was treated in filter presses, leeched by a cyanide solution.

Q. What about the machine shops?

A. The property also has complete machine shops, blacksmith shop, drill repair shop, drill sharpening shop, and foundry, and the foundry, machine and blacksmith's shops, were operated through the shutdown period in efforts to [fol. 786] manufacture various things for the war effort.

Q. What were some of those things?

A. Well, in some cases, we knew and in some cases we didn't know. They were the manufacture of parts that were——

Q. Components of something?

A. Components of airplanes, ships, they ranged from small parts for airplanes to large, 10 inch shafts, some 10 feet long or more that probably were for ships. The thing that was perhaps most interesting to us that we manufactured at that time far inland in a mountain section of the country were fishing net weaving machines. We began by making parts for a Chicago concern and shipping them to them for assembly, but toward the end of the war we assembled one complete machine at Lead. Our shops were repair and maintenance shops in which a great majority of the time one part may be made and later, for example, they may make one part of one kind and then it has to be set for another part of another kind. So that they were not well adapted to quantity production of identical units, but we did the best we could with them.

Q. I was going to ask you whether you were set up for mass production of any sort.

A. No. On mass production of identical units, most of those machines would be semi-automatic or in most cases automatic. Ours had all to be manually operated.

Q. Now, were these activities that you have just been de- [fol. 787] scribing that were going on in the shop going on prior to the shutdown?

A. They began just shortly before the shutdown. We were in negotiations with people who wanted us to make things for them before the shutdown, but the first actual work began just very shortly before the shutdown.

Mr. Barnes: What do you mean by "very shortly"—weeks, days, hours?

The Witness: I think a week or ten days. And at the end of the period we had a contract to case hand grenades which we had to do a lot of experimental work on before we could get any quantity production on them, and just reached quantity production when the war ended.

By Mr. Rigney:

Q. Now, Mr. Bjorge, the testimony here is, and I think you will agree, that Homestake lost its serial number under P-56, on March 2, 1942, is that right?

A. That is correct.

Q. Let me ask you now, assuming that Order L-208 had not been adopted by the War Production Board and that Homestake mine had been permitted to continue operations subject to the existing priorities and allocations, can you say what effect such operation would have had on Homestake's productive capacity in its lumber and timber operations and in its shop, so far as this War Production [fol. 788] program that you have described is concerned?

A. I don't think it would have made any difference. Our lumber and timber operation produced mine timber and that is timber that was framed in lengths shorter than the usual commercial lumber for use in the mine, and then produced commercial lumber from site cuts and from logs that wouldn't produce mine timber. We had a large stock of plain mine timber in stock in our sawmill yards at the time that would have lasted us through the shutdown period even though we had produced for commercial sales throughout the war.

Q. Were your shops and lumber operations operated on a seven hour day?

A. Yes.

Q. When was that established?

A. That was established in 1940.

Q. Was that changed anytime during the war period?

A. No, because of the suspension of our operations, we didn't change that.

Q. Now, can you tell us up to the issuance of the L-208 on October 8, 1942, what effect labor shortages and priority restrictions had had on Homestake's operations?

A. Well, they naturally had had an effect on our operation, but they had not reduced our production. We had adjusted operations to the shortages and were still producing at the full capacity rate.

[fol. 789] Q. Would it have been possible with the shorter labor force and priority restrictions in effect to have continued a profitable operation, assuming that Order L-208 had not been issued?

A. Yes.

Q. Now, has there been any previous experience in Homestake's history upon which you predicate that conclusion?

A. In World War I, labor shortage developed and they maintained full production in tonnage and ounces of gold with the shorter labor force.

Q. Now, Mr. Bjorge, would you explain the type of ore body in the Homestake mine?

A. Well, the ore mines were described by Mr. McLaughlin on the opening day, but I think it is well to describe in a little more detail the size of them.

Q. Would you like me to get that chart?

A. The ore occurs in one formation in metamorphic rocks that are very highly potent, so that the traces of that formation either on horizontal level or vertical plane are very crooked. In certain folds of that structure the ore bodies occur. Sometimes they may be only two feet wide, and at other times, they may be in widths running up to a maximum of 400 feet wide. They have been followed from the surface. The main group of ore bodies have been followed from the surface to the 5,000 level. There are other ore [fol. 790] zones, one that was followed from the surface to about the 1400 level and played out at that depth, and another large ore body that was first found at a depth of

3200 feet and has been followed upwards and downwards along the pitch from that.

Q. Now, would you tell us what the normal underground procedures are which are followed to exploit these ore bodies?

A. Of course, at the beginning of a mine, you have to sink from the surface at open levels. I think we might assume now that in an operating mine, and that the mine is deepened to a new level, on that new level drifts or tunnels are driven out to the ore areas. Then there is a great footage of drifts, cross cuts, raises. The raises are vertical openings. Then they drill holes to delimit the ore bodies, to find the ore bodies, and to outline them. Then further work is done to get the necessary openings to make them available for ore extraction. And finally the ore extraction begins. In Homestake along the length of the ore body the stopings are laid out across the full width of the ore body, in alternate 60 foot and 40 foot distances in the direction of the length of ore body. Then the original stoping begins with the 60 foot sections. I think probably those diagrams will illustrate.

Q. What is the meaning of that term "stoping"?

A. Stoping is the process of ore extraction, and the stope is the opening in which the ore is being broken and taken out.

[fol. 791] Q. Now, can you describe the procedures which are used after ore is withdrawn from the stopes?

A. Well, after the ore is withdrawn from the stope it is drawn into mine cars and hauled in trains around to the shafts where it is dumped into ore pockets and transfer raises, and then eventually drawn from those into the skip, which is the bucket in which the ore is hoisted to the surface in our two shafts. Those buckets in one shaft have a 7-ton and in the other a 10-ton capacity. The ore is hoisted to the surface, crushed into about 1½-inch size at that time, and then it passes into storage bins that are directly at the shafts from which the ore is drawn into cars and hauled by train to the mill, where the process of crushing with stamps and grinding in rod mills and ball mills continues until the material has reached a fineness from which the gold can be extracted.

In the stamp mill, or rather in the rod mill section of that mill, 65% to 70% of the gold is extracted by amalgamation. The residue from that operation is then re-

ground and reclassified into sands and slimes. The sand portion is a fine sand, but it is still coarse enough to settle quickly in water, although it is very fine and can be leached in large vats. The slimes are so fine that they cannot be leached in that way. They do not settle in water and they are leached in filter presses. The slimes will substantially all pass through 300 mesh, and that means that there are 90,000 openings to the square inch, much finer than flour. [fol. 792] The chemical process in the sand plant and the slime plant is the same, but the physical method of treatment is different. They are leached by a cyanide solution which has the power of dissolving gold like coffee dissolves sugar, and it goes into a solution which contains about two cents in value to the quart, and minute quantities of zinc dust are added which precipitates the gold out of the solution, and that precipitate is collected in filter presses and eventually both the amalgam from the mills and the precipitate from the cyanide plants go to a small refinery we have which is virtually a miniature smelter where they are treated and fine gold is ultimately produced.

By the Commissioner:

Q. What is the filter press you speak of?

A. They are steel frames with plates in between, and a filter media of duck or twill. And in the space in between in the slime plant, for example, there are, I think, ninety such frames in each press. When a mixture of finely ground ore and water passes into that press the liquid, the water and cyanide solution passes through the filter cloth while the slime remains as a cake in that press. And in the collection of the precipitate, after cyanidation, the solution containing the gold and the precipitate is passed through a similar, much smaller filter press, and the precipitate collects as cakes between the filter cloths and the press is [fol. 793] opened once a week and all of that precipitate carefully cleaned out and transported to the refinery.

The Commissioner: It did help to go through a gold mine and see it in operation.

By Mr. Rigney:

Q. Now, Mr. Bjorge, assuming that Order L-208 had never been issued, and assuming that shortages of labor

and materials would have existed during the period of actual shut-down, can you tell us what specific changes in your operations could have been undertaken and would have been undertaken?

A. In our operations we could have eliminated all development work.

Q. Now, may I ask you if you would just expand a little bit on that development work?

Mr. Rigney: Let this be marked, please, Plaintiff's Exhibit 139 for identification.

(Said photograph was marked for identification Plaintiff's Exhibit 139.)

By Mr. Rigney:

Q. I show you Plaintiff's Exhibit No. 139 for identification, and ask you what that photograph represents?

A. This photograph represents a drift heading, a place in which a drift is being advanced, taken in the Homestake mine. The picture happens to be dated April 18, 1934, but the situation would have been the same in 1942. It is one [fol. 794] part of the development work, the advancing of drifts and cross-cuts. And this shows an operation with two miners with their machines set up for drilling.

The cycle of operation would be that those miners would come on the shift in the morning, clean up, if there was anything remaining to be cleaned up in that drift heading from the previous day's work, set up their machines, and drill something like twenty-eight 6½-foot holes, and then take their machines down and remove them, load the holes with dynamite and, at the end of the shift, blast. On the opposite shift the broken material would be removed, and the following day the same cycle would begin over again, with the advance of about sixty in twenty-four hours of the drift heading.

By Mr. Barnes:

Q. What is the difference between a drift and a cross-cut? You used those two terms.

A. The drifting was developed from the old idea of simple vein deposits, that a drift was along the length of the vein. Drifts that are parallel with that in the wall are

also called drifts, and the drifts across at right angles to the long section of the vein are called cross-cuts. They are the same kind of opening, but it just designates whether you are going in the long direction of the ore body or across it.

Mr. Rigney: Plaintiff offers in evidence Exhibit 139 for [fol. 795] identification.

Mr. Barnes: No objection.

The Commissioner: It is admitted.

(Said photograph of drift heading operation, marked "Plaintiff's Exhibit No. 139, admitted in evidence and made a part of this record.)

The Commissioner: We will recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearing.)

By Mr. Rigney:

Q. Mr. Bjorge, had you completed your testimony with regard to the development operation? Was there anything you wanted to add to that?

A. The description here was of a drift heading. There would also be the driving of many cross-cuts as we have explained them, and the vertical openings called raises, and diamond drill holes, in order to sample and bring up the ore.

Q. In addition to this development program, I think you indicated that there were two other steps that you could have taken, or changes which you could have made in your operations.

A. Yes.

Q. What were those?

A. With a shortage of men, we would have eliminated the pillar stopes and confined our production to the shrinkage stopes, with a very much smaller use of expendable materials, and much greater production per man.

[fol. 796] I may say that in normal operations, our aim is to have a balanced operation in which each year you endeavor to develop as much new ore as is mined during that year. That does not hold for one particular year, but

it will hold over an average of years, because one year your development results may be better than expected and another year are not as good. The aim is also to keep a proper balance between the different methods of stoping in order to eventually mine out all of the ore. But whenever you get in a tight pinch you meet that, and we could under those circumstances confine our operations to the shrinkage stopes, and we could have, the third item, returned to the eight-hour shifts.

Q. Now, in connection with what you have had to say about the changes that could have been made in your development program, Mr. Bjorge, I would like to show you Plaintiff's Exhibit 139 and ask you if the machines and drill steel and other tools shown in that photograph are usable or were usable in shrinkage stoping?

A. Yes, definitely.

By Mr. Barnes:

Q. What is the difference between shrinkage stopes and pillar stopes?

A. It is quite a long story, but we will come to it very soon.

Mr. Connor: We are coming to that practically next.

[fol. 797] By Mr. Rigney:

Q. Can you tell us what Homestake's ore reserves as of October 8, 1942 were?

A. Yes, because it was the same as the estimate that was prepared for December 31 of that year, and it was 19,400,000 tons.

Q. Now, would the existing reserves as of October 8, 1942 have been sufficient to have furnished ore for the shut-down period without the performance of any development work?

A. Yes.

Q. Can you tell us what the basis for your conclusion is?

A. I can show you, this is the curve of the tonnage of ore in reserve (indicating) and you will note that prior to 1938 the reserve of developed ore was maintained at substantially 15,000,000 tons. Late in 1936 we had found a

new ore body, and the development of that ore body, in subsequent years, increased our reserves so that at the end of 1942 it was 19,400,000 tons.

We could, therefore, have mined 4,400,000 tons, which would be equivalent to a little more than three years' production, without doing any new development work and still have the ore reserve which had been the normal reserve prior to 1938.

Mr. Rigney: I think perhaps the most expeditious way is [fol. 798] to have these five exhibits marked now, your Honor.

The Commissioner: Yes.

(Said documents and photographs were marked for identification Plaintiff's Exhibits Nos. 140 through 144.)

By Mr. Rigney:

Q. Would you look, Mr. Bjorge, at Plaintiff's Exhibit No. 143 for identification, and tell us what that is?

A. That is a vertical projection in the direction of the long dimension of the ore body. The ore body is the red portion projected down through here (indicating). The alternate 60-foot and 40-foot distances in the direction of the length of the ore body are shown down here at the bottom. These going back show the different stages in a shrinkage stope. There is where the stope is starting (indicating) at the bottom of the ore body. It will be of considerable width at right angles to this section. And it is carried up. And the reason for the term "shrinkage stope" is that when you break the ore it expands in volume over the ore in place by about one-third, and that third is drawn off, and the remaining two-thirds is left in the stope and serves as a floor on which the miners work in drilling and blasting the next round. And the stope continues to go up until it reaches as great a height as is safe, and then all of the ore is drawn out of it and it is filled with waste, and the stoping again begins and is carried through until that stope is mined through from the bottom to the top of [fol. 799] the ore.

In that system of mining very little timber is used. The only timber necessary is for the drift and the chutes and

for these drifts after they are filled. What we call a timber line or line of drift sets with chutes for drawing the ore are installed. But beyond that there is no timber in the stope.

May I have the next section?

Q. Yes sir.

A. This is a similar section.

Q. Referring to Plaintiffs' Exhibit 144 for identification.

A. —— in which the shrinkage stopes have been finished and filled with waste. Then the 40-foot sections between the shrinkage stopes, where the ore has been mined across the full width of the ore on both sides will not stand the way the first opening will stand, and that is extracted in much smaller openings, with timber support for every round taken out. One round is blasted and then that cleaned out and that space supported by timber, and another one taken out, and so forth. We generally begin at the top and take those sections out in 75-foot vertical lifts. And when this one is finished (indicating) another one starts. Here we see one that is finished, and another one is started and well on its way there. (Indicating). Those are of considerable widths at right angles to these diagrams, and each one of these little squares in the pillar stopes [fol. 800] represents one set, one square set as we call it, and the square set mining requires a great amount of timber. The timber consumption in shrinkage stoping is about one board foot per ton of ore mined. In the square set it is about fourteen or a little over fourteen board feet per ton of ore mined.

It also requires a great deal more work in transporting of supplies, timber and steel and what not into the pillar stopes than it does to the shrinkage stopes.

Mr. Rigney: I should like to offer these, Plaintiffs' Exhibits 143 and 144, in evidence. They might be useful, I think.

Mr. Barnes: There is no objection, as illustrative of his testimony, your Honor.

The Commissioner: They may be received.

(Said diagrams of stoping operations, marked "Plaintiffs' Exhibits Nos. 143 and 144", respectively, admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Now, Mr. Bjorge, would you look, please, at Plaintiffs' Exhibit No. 140 for identification and tell us what that picture depicts?

A. That is a picture taken in the Homestake mine of a shrinkage stope, showing three crews with their machines set up and drilling, showing how they are working on top of the broken ore.

[fol. 801] Q. And is Plaintiffs' Exhibit No. 41 for identification also a photograph of a shrinkage stope?

A. That is also a photograph in a shrinkage stope. The one man has a machine set up drilling to break ground and the other one is drilling for the secondary blasting where boulders are too large to go through the chutes. We speak of it as block holding. They drill and blast the boulder. That is where the man is drilling downward.

Q. Similarly, is Plaintiffs' Exhibit 142 for identification a photograph of a shrinkage stope of Homestake?

A. This is another photograph in a shrinkage stope, and I may add the remark that this photograph is obsolete, in that the miners are using carbide lamps instead of electrical lamps.

Q. But as a shrinkage stope it depicts typical——

A. Typical shrinkage stope conditions.

Mr. Rigney: Plaintiff offers these in evidence.

Mr. Barnes: I have no objection.

The Commissioner: What are those numbers?

Mr. Rigney: 140, 141 and 142, your Honor.

The Commissioner: They may be received.

(Said photographs of Homestake shrinkage stopes, marked Plaintiffs' Exhibits No. 140, 141 and 142, respectively, admitted in evidence and made a part of this record.)

[fol. 802] By Mr. Rigney:

Q. Would you briefly summarize, Mr. Bjorge, what the adoption of this plan for concentrating on shrinkage stoping would have accomplished in the way of savings of scarce materials and labor?

A. Well, it would get materially more production for each man working. Our figures for that in 1942 were that

in shrinkage stoping we got about 12 tons per manshift, and in square set stoping 8.7 tons per manshift. It would have greatly decreased the consumption of materials. The ratio of the amount of timber used would be 1 to 14 in the pillar stopes.

By the Commissioner:

Q. Do I understand that your usual practice does not involve the shrinkage stopes?

A. Oh yes, but we would have limited the operation to the shrinkage stopes in case of extreme shortage of men and materials.

Mr. Rigney: We are going now into the square set stoping.

The Witness: That is over a long period of time, you would want to have what I described as a balanced operation. But if you were faced with a temporary limitation of manpower and supplies, you would adjust yourself to that and get the maximum production during that period that you could get, and, as is shown by our ore reserves, we could do that.

By the Commissioner:

[fol. 803] Q. Well, does that contemplate then leaving these portions which are shown on this Exhibit 144 in red in between the two black portions, leaving the parts shown in red alone?

A. Leaving them to be mined at a later date.

The Commissioner: That is what I wanted to know.

Mr. Rigney: May this be marked Plaintiffs' Exhibit 145, and also 146.

(Said photographs were marked for identification as Plaintiffs' Exhibits Nos. 145 and 146.)

By Mr. Rigney:

Q. I show your Plaintiffs' Exhibit No. 145 and 146 for identification, Mr. Bjorge, and ask you what those two photographs depict?

A. Those are photographs taken in the Homestake mine showing the operation of square set stoping. The first one was taken at a place where there happened to be an

opportunity to get a view of a fair-sized opening so as to show a number of sets of timber. In most stopes you could not get that much of a view. But those timbers are about six feet apart. They are 12x12-inch timbers, so that——

Q. You are referring now to Plaintiffs' Exhibit 145 for identification.

A. —you see the quality of timber.

And this one——

Q. Referring to Plaintiffs' Exhibit No. 146 for identification——

[fol. 804] A. —shows the miners in the process of setting up the timbers. It shows the additional labor in the square set stopes over that in the shrinkage stopes.

Q. Now, could you give us a description of how the square set stopes are operated under normal conditions?

A. Well, they begin at the bottom and mine out one: Well, let us take this one. They mine out one floor, and this man is drilling, and he will blast here (indicating) and as soon as he has made room for another set, that set of timber will be set here (indicating).

Mr. Barnes: I am afraid the transcript is not going to make much sense when the witness indicates on the picture and says here and here.

Mr. Rigney: Supposing I withdraw that question and answer, and have that stricken, and I will put the question to you this way:

By Mr. Rigney:

Q. Directing your attention to Plaintiffs' Exhibit 145 for identification, would you describe how what is known as square set stoping operates?

A. The process of square set stoping begins at the level the ore is drilled and broken, and only a small area will be broken at a time, and then a set of timber set in. Then room for another set is broken and it is set in, until that floor is completed for the particular area to be taken out by that stope.

[fol. 805] Then they raise in the back of the stope and set one square set above another, and then proceed on that floor to work out from that raised set to break room for another set, and so on, until that floor is completed.

By the Commissioner:

Q. Leaving the timber in place?

A. Leaving the timber in place.

Q. Is it ever recovered?

A. No.

Then when that stope has gone to a height of 75 feet it is cleaned down, all of the ore cleaned out of it and some of the timbers. The timbers that are on the floor of the stope are salvaged, but the main timber structure remains, and the stope is filled with waste and sand tailings, and another section is started alongside of it.

By Mr. Rigney:

Q. Directing your attention to Plaintiffs' Exhibit No. 146 for identification, what are these men doing here, who are shown in this photograph?

A. They are putting up a cap. The segments of the timber structure, the vertical members, are known as posts, and the horizontal members are caps in one direction and ties in the other. They are raising the cap into place.

Mr. Rigney: Plaintiffers Exhibits 145 and 146.

Mr. Barnes: No objection.

[fol. 806] The Commissioner: They are admitted.

(Said photographs of Homestake square set stoping, marked Plaintiffs' Exhibits Nos. 145 and 146, admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Is this method of mining which you have been describing here, square set stoping, the method of mining which you would have postponed during the period in question?

A. Yes.

Q. During the period, I mean, from October, 1942, to June, 1945, assuming that L-208 had not been in effect?

A. Yes.

Q. What would have been the effect upon your labor situation, your manpower situation, as a result of this concentration on shrinkage stoping which you have referred to?

A. We could have obtained large production with a substantially smaller number of men.

By the Commissioner:

Q. How long could you have continued that?

A. Well, in the estimate of 19,400,000 tons in 1942 there was 8,000,000 tons of ore in the shrinkage sections.

By Mr. Rigney:

Q. And your annual——

A. Annual production was 1,400,000 tons.

[fol. 807] Q. So that you would conclude that you could have continued it for five to six years or something like that?

A. We could have if we had been forced to it.

By the Commissioner:

Q. What about the ore in between the columns?

A. The mining of that would be postponed.

Q. Is that included in the 8,000,000 figure?

A. No, the total figure is over 19,000,000.

The Commissioner: I see. All right.

By Mr. Rigney:

Q. You have referred, Mr. Bjorge, to a third measure which you could have adopted, which was the return of the eight-hour shift. Would you describe and expand upon that answer to the extent that we may understand what your program would have been if you had done that?

A. Yes. Of course, the change to the eight-hour shift would have made a direct increase of 14% in the working time of all of the men. But in the mining operation it would have increased the ore breaking time in a greater percentage than that, because the amount of time taken during each shift to travel to and from the working place, to bar down loose rock in order to make the working place safe, to set up their machines, to tear them down at the end of the shift and to load their holes and blast, is substantially constant. And a lot of their additional time of the [fol. 808] working shift would be largely devoted to the drilling which measures the amount of ore broken. And

the increase in ore broken would therefore be substantially more than the 14% indicated by the flat increase in working time. It would probably be somewhere in the range of 30% to 50%.

Q. Can you tell us the total number of employees who were on the Homestake payroll for the period October 1 to 15, 1942? Do you know what that figure is?

A. That figure was 1,777.

Mr. Rigney: May this be marked Plaintiffs' Exhibit No. 147?

(Said bound volume was marked for identification as Plaintiffs' Exhibit No. 147.)

By Mr. Rigney:

Q. Were you operating in full production in the October 1 period, 1942, with the labor force you said was on your payroll?

A. Yes.

Mr. Rigney: I said before the recess that we would endeavor to accomplish something with respect to this employee data during the recess, but I did not have an opportunity to do anything about that, so I had the exhibit marked for identification now, and we will try to work out something satisfactory.

The Commissioner: All right.

[fol. 809] By Mr. Rigney:

Q. Mr. Bjorge, what has Homestake's inventory policy been over the years since you have had knowledge of it?

A. Homestake has always had a policy of maintining a very substantial inventory. I think that that inventory is in excess of what many mining men would deem as necessary. That is the policy and has been maintained for many years, in fact, I think, always.

Q. Was that true in 1942?

A. Yes.

Q. Now, at the time of the issuance of Order L-208 on October 8, 1942 was an inventory prepared showing the operating supplies on hand as of that date?

A. Yes. One was required by the Order and was filed.

Q. And was the regular inventory taken as of the close of 1942?

A. Yes.

Q. Were you familiar with that inventory, or both of those inventories?

A. I was familiar with it as always with inventories, familiar with the total amounts and, of course, not familiar with the detail of myself counting every piece, but in going through the warehouses and seeing the stock.

Q. Was the inventory as of the close of 1942 substantially the same as the inventory that was taken as of the date of [fol. 810] the close-down order, October 8, 1942?

A. Substantially the same, yes, with some slight consumption in the meantime.

Q. Can you tell us what materials and supplies were necessary, or are necessary to operate a gold mine?

A. Well, the list of items of materials and supplies necessary to operate a large mine would be so lengthy that it would be quite beyond anyone's memory to list. The principal items that might be used as a measure of the——

Q. Some of the key items.

A. —the key items would be, for the mine, explosives, pipe, rail,——

Mr. Barnes: A little slower, please.

The Witness: Pipe, rail, rock drills, parts for rock drills, drill steel, mine cars, locomotives, mechanical shovels, hoisting ropes, and I think that about covers it.

By Mr. Barnes:

Q. Is that a wire or metal rope or cable?

A. That is a wire rope. In mining we always speak of them as ropes rather than cables.

Q. What about wiring itself, electrical wiring? Is that necessary?

A. Electrical wiring, yes.

For the mills, cyanide, lime, stamp shoes and dies, balls and rods for the grinding mills, liners for the grinding [fol. 811] mills, cones and mantles for the crushers, and I think that is a fair list for the milling operation. And for the——

By Mr. Rigney:

Q. Foundry?

A. For the shops and foundry we would need scrap material, scrap iron and steel, scrap bronze and brass, and would require various structural shapes, tools, tool parts for the shop tools——

Q. Mr. Bjorge, do you have an opinion as to the length of time Homestake could have continued to operate profitably with the materials and supplies on hand as of the inventories prepared in 1942 that you have just referred to?

Mr. Barnes: Your Honor, maybe I had better have that question read, please.

(The pending question was read by the reporter.)

Mr. Barnes: I think that question is unobjectionable, but I think the witness should be advised that he can answer it with a yes or no answer. He only asked him whether he has an opinion.

The Commissioner: Yes. I think you ought to fix the time a little better.

Mr. Rigney: Shall we say with the inventory on hand of the materials and supplies on hand as of October 8, 1942?

The Commissioner: Yes.

By Mr. Rigney:

[fol. 812] Q. And the question is now: do you have an opinion as to whether or not Homestake could have continued to operate profitably with the materials and supplies on hand as of October 8, 1942, assuming there were no additions to them and assuming there had been no shut-down?

A. Well, the period hasn't been stated.

The Commissioner: The question originally was: did you know how long a period the period might be, but the question is only directed at do you know.

Mr. Rigney: Supposing we withdraw the question and we will try it this way:

By Mr. Rigney:

Q. Do you have an opinion as to the length of time that Homestake could have continued to operate profitably with

the materials and supplies on hand as of the inventory of October 8, 1942?

A. Yes.

Q. What is your opinion as to how long Homestake could have continued profitable operations?

Mr. Barnes: I object to that on the ground that it is not the best evidence. This is an opinion based on two sets of records, one being the inventory, the material on hand, and two being the historical record of use of materials in inventory. This witness is being asked to, in effect, interpret two documents that are not before the Court, two rec- [fol. 813] ords, and give an opinion based upon them.

Mr. Rigney: It seems to me, your Honor, with his qualifications, his knowledge, his intimate knowledge of the situation at Homestake, he is qualified to give an opinion on that. He is subject to cross-examination.

Mr. Barnes: How can he be subject to cross-examination without the basic documents being produced, or even being available. That is the difficulty under these circumstances.

The Commissioner: Read that question back as finally put.

(The record was read by the reporter.)

The Commissioner: Overruled.

The Witness: It is my opinion that we could have operated for the duration of the shut-down period.

By Mr. Rigney:

Q. Can you describe the physical condition——

Mr. Barnes: Your Honor, in view of this, I would like to give notice now that I am going to have to file a notice on the plaintiff to produce both their inventory records as of October 8, 1942 and the historical records of consumption of materials during the year or two prior to that date, and ask for time to study those prior to cross-examination on those.

The Commissioner: That question was based on, as I understand it, the witness' knowledge of how much material he had, and his knowledge as an operator of gold mines, as to how much the consumption would be. You can serve the notice, as you have done, but I do not see that it is [fol. 814] accomplishing anything.

Mr. Barnes: I do not see how the witness can be cross-examined without having available to counsel the basic records upon which he bases that opinion, your Honor.

The Commissioner: There is no suggesting that it was based upon records from the question as put or the answer as given, as far as the Commissioner is concerned.

Mr. Rigney: Shall I proceed?

The Commissioner: When I say "records" I mean particular records. Go ahead.

By Mr. Rigney:

Q. Can you describe the physical condition of Homestake's plant and equipment in October, 1942, as of October 8, 1942?

A. Homestake's plant and equipment was in exceptionally good condition to meet a period of supplies limitation. We had in the ten-year period from 1932 through 1942 expended in the neighborhood of——

Mr. Barnes: I object to the statement as to what the company had expended. The best evidence of that is the books and records of the company.

The Commissioner: Sustained.

By Mr. Rigney:

Q. Would you describe what the condition of the buildings and the other physical properties was as of October 8, 1942?

A. We had in that ten-year period put down two new [fol. 815] shafts, very well equipped shafts, with the most modern hoisting equipment that was built in the United States at that time. We built a new coal-burning steam-power plant, we added 60 stamps to our former 120-stamp mill and thereby abandoned two old stamp mills and concentrated our milling in the one plant. We had built an addition in a separate building to our cyanide sand plant to take the place of an older cyanide plant that was then abandoned. We had new compressor plants at both of the new shafts.

That about completes it as I remember it, but it put us in an unusual situation of having a 65-year-old mine with an almost new plant.

Q. Mr. Bjorge, would any local requirement of the war effort have caused any serious curtailment in Homestake's ability to obtain power to operate?

Mr. Barnes: Your Honor, I object to that as calling for an interpretation of the witness.

The Commissioner: Sustained.

By Mr. Rigney:

Q. Where does Homestake obtain its power, Mr. Bjorge?

A. Homestake makes its own power. It has three hydroelectric plants and one coal-burning steam turbine plant, which I referred to a minute ago. The hydroelectric plants have 8,000 kilowatts of installed capacity, and the steam plant has about 14,000 kilowatts installed capacity.

[fol. 816] Q. What were Homestake's power requirements in 1942, annual power requirements per year in 1942?

Mr. Barnes: I object to that on the grounds it is not the best evidence. The books and records of the company would be the best evidence.

The Commissioner: Overruled.

The Witness: The annual consumption of power was some 60 to 65 million kilowatts.

The Commissioner: That was not the question. The question was: what were the power requirements?

By Mr. Rigney:

Q. What were the requirements, Homestake's power requirements per year?

A. About 60 million kilowatt hours.

Q. That was what was required to operate the plant in normal operation?

A. Yes.

The Commissioner: That was leading. It was not leading when it was originally asked.

Mr. Barnes: Your Honor, the question was definitely leading. The witness has answered it.

The Commissioner: Yes.

Mr. Barnes: The last question which went beyond the preceding questions was not a summation of the witness' testimony.

Mr. Rigney: I did not mean it that way, your Honor.
[fol. 817] The Commissioner: I did not understand it. We will review it. Let us have the last question read back.

(The record was read by the reporter.)

Mr. Barnes: That brought in normal operation which was not present in the preceding question.

Mr. Rigney: I will withdraw it. It is not important.

The Commissioner: All right.

By Mr. Rigney:

Q. What was Homestake's maximum generating capacity so far as its power plant was concerned in 1942?

A. I gave the installed capacity, and we had in one year produced as much as 65 million kilowatt hours.

Q. And what is the source of fuel for your steam turbine plant which produces the power?

A. The Wyodak mine which is operated by a wholly owned subsidiary, five miles east of Gillette, Wyoming.

Q. Can you tell us whether or not there were ample coal reserves and productive capacity to have taken care of Homestake's operations in this regard?

A. There are very large coal reserves at our Wyodak mine, and the capacity of the plant has never been tested by the demand. It is an open pit or strip mine, as they call it in coal mining, that can produce a large tonnage of coal with a very small number of men.

Q. Are you an officer of the Wyodak Coal Company?

[fol. 818] A. Yes, I am president of the Wyodak Coal Company.

By Mr. Barnes:

Q. Were you in 1942?

A. Yes.

By Mr. Rigney:

Q. Was any machinery or material ever requisitioned from Homestake by the War Production Board, or any other government agency during the close-down period?

A. No.

Q. Did there come a time subsequent to the close-down order when Homestake was allowed to order material and supplies?

A. Yes.

Q. When was that?

A. In September of 1944 we received instructions——

Mr. Barnes: I object to anything beyond the date as not being the best evidence, the instructions they received. The documents would be the best evidence.

The Commissioner: Sustained.

By Mr. Rigney:

Q. Can you tell us when the Homestake mine was permitted to order material and supplies by the Government?

A. September, 1944.

Q. And did Homestake at that time or thereafter place orders for such things?

A. We did place orders.

[fol. 819] Q. And do you know when those orders were filled?

A. Well, we received some stamp shoes and dies in December of 1944, and some grinding mill rods in February of 1945.

Q. Now, Mr. Bjorge, did you reside in Lead continuously during the shut-down period from October 8, 1942 to July 1, 1945?

A. Yes.

Q. Can you tell the Court the effect of the shut-down upon the City of Lead?

Mr. Barnes: I object to this as being completely immaterial and irrelevant.

The Commissioner: Overruled.

By Mr. Rigney:

Q. You may proceed, sir.

A. Naturally, with the shutdown of the mine and the lay-off of the employees, a large number of people moved out. The poulation decreased from 7,500, the census figure for 1940 was 7,520 and the figure for Ration Book #4 was 4,500 and some. There were a large number of vacant houses

with windows boarded up, I think twenty-eight business places, four closed-up service stations with only two operating. We took a count of the vacant places in the spring of 1943.

Q. And can you tell us how many there were?

A. If I may refresh my memory (referring to document).

[fol. 820] I was in error on filling stations. There were twenty-eight vacant stores was correct, eight vacant filling stations, and only two operating, 678 vacant houses and apartments, 41 vacant houses and apartments in Terraville, which is a little community about a mile out of Lead, and 55 vacant houses and apartments in Central City, which is another little community about two miles from Lead.

Q. I asked you before if the War Production Board or any government agency requisitioned any of Homestate's materials or supplies during the shut-down period, and your answer was that it did not. I now ask you if the War Production Board or any government agency made any request upon Homestake for any such materials or supplies?

A. No.

Mr. Rigney: Your witness.

Mr. Herrington: May I ask a question?

The Commissioner: Yes.

By Mr. Herrington:

Q. Mr. Bjorge, in your work as consulting engineer in San Francisco, did you become acquainted with the California gold mine districts?

A. Yes.

Q. Will you state generally how many strictly gold mining districts there are in the United States limited to mines which produce gold as a base metal and not as a by-product?

[fol. 821] A. Well, the principal ones I know are the northern Black Hills in South Dakota, and the Cripple Creek district in Colorado, the Grass Valley and Mother Lode districts in California, and of course the dredging operations in the valleys in California, and there are some smaller dredging operations in Nevada and Montana.

Q. Do you know the relative importance in the production of gold of those various districts, approximately, in 1942?

A. Well, we had the relative production of various mines presented on the first day of this case. I know that Homestake is the first producer in the United States, and that the second producer of gold in the United States is the Utah Copper Co.

Q. I think you misunderstood my question. I was limiting it to mines which produced gold strictly and not as a by-product.

A. The second producer of straight gold mined, I think, at that time was the Idaho Maryland.

Q. Can you tell us whether there is any material difference between the ore bodies in the California gold mining districts and those which you have described in Lead and the Homestake mine?

A. Yes, there is a very great difference, in that the California deposits that I know, the Mother Lode deposits and the Grass Valley deposits, are vein deposits. Those along [fol. 822] the Mother Lode reach quite substantial widths. The veins in the North Star and Empire are very narrow veins. I have not been in the Idaho Maryland.

Q. You have been in the Empire and North Star?

A. Yes.

Q. Do you know where the Idaho Maryland mine is located with respect to North Star and Empire?

A. Yes.

Q. Will you state where it is?

A. It is just outside of Grass Valley, off the road between Grass Valley and Nevada City, a mile out of town, perhaps.

Q. Is it close to Empire and North Star mines?

A. Yes, two miles, I would say.

Q. Do you know whether the Grass Valley mining district is more or less of the same geological formation?

A. I believe so, yes.

Q. What can you tell us with respect to the depths of the mines in the Grass Valley district and the Mother Lode country as compared, we will say, with the depth of the mine at Homestake?

A. Well, I have been over 5,000 feet deep in the Argonaut and Kennedy mines on the Mother lode, and I don't recall the exact vertical depth in the North Star and Empire, because they were incline shafts, and their levels were measured on the incline. The bottom level of the North Star was the 6300 level, but that was down the incline of the vein, and [fol. 823] it was, I think, only about 2600 feet vertical depth, but I am not quite certain of it.

Q. Would it be a fair statement to say they are deep mines.

A. Yes.

Q. The word "Mother Lode" has been mentioned several times. Could you describe that generally?

A. Yes. In prospecting for gold the prospector follows the streams searching for detritus gold in the gravel, placer gold, and when he finds that he endeavors to follow up stream to try to find the source of the detritus that is in the bottom of that stream.

By Mr. Barnes:

Q. What is that word, detritus?

A. Yes.

Q. How do you spell it?

A. D-e-t-r-i-t-u-s.

And the vein or load, or whatever the form or body was that has been eroded to go into that stream, the prospector regards as the mother, the source of the gold in the stream. There have been many prospectors that have talked about finding the mother lode, the true mother lode.

But in California, along the foothills on the Sierra Nevada, there is a belt of slate, I think it varies from a half [fol. 824] mile to a mile in width, and over a hundred miles in length, and along that belt of slate sometimes on one contact and sometimes on the other, and sometimes within the slate are gold-bearing quartz veins, and there are a number of mines along that length of one hundred miles. And when the placer miners, the forty-niners, were mining in California and they found these vein deposits, that was the Mother Lode, and the region has always been called the Mother Lode, and the Mother Lode country since then.

By Mr. Herrington:

Q. That is a region of approximately 125 miles long?

A. It stretches from north of Plymouth down to about Mariposa.

Q. And the Grass Valley mines are by themselves, are they not?

A. Yes.

Q. Usually called the Grass Valley mining district north of the Mother Lode country?

A. That is correct.

By Mr. Barnett:

Q. Central Eureka is in the middle of the Mother Lode, is that right?

A. Approximately. I think it is somewhat north of the middle.

By Mr. Herrington:

[fol. 825] Q. You have described the mining methods that are carried on in the Homestake mine. Can you tell us whether or not comparable mining operations are the customary method of operating in the Nevada City, California and Mother Lode country and Grass Valley districts?

A. I think the operations that I have seen on the Mother Lode were largely stoped by the square shaft method. In the North Star, Empire the narrower veins in hard rock were mined almost entirely without timber. There might be an occasional stull to support a piece of loose ground.

Q. What about the water conditions in the mines in the Grass Valley district as compared, for example, to Homestake?

A. I don't know how much water they pump, but I saw no evidence of any large quantity of water.

Q. Do you know roughly about how far the copper mines in Utah and Montana are from the Grass Valley mining district?

A. Oh, probably in the range of 800 miles.

Q. And about how far is it from the Grass Valley mining district to the mines in Arizona, the copper mines?

A. A range of a thousand miles, not airline, but by way

of travel, four hundred miles to Los Angeles and at least another four hundred miles across to the places in Arizona.

Q. Mr. Bjorge, in your consulting work in California, did you ever have occasion to examine any mercury mines?

A. No.

[fol. 826] Q. Are you familiar generally with the mercury mines of California?

A. Only from the literature. I have never been in one of them.

Q. Do you know roughly where they are located, the principal mines?

A. There are some in Lake County, California and the New Idria District south of San Francisco.

Q. From your work as a consulting engineer you know something of the geology of the Coast Range Hills?

A. Not too much of the Coast Range Hills.

Q. Do you know whether or not the mercury mines in California are located in the Coast Range Hills, principally quicksilver mines?

A. Generally, I would say that is their location.

Q. Whereas the gold mines we have been talking about and the Mother Lode and the Grass Valley District are located entirely in the Sierra Nevada Mountains, are they not?

A. Yes, they are in the foothills of the Sierra Nevada Mountains at elevations of, I think, ranging from six or seven hundred feet at the river levels to twenty-five hundred feet along the Mother Lode; and Grass Valley, as I remember, is around three thousand feet.

Q. Is there a difference, if you know, between the geological formation of the rocks in the Sierra Nevada [fol. 827] Mountains and the Coast Range Hills?

A. There is a difference, I am sure. I know a lot of general geology. I never examined any properties in the Coast Range of California. I don't know too much about the geology.

Q. You have some general knowledge of it, do you not, as a mining engineer?

A. Not very much, because I haven't followed it.

Mr. Barnett: May I ask a question at this time?

By Mr. Barnett:

Q. Mr. Bjorge, you have been in Central Eureka's mine, is that correct?

A. Once, yes.

Q. Do you recall to what level you went?

A. I think that the mine was a depth, a maximum depth of 2600 feet at that time.

Q. And you descended in a skip, is that correct?

A. Yes.

Q. And subsequently did you go through the mill?

A. I don't remember the mill at Central Eureka very well, but the occasion of my visiting the mine was in the spring of 1918. I was making a reconnaissance of the Mother Lode country to see whether I could see anything that looked like a good speculative venture, and not having been in gold mines prior to that time I visited the Central Eureka and obtained permission to go down with Mr. [fol. 828] Spears, who was then superintendent, and also the Argonaut Mine and the Utica Mine at Angels Gap, and one or two others.

[fol. 829-830] Q. Central Eureka was formerly known as the Hetty Green mine? The old Eureka?

A. The old Eureka—I was in the Central Eureka—and the old Eureka which at that time was not opened was known as the Hetty Green.

[fols. 831-835] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

Transcript of Testimony—February 2, 1953

TESTIMONY FOR PLAINTIFFS (Resumed)

The hearing was resumed, at the time above indicated pursuant to the recess previously taken.

ADDITIONAL APPEARANCES

Present: (The same appearances as previously noted with the following additional appearances for the plaintiffs: O. R. McGuire and Stanley Snydam).

[fol. 836] Guy N. Bjorge, resumed the witness stand and was examined and testified as follows:

Direct examination (resumed).

Mr. Rigney: May this be marked Plaintiffs' Exhibit No. 148?

(Said document was marked for identification as Plaintiffs' Exhibit No. 148.

[fol. 837] Mr. Rigney: And may this be marked Plaintiffs' Exhibit No. 149 for identification.

(Said document was marked for identification as Plaintiffs' Exhibit No. 149.)

By Mr. Rigney:

Q. Mr. Bjorge, I show you Plaintiffs' Exhibit No. 148 for identification and ask you what that document is?

A. This is a list of machinery and equipment of the types listed in Schedule A to Preference Order P-56 as required in the amendment of November 19, 1942 to Limitation Order L-208.

I wish to call attention to the fact that there is a typographical error in the list. The letter is dated January 16, 1943 and refers to the enclosure which is dated January 16, 1942, which is a typographical error that had not been previously noted.

Q. In other words, the letter of transmittal here of January 16, 1943 transmitted this accompanying list of equipment?

A. Yes.

Q. On or about the date that the letter bears, and where it refers to January 16, 1942 on the list it should read January 16, 1943?

A. That is correct.

Q. What is Plaintiffs' Exhibit No. 149 for identification?

[fol. 838] A. That is our general supplies inventory as of the end of 1942. It is dated January 1—in different departments, some are dated in December 31, 1942 and most of them are December, 1942, but I notice that one, as I looked through, was dated January 1, 1943.

Q. But it is the general inventory?

A. It is the general inventory for the end of the year.

Q. Is there any copy of this in existence?

A. That is our only copy.

Q. Now, Mr. Bjorge, would you tell us what Homestake's inventory practice in 1942 and prior years had been?

A. In 1942 and for years prior to that it had been the regular practice of Homestake to charge certain things directly to operations. Things that were purchased specifically for one use, and would only be used for that one use would be charged wholly to that operation at once instead of being charged into inventory and then charged out as used.

By Mr. Barnes:

Q. Could you give us an example of what you mean, Mr. Bjorge?

A. For example, mine rail, which will only be used for the mine, a carload of mine rail is received and instead of charging that into the inventory and charging it out as it went into the mine, the carload was charged to the mine immediately. The difference was that there would be a high [fol. 839] in the cost sheet for that month for rails, and then perhaps nothing charged for several months, and then another high when another carload is received.

By Mr. Rigney:

Q. Now could you go ahead, Mr. Bjorge, and tell us what other types of items fall into that category?

A. Mine rail, pipe for the mine, hoisting ropes, air and water hose, and other things that would go directly to the mine and only to the mine. They were never included in the general supplies inventory. The general supplies inventory was more the items that were usable in numbers of places and could be issued to any department.

Q. Now, may I ask you, do these two inventories which I have asked you to identify, Plaintiffs' Exhibit No. 148 for identification and 149 for identification, include all of the avaliable materials and supplies for use by Homestake as of the time that the inventories were prepared?

A. No.

Q. And is that because of the practice to which you have just testified?

A. Well, t' at, and also the practice that all capital items, equipment, we e charged when purchased to a capital account, which was then charged out by depreciation and never entered the inventory.

Q. You will recall that on last Friday you mentioned [fol. 840] in your testimony several key items which were required in the operation of a gold mine. I wonder if you can testify now from your own recollection as to what Homestake's inventory position was in 1942 on these various key items?

Mr. Barnes: I object on the ground it is not the best evidence. We now have the inventories here.

Mr. Rigney: Well, I am merely asking that question preliminarily, your Honor, to permit him to use a—the fact is that he cannot testify, of course, from recollection on all these many items, and he has a memorandum here which will aid his recollection in that regard. I want to lay the foundation to permit him to use that.

The Commissioner: Overruled.

The Witness: The question was whether I could——

By Mr. Rigney:

Q. From your own recollection unaided by any record.

A. Obviously, the number of items and great number of figures included in such a record would be beyond memory and could not be testified to without some memorandum.

Q. Do you have a memorandum which will aid you in that regard?

A. I have.

Q. All right, now, I would like to ask you by reference to the memorandum which you have with you, to tell us what the situation was as far as Homestake was concerned [fol. 841] with regard to explosives in the inventory situation.

Mr. Barnes: May I ask a few questions about the memorandum?

The Commissioner: Yes.

By Mr. Barnes:

Q. When was this memorandum prepared?

A. This memorandum was prepared within the last few weeks.

Q. And, from what source was it prepared?

A. The sources were the general supplies inventory, the inventory submitted under L-208, and the records and count of equipment as of October 8, 1942.

Mr. Barnes: Your Honor, I think that those records are the best evidence rather than this memorandum prepared from them, and I object to testimony which is not the best evidence.

Mr. Rigney: Your Honor, it seems to me that the inventories are available now for counsel's examination and for his use in cross-examination, and it would seem to me that it would be a great aid to discovering what the facts are in this case to permit this witness now, with the personal knowledge which he does have, aided by this memo, to testify generally to what the situation was with regard to these several items that he mentioned on Friday in his testimony. I would think that it would be an aid to your Honor, and I am sure it would be an aid to everybody else [fol. 842] in the case to be able to go to the record without going through the minutiae of a 200-page inventory to develop it.

The Commissioner: I gather the memorandum, from the testimony of the witness, is somewhat like an accounting summary.

Mr. Rigney: Yes.

The Commissioner: It could be considered in the same light as an accounting summary.

Mr. Rigney: Compiled from the basic documents.

Mr. Barnes: Your Honor, the difficulty is that we attempted at pre-trial to dispose of all of those accounting summaries before trial, so that there would be no possibility of our having to ask for time so that this memorandum could be compared to the 200-page document which Mr. Rigney has just referred to.

The Commissioner: That is true.

Mr. Barnes: And it puts me in the position of perhaps having to ask for time so a comparison can be made. The witness has also referred to other records with no indication whether they are here or in Lead used to prepare that memorandum.

By the Commissioner:

Q. What records besides these Exhibits 148 and 149 were used to compile that memorandum, Mr. Bjorge?

A. This memorandum has a notation on it as to the [fol. 843] items that are in the general supplies inventory, the items that were in the L-208 inventory that was submitted, and the items that were in both.

The Commissioner: I am asking you now what papers besides the two exhibits that were marked for identification were used in the compilation of the paper.

Mr. Rigney: Any other records, Mr. Bjorge, or documents or papers of Homestake besides the two inventories, if there were others.

The Witness: There were certain items on here that——

By the Commissioner:

Q. I do not care what you have on the paper, Mr. Bjorge, I want to know this: did you prepare that memorandum?

A. That was prepared under my direction by the various departments from the inventories, from the L-208 inventory, and in a very limited number of the items from certain counts that were made in October, 1942.

The Commissioner: I think I am going to have to exclude it.

Mr. Rigney: May I ask this one question, your Honor?

By Mr. Rigney:

Q. Do you have any memoranda there from anyone within the Homestake organization from which any of the data that you have assembled here was taken? And when I say "there" I am referring to the memorandum for refreshing your recollection.

[fol. 844] A. Yes.

Q. Would you tell us what that material is?

Mr. Barnes: Describe it without describing its contents, if you can, without telling us what it says.

By Mr. Rigney:

Q. Yes, just a description of what the particular document is, from whom, to whom, and regarding what.

A. These are reports to me from the several departments.

Mr. Rigney: I think it would be well to take them up one at a time, your Honor, if we may, otherwise we will have a rather general description.

The Witness: The first is by Mr. Kravig, Mine Superintendent.

Mr. Barnes: Dated what date?

The Witness: These are all dated in October and November of 1952. The second is from Mr. Seyhers, Chief Mechanical Engineer, head of our Mechanical Department. This is from Cedric L. Gust, Chief Electrical Engineer. The next one is from Mr. Seyhers, a second one from Mr. Seyhers, our Mechanical Engineer. There is one from Mr. Herz, our Metalurgical Superintendent. And this is a listing of equipment from Mr. R. R. Pullen, then our Chief Mechanical Engineer, dated January 12, 1943.

Mr. Rigney: Now, your Honor, I renew my offer of proof through Mr. Bjorge with respect to these various key [fol. 845] items to which he has referred, and what the situation was as far as inventory and Homestake's needs on those items was.

Mr. Barnes: Your Honor, it seems to me that in these last questions directed to the witness it now begins to indicate that this may be hearsay testimony based upon the reports of other people who are not present for cross-examination, and on the basis of those memoranda some document was prepared.

The Commissioner: Well, we are in a situation here now where you have handed to the witness a paper which you have indicated you want to use for the purpose of refreshing his recollection. That has been excluded. And if you are asking for reconsideration of that ruling——

Mr. Rigney: Yes.

The Commissioner: I adhere to the ruling. I do not think that it is proper to allow the use of such memoranda for the purpose of refreshing his recollection. He did not even prepare it himself.

Mr. Rigney: Very well, your Honor.

The Commissioner: If counsel wants to make his record over the exclusion of the Commissioner, he may make an offer of proof.

Mr. Rigney: Yes, your Honor, but before I do that it may be possible for us to offer this proof directly through the witness.

The Commissioner: All right.

[fol. 846] Mr. Rigney: In view of your Honor's ruling that this memorandum which has been prepared under Mr. Bjorge's supervision with respect to the inventory position cannot be used by him to refresh his recollection, I now propose to interrogate Mr. Bjorge directly to the extent that his memory will enable him to testify on these things. I do not know how far we can go in that way.

By Mr. Rigney:

Q. Would you tell us from your own knowledge, Mr. Bjorge, or by reference to Exhibit 148 or 149 for identification, which I believe would be permitted you, what the situation was with respect to explosives?

Mr. Barnes: Your Honor, I think that the witness should be instructed to indicate whether he is doing this on his own recollection, or whether he is referring to either or both of these documents as he answers the question. We have got three possibilities embraced in the question. I do not want to object on the basis of duplicity, but if the witness will indicate as he answers the question the source of the information, I will not interpose an objection to the question.

The Commissioner: I think he might well do that. It will simplify the later cross-examination.

Mr. Rigney: Yes, I think that is an expeditious way to do it.

By Mr. Rigney:

[fol. 847] Q. Mr. Bjorge, you have before you Plaintiffs' Exhibit 148 for identification, being the inventory submitted pursuant to the provisions of Order L-208, and you have Plaintiffs' Exhibit No. 149 for identification, which is Homestake's general inventory as of December 31, 1942.

Now, I want to ask you what the situation was as far as inventory position is concerned, and the length of time the item would have served Homestake so far as explosives are concerned, first. Now, can you refer to those inventories,

and when you do, specify, please, to what you are referring and tell us what the fact is.

A. In the inventory submitted under L-208——

The Commissioner: Get that identified by number.

By Mr. Rigney:

Q. Exhibit 148 for identification.

A. 148 for identification—it shows that we had 210,980 pounds of Gelex No. 2 dynamite.

Q. And you are referring now to page 3 of Exhibit 148 for identification under the heading Explosives And Blasting Equipment, is that right?

A. Yes.

Q. Is there other material appearing in that same paragraph?

A. Yes. There are 3,165,762 feet of Bear Brand fuse; one blasting machine that would serve 150 holes, three that [fol. 848] would serve 100 holes, thirty-five that would serve 30 holes, and six that would serve 10 holes; 44 reels of 500 feet each of wire for those blasting machines, three reels of 1000 feet each; 18 Galvanometers; 47,408 #6 blasting caps, 59,027 electric blasting caps, 1,319 pounds of lead-in wire #20.

Q. Could you tell us how long that supply of dynamite you have testified was on hand would have lasted Homestake in normal operations?

A. That would have lasted three months under normal operations.

Q. Do you know of your own knowledge whether or not during the shut-down period dynamite was under allocation?

A. Commercial dynamite was not under restriction during the shut-down period.

Q. Now with reference to the other items to which you have just referred appearing under this paragraph Explosives And Blasting Equipment, how long would those items have lasted Homestake?

A. The fuse would have lasted more than a year. We purchased fuse in carload lots in order to get the best purchase conditions, and a carload of fuse lasted us a long

time. I cannot give you the exact number of months, but I am sure that quantity would have lasted us over a year.

By the Commissioner:

Q. You have used the term "commercial dynamite". Was [fol. 849] that dynamite that you testified about commercial dynamite?

A. Yes. All of this dynamite, the fuses and the caps were what is known as commercial explosives, industrial explosives, used in industry.

By Mr. Rigney:

Q. What was the situation with respect to pipe, Mr. Bjorge?

A. With respect to pipe, we had sufficient pipe for an indefinite time. Underground there was installed miles of pipe line, and with an operation such as we have described, and at any time there are extensive workings that were inactive, the pipe can be taken out and installed in another place.

Q. I don't know whether you referred to this inventory with respect to this item of pipe or not. Did you do so?

A. No, I did not. Pipe is not listed in that inventory.

Q. Let me ask you this, in connection with dynamite, Mr. Bjorge: how large an inventory or supply is it feasible for Homestake or anybody else to keep on hand at one time?

A. The inventory we had at that time was near the maximum. Dynamite can be kept for a long time safely, but it is not desirable to store it for too many months. We did keep the dynamite that was in storage at that time throughout the war period and used it after the war.

Q. Would you look now, please, at page 2 of Plaintiffs' Exhibit No. 148 for identification, and let me ask you if this [fol. 850] paragraph which is headed "Air Distribution Equipment"——

A. I made an error. I was looking for the heading of pipe, and pipe is listed under "Air Distribution Equipment".

Q. And then in the breakdown of it by sizes and so forth it is described as low pressure pipe, is that right, sir?

A. Yes sir. The low pressure pipe was the pipe used for 100-pound pressure air, which is the power for the rock

drills. We also use high-pressure pipe which is under a pressure of 1000 pounds for haulage. There is only one item of high-pressure pipe on this list.

Q. Can you tell us, Mr. Bjorge, how long Homestake would have been able to have operated, so far as its inventory of pipe was concerned, during the shut-down period?

A. With this inventory and that which I described as being in the mine, we could have operated for an indefinite period without purchase of additional pipe.

Q. When you say an indefinite period, how long do you mean? What is the minimum that you could operate?

A. Certainly five years or more.

Q. Now I ask you about rails of track, and ask you what the situation was inventory-wise in that regard?

The Commissioner: Are all of these questions related to the period of time at which L-208 became effective?

Mr. Rigney: Yes, your Honor.

The Witness: The inventory submitted under L-208, that [fol. 851] is, Exhibit No. 148, shows 30675 feet of new 40-pound rail, 1800 feet of used 40-pound rail, 3875 feet of used 25-pound rail, and 300 feet of 15-pound rail.

By Mr. Rigney:

Q. Can you tell us for how long a period of time that inventory would have sufficed for normal operations of Homestake?

A. For normal operations that amount of new 40-pound rail, which is the weight we use in our underground track, would have been sufficient for about a year and a half. But with the elimination of development there would not have been any new rail installed. We would not have used any during the shut-down period if we had been permitted to continue to operate.

Also, there were miles of track underground that could have been taken up and the rails placed in whatever new place they might be needed.

A mine the size of Homestake could have, if necessary, operated for many years without any purchase of new rails.

Q. Now, Mr. Bjorge, directing your attention to rock drills and parts, I should like to ask you what the inventory situation was with regard to those items?

A. The rock drills listed in the inventory, Exhibit 149, which are new rock drills, list 9 Cleveland D-12 drifters, 3 Cleveland D-12 drifters with a longer carriage, 42 Cleve- [fol. 852] land H-10-H pluggers, 20 Chicago pneumatics, CP drifters.

Q. Those were on hand as of December 31, 1942 listed in the inventory?

A. Yes, on hand at that time.

The inventory given in Exhibit 148, which included all of the machines in use at the time, lists five drifters, 222 drifters, 77 stopers, 234 jack hammers, 12 sinkers, 8 extension jack hammers, and 1 dry jack hammer.

Q. Those were the items on hand as of October 8, 1942 of that particular category?

A. They were on hand at that time, and in use or new, except for the few that are listed as new.

Q. Can you tell us how long those particular items would have lasted?

A. Those items with repair parts in minor amounts would have lasted through the shut-down period, with a straight stoping operation, and with the use of parts from machines that were taken out of use we could have easily operated without any additional new machines throughout the period of the shut-down.

Mr. Barnes: Could I have the first part of that answer read, please?

(The record was read by the reporter.)

By Mr. Rigney:

Q. You refer, Mr. Bjorge, to repair parts. Where would [fol. 853] those have come from?

A. From the stock that we had on hand at that time.

Q. So that do I understand that when you referred to repair parts in your answer you were not contemplating the buying or acquisition of new repair parts?

A. No.

Q. Mr. Bjorge, what was the situation with respect to mine cars as of October 8, 1942?

A. Exhibit 148 lists 646 1-ton end dump flat bottom cars, 706 1-ton side dump cars, 187 3-ton Granby-type cars, 57 2½-ton Granby-type cars, 45 5-ton bottom dump cars, 388

timber trucks, 179 steel trucks, 92 miscellaneous tramway cars and 21 passenger cars.

Q. And you are referring to the second paragraph, page 4 of Exhibit 148, which is denominated "Mine Cars"?

A. Yes.

Q. Now, how long would that number of mine cars have enabled Homestake to continue operation, assuming no addition to your supply?

A. Much longer than the shut-down period.

Q. What was the situation with respect to locomotives?

A. On page 4 of Exhibit 148 at the top of the page there is a list of locomotives for haulage: one 8½-ton air-operated locomotive, one 13-ton and one 14-ton, and these three are for 22-inch guage track; one 10-ton trolley locomotive for [fol. 854] 30-inch guage track; two 6½-ton battery locomotives, 18-inch guage; twenty-three 5-ton air-operated locomotives, 18-inch guage; ten 3½-ton air-operated locomotives, of 18-inch guage.

Q. And how long would they have permitted operation, assuming no additions to them?

A. The air-operated locomotives would have lasted for, I don't know how many years. They are still in use, every one of them. And the battery locomotives, we have material on hand for two extra batteries which would have given those two battery locomotives at that time a life of about five years.

Q. I take it, then, that they would have permitted operation for longer than the shut-down period?

A. Much longer.

Q. What was the situation as far as mechanical shovels were concerned?

A. At the bottom of page 3 there is a listing of 16 Gardner-Denver small-size 18-inch gauge mucking machines.

Q. And they would have permitted operations for how long a period?

A. With the elimination of development work—they were used almost entirely in drifting—they would not have been used on the kind of operation that we talked about. In normal operations they would have lasted, I would say, longer than the shut-down period.

[fol. 855] Q. What about hoisting ropes, Mr. Bjorge? Are

they normally reflected in the inventory or are they reflected specifically in Plaintiffs' Exhibit 148 for identification?

A. No. The hoisting ropes that we had at that time were on the hoists, and had been charged out to operations, except for two spares, spare ropes, which had also been charged out. There were four hoists, two hoists at each of the two shafts, one for hoisting ore and one for the cages for men and materials. The ropes on the cages at that time would have lasted about five years. The hoisting ropes on the ore hoists were good for a total of about 5 million tons as of that time. The ropes that were on the ore hoists were replaced last October.

Q. What was the situation as far as electrical wiring was concerned?

A. Our entire plant in 1942 was in excellent shape, with no new construction planned. We had just completed an extensive construction program so that the use of electrical equipment in the following years, the electrical wiring and other accessories, would have been exceedingly small. We have not since that time had any major failure of either wiring or equipment that required any substantial installation.

In addition to that, in wrecking the obsolete plants that we had wrecked as a result of our construction program in the preceding years, all such material had been salvaged, [fol. 856] and our electrical department had a large stock of salvaged wire of a variety of sizes, and the accessory equipment, and that could have taken care of any job that might have come up in the next five years.

Q. So, briefly, what do you say with respect to the sufficiency of your inventory of electric wiring to enable you to continue operations for at least the period of the shut-down?

A. We had enough.

Q. I want to ask you now about cyanide, Mr. Bjorge. I show you Plaintiffs' Exhibit No. 149 for identification, being the general inventory, and ask you to tell us what the situation was with respect to cyanide?

A. We had on hand at that time 107,781 pounds of Arrow Brand cyanide, and 26,307 pounds of flotation cyanide.

Q. Do you know whether or not cyanide was listed in

Plaintiffs' Exhibit No. 148 for identification, being the October 8, 1942 inventory.

Mr. Rigney: I think perhaps we could save time by saying it is not listed there.

The Commissioner: All right.

Mr. Rigney: This will be offered in evidence, but I wanted the record to show that he could not testify from this with respect to cyanide.

By Mr. Rigney:

Q. What about lime, Mr. Bjorge?

[fol. 857] A. Lime is produced locally in the Black Hills and was in adequate supply.

Q. How about stamp shoes and dies?

A. Our inventory shows 104 shoes——

Mr. Barnes: Are those all the same size?

The Witness: Yes.

By Mr. Rigney:

Q. You are referring now, sir, to Plaintiffs' Exhibit No. 149 for identification, the general inventory, and does this have a page number?

A. That particular page——

Q. You are referring to a page which is headed under department "General Supplies, Mill Supplies No. 6541, Cyanide Supplies No. 6542". Is that correct? It does not seem to have a page number, does it?

A. Those are the charge numbers in which they are listed. That was in general supplies, and in the metal-urgical section of the same inventory there are listed 117 dies and 104 shoes.

Q. Have you completed now your testimony with respect to stamp shoes and dies, so far as the quantity on hand is concerned?

A. I think so.

Q. Could you tell us for how long a period they would [fol. 858] have served you?

A. I don't think we have used the last of our stock at the present time, in the seven years' operation since the shut-down.

Q. So that they would have lasted for longer than the shut-down period, assuming no additions to it?

A. Yes.

Q. What was the situation with respect to balls and rods and liners for the grinding mills, Mr. Bjorge? I show you Plaintiffs' Exhibit No. 149 for identification.

A. Well, with respect to the balls, the balls are all cast in our own foundry from scrap iron and steel, and there was ample scrap to continue casting those balls for the entire period of the shut-down. The grinding rods, we had in the inventory on the same page that we have referred to in Exhibit No. 149,283,985 pounds of 10-foot rods and 462,672 pounds of 12-foot rods. And in addition to that there would have been approximately 150,000 pounds of rods in the mills that were in operation at the time.

Q. For how long a period of operation would that quantity have sufficed?

A. It would have been sufficient for milling approximately one million tons, as the rod consumption is about one pound per ton.

Q. Is it possible to make a substitution of balls for rods [fol. 859] in this operation if need be?

A. Yes. If we were not able to obtain rods, we could cast balls in our foundry and use balls in the rod mills.

Q. Do you recall what the fact is with respect to cones and mantles for crushers insofar as these two inventories are concerned, Plaintiffs' Exhibits 148 and 149 for identification? Can you tell us whether or not they are referred to in either of those two inventories?

A. They are not in this inventory.

Q. Referring to Exhibit 148 for identification.

A. And I am quite sure they are not in the other inventory. The repair parts, replacement parts for the crushers, were in the class that I previously stated was charged out and not in the inventory. We had duplicate units at both of our crushing plants. We have a crushing plant at each shaft, and each one had two parallel units, each unit with sufficient capacity for all of the ore that could be hoisted. So that in case of any stoppage of one unit they simply had to shift to the other unit. Between those four crushing units and the spare cones and mantles that

we had on hand at that time we could have crushed ore for longer than the shut-down period.

Q. Is it also the fact that scrap iron and steel were not carried in either of those inventories, 148 and 149 for identification?

A. No, they were not inventoried.

[fol. 860] Q. What was the situation as far as scrap iron and steel was concerned on hand, if you know?

A. Well, I don't know the figure, but we had a large amount of scrap iron and steel. In our isolated location, at no time prior to the war was it possible to ship scrap and pay for the collecting and the freight. So that there was an accumulation of scrap everywhere. In fact, it had been regarded of such little value that at one place we found scrap that had been buried in making a shop yard, and we put a powerful shovel into that pile and mined out about five tons of scrap, and even found some pig iron that had been buried along with the rest accidentally many years before.

Q. How about scrap bronze and brass, Mr. Bjorge?

A. Our use was small, so that the scrap on hand was adequate for our use for a long time. Most of that is not expendable. Brass is cast into a bearing for a machine, and when that bearing has worn to the point where it has to be replaced, the amount of brass that has been worn off is very small, and the worn bearing goes right back to be recast for new bearings again.

Q. When you said adequate for a long time, did you mean by that for at least the length of the shut-down period?

A. More than the length of the shut-down period.

Q. Now would you look, please, and see what the situation was with respect to tools and tool parts?

[fol. 861] A. There were tools and tool parts not in inventory as they had been charged out to the several departments for their use, and by interchange between departments there were adequate tools and tool parts to get along for more than the shut-down period.

Mr. Rigney: I am just about to complete, your Honor.

The Commissioner: Suppose we recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearing.)

[fol. 862] OFFERS IN EVIDENCE

Mr. Rigney: Your Honor, Plaintiff now offers in evidence Exhibit 148 for identification, being the inventory submitted pursuant to Order L-208.

Mr. Barnes: Subject to verification, no objection.

The Commissioner: Admitted.

(Said inventory submitted pursuant to Order L-208, marked "Plaintiffs' Exhibit No. 148," admitted in evidence and made a part of this record.)

Mr. Rigney: Plaintiff now offers in evidence Exhibit No. 149 for identification, being the general inventory. I should like to say, Your Honor, that this is the only copy in existence, and we would like to have permission to have it photostated and to substitute a photostat for this original.

Mr. Barnes: I would like to examine the witness from that before the preparation of the document, and before I make any objection.

The Commissioner: I will rule on it after cross-examination.

Mr. Rigney: Surely.

That is all, sir.

Cross-Examination.

By Mr. Barnes:

Q. Mr. Bjorge, going back to this pension plan which you said Homestake had, when was that founded?

A. 1917.

[fol. 863] Q. What group of employees did it cover at that time?

A. All employees.

Q. Did the coverage at any time change between that date and 1942?

A. No.

Q. What about the insurance plan that you referred to? When did that come into existence?

A. 1910.

Q. Did that also cover all employees?

A. It covered all employees.

Q. Did the company handle that, or was that handled through some insurance underwriter?

A. No, the company has handled that throughout the years. They have contributed all of the clerical work necessary to operate the plan, and have made the investments out of the reserve fund. It is known as the Homestake Mining Company Employees Aid Fund, and it is administered by a board consisting of the manager, the chief counsel, and I think there are three department heads and three day's-pay employees.

Q. Does that cover all employees?

A. That covers all employees.

Q. Does that cover only life insurance?

A. And sick benefit.

Q. What about accident insurance?

[fol. 864] A. No, we have always been self-insured on workmen's compensation.

Q. So in case of accident, it is only workmen's compensation benefits that they receive?

A. Accidents off the job are covered by the aid fund. Industrial accidents are covered by compensation, but if a man is injured in an automobile accident, if an employee is injured in an automobile accident, he receives benefit under the aid fund.

Q. In your testimony on Friday, you referred to the fact that the Homestake Veterans Association in 1942 had 440 living members.

A. Yes.

Q. Were all of those employed by Homestake at the time, or had some of them retired?

A. Some of them had retired.

Q. How many of them were employed at the time, do you know?

A. At that time there would be in the neighborhood of 400. I think there were something over 60 or 70 living retired employees at that time. Whether all of them were members of the Veterans Association or not, I can't say. Probably most of them were.

Q. You testified also that sometime in August, 1942, having heard rumors of a threatened shutdown of the [fol. 865] gold mines, you came to Washington, is that correct?

A. Yes, I came to Washington very late in August.

Q. And you told us at some length what you said to Wilbur Nelson on that occasion.

A. Yes.

Q. What did Mr. Nelson say to you? Do you recall that?

A. I think Mr. Nelson was very considerate in allowing me to present my case, and he said that he would keep all of those facts in mind in case any such order was issued. He definitely agreed with the idea submitted with respect to the ineffectiveness of an order that might attempt to do what L-208 was attempting to do.

Q. How long did you spend with Mr. Nelson, Mr. Wilbur Nelson?

A. I can't say exactly. Several hours, probably, at various times.

Q. You mean a total of several hours on various occasions?

A. Yes.

Q. Do you recall how long you were here in Washington? A week, two weeks, three weeks?

A. No. I think it was less than a week. I don't have the dates with me.

Q. You said that you also saw Donald Nelson on that occasion. Did you arrange that appointment, or was that [fol. 866] arranged through some other source?

A. I think that that was arranged through either Senator Gurney or Mr. Case. I am not certain.

Q. Weren't there two Senators from your State at the time?

A. Yes.

Q. Who was the other one?

A. Senator Bushfield.

Q. Did you consult with him at all?

A. I saw him also, yes. He assisted in some of those things, in making appointments. He has since died.

Q. How long did you spend with Donald Nelson? Do you recall that?

A. As I remember it, maybe 20 minutes or so, 20 or 30 minutes.

Q. After you had made your presentation to him, did he say anything?

A. He simply said that he would give consideration to what I had said.

Q. He made no answer to any of the points you mentioned specifically, that you can recall?

A. No. I think he definitely emphasized the need for miners.

Q. Then you said you saw a General McSherry. Who was he?

[fol. 867] A. In the War Manpower Commission.

Q. Page 733 of the transcript refers to General McSherry of the War Production Board. If you said that——

A. If I said that, that must have been an error.

Q. What was General McSherry's position in the War Manpower Commission, do you know?

A. No, I don't know exactly what his title was.

Q. How did you come to see him?

A. I came to see him because some of the men that I visited with, either our Representatives or Senators, or Wilbur Nelson, told me that he was someone that I should try to see.

Q. Do you recall how much time you spent with him?

A. I should say again probably 20 minutes.

Q. Did he make any answer to you after you had presented your various points to him?

A. During the conversation he emphasized the need for miners, and at the end of the interview he said that he would give consideration to the statements I had made to him.

Q. You also referred to having seen General Somervell.

A. That is correct.

By the Commissioner:

Q. Did you pursue the suggestion with either Donald Nelson or General McSherry that there wouldn't be enough gold miners released to mine copper to justify the issuance [fol. 868] of such an order?

A. Definitely. I summarized the arguments which I stated I had made at greater length to Wilbur Nelson. I was certain that the number of miners in gold mines was too small to be of great importance, and that an order would be entirely ineffective because if the men were displaced from their jobs in the copper mines, from the area where they had their homes, they would not be likely to go to replace a man in the Anaconda mine, for example, who had left Anaconda to go to a job that was more attractive to him.

Q. Was there any specific response by either Donald Nelson or General McSherry to that suggestion?

A. I don't remember that there was anything specific with regard to that.

Mr. Rigney: Your Honor, in his previous answer, the witness inadvertently said "men displaced from copper mines." He meant gold mines, I am sure.

The Commissioner: Yes, I am sure he did.

By Mr. Barnes:

Q. With respect to General Somervell, how did you come to see him?

A. Senator Gurney offered to make an appointment for me with General Somervell, and accompanied me to General Somervell's office. Naturally, General Somervell was an extremely busy man, and we had a short interview there.

[fol. 869] Q. What do you mean? Twenty minutes again?

A. Something on that order, yes.

Q. Did you present to him the same arguments?

A. I summarized the same arguments.

Q. Did he make any answer to them?

A. He, of course, more than anyone else, emphasized the need for men in the copper mines, and he gave me no encouragement other than to say that he would give consideration to the statements I had made.

Q. Specifically with respect to the statement you just referred to in answer to the Commissioner's question, that you felt that it was unlikely that gold miners would go to the copper mines, did General Somervell say anything that you can recall?

A. He made the statement with regard to the fact that they were furloughing men from the Service to go to the copper mines; that they could not be doing that as long as there were miners available in gold mines who might be used in the copper mines.

Q. Specifically with respect to your statement that you didn't think the gold miners would go to the copper mines, did he say anything?

A. I don't think there was any statement as to the method of getting them to go there.

Q. You referred to the fact that you also talked to Mr. [fol. 870] Ayers and Mr. Hayes in the Copper Division. Did you tell them the same thing that you had told these other people?

A. Yes.

Q. Did they say anything about it? Did they make any answer at all?

A. Both Mr. Ayers and Mr. Hayes were men of very broad experience in mining, and they were old friends of mine. I had known them both in Arizona. That is why I went to see them. They both agreed as to the ineffectiveness of such an attempt.

Q. You referred to certain types of non-ferrous mining activities in the general vicinity of Lead. I take it that the most remote that you referred to was the copper mining in Salt Lake City, which you said was about 650 miles from Lead, is that correct?

A. Yes.

Q. Within that total 650-mile radius, what non-ferrous mines were there other than gold?

A. There were the copper mines at Butte, the large molybdenum mine in Colorado, several districts in Colorado where they were mining what we generally speak of as the complex ores, ores with a number of metals in them. For example, the Ouray District in Colorado has an ore that contains gold, silver, copper, lead, zinc.

Q. What about any of the ferro-alloys? Were any of them mined in that area?

[fol. 871] A. There are no ferro-alloys mined. They are manufactured.

Q. I was thinking of the alloy materials other than molybdenum, the alloys other than molybdenum.

A. There is iron in Wyoming. There has been a little tungsten in the Black Hills. Homestake had fairly substantial tungsten production in World War I, as did another property, the Wasp No. 2, which is near Homestake and which we owned in 1942. In the summer of 1942, there was exploration work in the areas that had produced tungsten in World War I, but we were unable to find more than a nominal amount, which produced a few carloads.

Q. What about vanadium? Was any of that produced in that 650-mile area?

A. Yes, the vanadium mines of Colorado would come within approximately the 650-mile limit.

Q. You also referred to certain bentonite and feldspar. Do you think we have now exhausted the commercial mining prospects of that 650-mile area to the extent that they were then developed?

A. Oh, no. There are undoubtedly other small operations. I think I mentioned that the Black Hills pegmatite area in the southern Black Hills has produced a variety of relatively rare metals in small quantity. There is mica in certain areas of that pegmatite. There had been no [fol. 872] active mining before the war, but there was fairly active mining during the war. They had a mica drifting plant at Custer, at which the Government was purchasing their mica. They were small operations, largely 2 or 3 or 4 or 5-man operations. The pegmatites have produced lithium, columbium, tantalum, and beryl in small quantities.

Q. Were any of those, to your knowledge, expanded during the war?

A. I think there was a little activity in lithium; and at Tinton, at the South Dakota-Wyoming line, there was a small operation endeavoring to recover columbium and tantalum.

Q. You spoke of the Anaconda mine at Butte as being a hot mine. In mining parlance, what does that phrase mean?

A. It means a mine that is hot enough to be uncomfortable. An hour or two underground, and you will be soaking wet, and everything that you have on.

Q. Reduced to temperatures, for the benefit of people who haven't been in mines of that type, what does that mean, Mr. Borge?

A. It is, of course, related to humidity. I think that the temperature is in the high 90's, with high humidity.

Q. By comparison, for example, what was the temperature at Lead in the mines?

A. In the low 80's.

[fol. 873] Q. What about the humidity?

A. Much drier, a much lower humidity. I think our rock temperature at the 5,000-foot level was 88 degrees, which is a low temperature for that depth.

Q. Referring to this meeting that was held in Washing-

ton on October 1, did each of the representatives of the mining industry have an opportunity to present their views?

A. Yes.

Q. How much time did you, yourself, take to present your views on that occasion, do you recall?

A. I can't give it in time, but I made the longest statement of any of them. I think it probable that I talked for half an hour.

Q. You referred also in your testimony on Friday, in summarizing the remarks that you made at that meeting, to a statement to the effect that you had pointed out the fact that "we were singled out for special treatment." What did you mean by that?

A. Meaning the gold mining industry.

Q. What kind of special treatment? What do you mean?

A. The suggestion was definitely made at that meeting that we were to be closed down, and I knew of no industry where suspension of operation had been ordered.

Q. You mean no industry or no mining industry?

A. Certainly no mining industry, and I don't think at [fol. 874] that time I knew of any other industry in which suspension was ordered.

Q. Hadn't you heard that the production of passenger automobiles had been completely terminated?

A. It hadn't been completely eliminated. I knew it had been curtailed.

Q. Hadn't you heard that the manufacture of coin vending machines had been completely terminated?

A. I don't know anything about coin vending machines.

Mr. Rigney: I object to the form of the question, because it is directed at a different type of situation than the witness testified he was speaking of. He said that at the meeting of October 1, he pointed out that the gold mining industry was being singled out for special treatment. In other words, the Order, L-208, apparently, as it was then drawn and certainly as it was issued, ordered the industry to close down—period; out of business. Mr. Barnes is now interrogating the witness as to whether he heard about various other businesses which were required to make adjustments during the war. I say to Your Honor that it is an unfair type of cross-examination because, in the first place, the witness can not be assumed to have knowledge

of all the "L" or "M" orders issued by the War Production Board, and it presupposes that these orders affecting these other industries were of the same general nature as Order [fol. 875] L-208. They were not. They may have denied steel for the automobile plants or they may have said to a given company, "You shall not make this or you shall not make that," but I know of no industry to which they said, "You will close your doors until this order is lifted." In that respect, it was unique.

The Commissioner: Overruled.

Mr. Barnes: Will yo read the last question and answer?

(Whereupon, the record was read by the reporter, as requested.)

By Mr. Barnes:

Q. Had you heard that the manufacture of bicycles had been prohibited?

A. No, I do not know that I had at that time.

Q. Have you ever heard of that? Was that called to your attention at that time by anybody?

A. I have heard it in testimony in this case.

Q. Did anybody at that meeting, any Government representative, call to your attention the fact that other industries had been prohibited by "L" orders from manufacturing their normal product?

A. I do not believe that that was brought up at that meeting.

Q. So your remark at that time, Mr. Bjorge, was not limited to the fact that gold mining was being put in a different category from other types of mining, is that [fol. 876] correct?

A. No. I think the opinion that I expressed at that meeting was broader than that.

Q. If you had known that the manufacture of automobiles had been prohibited, that the manufacture of children's metal toys had been prohibited, that the manufacture of coin vending machines had been prohibited, that the manufacture of amusement devices had been prohibited, and that the manufacture of bicycles had been prohibited, would you still have felt that the gold mining industry had been singled out for special treatment?

Mr. Rigney: I think that is objectionable.
The Commissioner: Sustained.

By Mr. Barnes:

Q. You said that certain Government representatives spoke in favor of the order. One of them you mentioned was General Clay. Do you recall what General Clay said?

A. In general. He emphasized strongly the need for copper and for miners in the copper mines; that it was very important that they obtain those miners.

Q. Had you repeated at that meeting the substance of the remark you had made to various individuals in August to the effect that you did not feel that gold miners would go to the copper mines?

A. Yes.

[fol. 877] Q. Do you recall General Clay's replying to that point at all?

A. No, I do not.

Q. You also referred to a Mr. Hill, who spoke in favor of the order. Incidentally, do you have any further initials or any other description of Mr. Hill?

A. No, I have not. In all probability, I wouldn't have remembered his name, because I didn't know him before, except for the listing which I made of the men that I either knew or who entered into the discussion.

Q. Have you ever seen Mr. Hill since that meeting?

A. No, I have not.

Q. Do you recall what the substance of Mr. Hill's remarks was?

A. I think it was the same general discussion of the need for men for the copper mines.

Q. Did he direct himself at all, as you recall it, to this argument you had advanced that you didn't feel that the gold miners would go to the copper mines?

A. I do not recall that he did.

Q. What about Mr. Harbison? What was the nature of his remarks?

A. I remember part of his remarks, because he directed them directly at me, arguing that if I went home and assembled our employees and made a speech to them and [fol. 878] urged them to go to the copper mines, wouldn't I have influence with them so that they might go.

Q. Did you answer that?

A. I did. I thought under the circumstances that my influence in that direction would be small, and that I thought I would be in a very difficult position if I took any such action.

Q. Did he make any further comment along those lines after you said that?

A. I think, as I recall it, that was the substance of it.

Q. What about Mr. Lipkowitz? Did he say anything at all?

A. I definitely recall his making statements about the number of men who were employed in gold mines.

Q. In which he said, your testimony on Friday indicates, that there were a total of 10 to 12 thousand people employed in the mines, of whom 4 to 5 thousand are miners? Is that your recollection?

A. That is my recollection.

Q. Do you recall anything else that Mr. Lipkowitz said?

A. No. What I recall has to do with the number of men.

Q. You don't recall his addressing himself to the point that these miners might not go to the copper mines?

[fol. 879] A. No, I don't.

Q. Was there anybody at that meeting, that you recall, who represented the War Manpower Commission?

A. General McSherry was there.

Q. Do you recall whether or not he said anything?

A. Yes. He spoke at the—I think it was near the opening of the meeting. He made the argument for the extreme shortage of men in the copper mines. He referred to the furloughing of soldiers back to the copper mines, and the necessity of getting the men from the gold mines.

Q. Do you recall whether or not he said anything at that time with respect to your suggestion that men from the gold mines might not go to the copper mines?

A. I think he stated that they were making plans for channeling men to the copper mines. I remember no details of how that was to be done.

Q. I take it that this part of the meeting which we might call the general part of the meeting lasted from approximately 2:00 to 5:30, is that correct?

A. Something like that; I think perhaps 2:30 to 5:30.

Q. Then after a recess, you continued under Mr. Wilbur Nelson's ch[illegible]ship to work out the figures as to the approximate [illegible]r of miners, is that right?

A. That is correct.

Q. You said that the figures given by Mr. Batt at the [fol. 880] meeting of the War Production Board on October 6, 1942, which is Plaintiffs' Exhibit No. 92, represented the substance of what you worked out at that meeting as later corrected. What corrections were made after the meeting?

A. None that I have first-hand knowledge of. At that meeting I supplied the information as to the number of men at Homestake, and the approximate number at Bald Mountain, which was a mine which was near us. The other men supplied information as to the men in the mines with which they were connected and other mines.

Q. Do you recall now what estimate you gave as to the number of men at Bald Mountain?

A. I think probably about 140. It may have been a little more than that.

Q. Where was Bald Mountain located?

A. About three miles from Lead.

Q. North, south, east, or west?

A. It is southwesterly.

Q. Was that the only other gold mine in South Dakota that you knew of?

A. That was the only other gold mine in South Dakota.

Q. Did you participate in the discussion as to the number of employees in any of these other areas that you can recall?

A. No. Estimates were made toward the end, of an [fol. 881] allowance of an additional 500 men for the various very small operations, but that was an opinion developed from the joint testimony of the industry men who were there.

Q. What do you mean by the "various small operations"?

A. There aren't any in our section, or there weren't any at that time. There had been one down at Keystone, South Dakota, that might have employed 10 or 12 men, and in other sections of the country there were mines that might have

employed from 1 or 2 or 3 to perhaps 20 or 25 men. I don't know. The men from those districts gave most of the testimony regarding those properties.

Q. Had you, yourself, been in these other gold mining areas? For example, the Cripple Creek area?

A. Not immediately prior to this meeting.

Q. How recently had you been there?

A. I worked around the Golden Cycle as a shoveler in the summer of 1911.

Q. Had you been there between 1911 and 1942?

A. No.

Q. What about the so-called Mother Lode area or the Grass Valley area? When had you last visited it?

A. In the late 20's.

Q. Are there any other sections of the country where there is gold mining?

A. Are you referring now to the straight gold mines, in [fol. 882] which gold is the primary metal produced?

Q. That is right.

A. I think the northern Black Hills, Cripple Creek, and the Alma District in Colorado, the Mother Lode District, and the Grass Valley area, and the dredging operations, the largest of which are in California valleys, will cover nearly all of the major mines in primary gold production. Of course, the Alaska-Juneau, in Alaska.

Q. The figure that Mr. Batt gave to the War Production Board as the total employment of the gold mining industry was 3,270 men. Do you recall how many employees Homestake had at the time?

A. At that time we had approximately 1800.

Q. So Homestake would have had approximately 60 per cent of the total employees in the gold mines in the United States, is that correct?

A. We were by far the largest operator in the United States, and that figure of 1800 men that I gave included the men in our sawmilling operation, which was in the neighborhood of 200.

Q. It would still, even deducting them, have approximated 50 per cent of the men employed in the gold mines?

A. In the major gold mines at that time.

Q. In all of them. How many gold mines were there in

the United States at that time, do you know? By that I mean [fol. 883] mines that produced almost exclusively gold, not gold as a by-product.

A. If you go down to the very small operations, there were probably a large number. I don't know exactly how many.

Q. Is dredging for gold done anywhere but in California?

A. Yes.

Q. Was there anybody at that meeting who represented dredging operations, other than from the State of California?

A. Mr. McCormick from the Natomas Company was the only one there.

Q. That is in California, is it?

A. That is in California.

Q. Was there anybody there who represented any of the mining companies, lode or placer, in Alaska?

A. No. The meeting had been called on short notice, and I presume they had no opportunity to get there.

Q. What was it you said you referred to when you said that the figures were corrected or adjusted after the meeting?

A. There was testimony here that at the end of that meeting, some of the men present stated that they would make telephone calls and get additional information to give to Wilbur Nelson. I did not do so, because I had given the information for our area.

Q. Were you present when any of them spoke to Mr. Nelson after that meeting?

[fol. 884] A. No.

Q. Do you recall how the figures that Mr. Batt is reported to have read at the meeting of the War Production Board, as shown in Plaintiffs' Exhibit 92, differed from the final figures that you had worked out with Mr. Nelson that afternoon of October 1?

A. No, I do not, in exactness. My recollection is that the summary of figures that was gathered that evening was that possibly 2500 men would be released by closing down the gold mines, of whom 750 probably would be miners.

Q. So when you referred in your testimony to the fact that the figures were corrected after the meeting, you were

speaking of only what you heard Wilbur Nelson say on the stand here, is that correct?

A. No. I think I had seen that figure of something over 3,000 subsequently.

Q. Directing your attention to Plaintiffs' Exhibit 132, telegram to Mr. Clark from Under Secretary Patterson, do you recall having a meeting with officials of the War Department and officials of the Anaconda Company as referred to in that telegram?

Mr. Rigney: Will you hold it just a minute, Mr. Bjorge? I want to ask that the question be read back.

(Whereupon, the question was read by the reporter.)

The Witness: I testified previously to the men from the [fol. 885] Army, the USES, and the War Manpower Commission, who came to Lead for a meeting with us. There was no representative of Anaconda at that meeting.

By Mr. Barnes:

Q. Did you ever see a representative of Anaconda that you can recall?

A. Not with reference to this subject.

Q. Mechanically, Mr. Bjorge, what is the process by which you pump water out of a mine?

A. All of the mine workings are ditched. A ditch is put in at the edge of a drift for carrying water to the central points, where it runs into sumps that are so arranged as to provide for settlement of the sediments that are in the water, the crushed rock, and so forth, to minimize the injury to the pump valves. Then it flows to the sumps at the underground pump station and is pumped to the surface.

Q. Physically, are the pumps in the mine, or at the surface?

A. They are in the mine at various places. It isn't economical to install a pump for too high lifts. Our pumping stations are near the Ross shaft. As the pipelines go up the draft, the first pump station is at the 1250 level, the second at the 2450 level, and the third at the 3650 level. Then there are smaller pumps that pump all the way from the bottom of the mine up to that 3650-level station.

[fol. 886] Q. Does the water at each level go into a new sump?

A. It is pumped from the sump at one level, beginning at the bottom level, into the sump at the next level, and picked up by the pumps in that station and pumped to the next one, and the same is repeated until it flows out on the surface.

Q. You have to use pipe to carry that water after the pumps start lifting it, don't you?

A. From the pump to the surface, yes.

Q. What type or size of pipes are those?

A. Those are fairly large pipes. I think the pipes in our Ross shaft, the water columns, are either 10 or 12-inch pipe.

Q. Do you ever have to replace any of those pipes?

A. Only at very long periods.

Q. Because of wastage or damage?

A. The wear from water being pumped through them is very slight. The Ross shaft, those pumping installations were put in in 1934. That shaft went into operation in 1934. Those water columns have not been replaced since then.

Q. Has there been any repair to them?

A. Minor, possibly.

Q. Is there any acid content to this water?

A. No, our water is not acid. We installed steel sets in our Ross shaft, and before making the decision to do that, the mine superintendent and I went through the mine and [fol. 887] inspected the structural steel in stations and other places where he knew that they had been put in at least 25 years before that, in order to see whether the corrosion and rust of that steel would be such that we wouldn't want to put steel sets in the shaft.

Q. Didn't Homestake file a second appeal with the War Production Board to be allowed to continue production because of arsenic that was available in its ore?

A. Not a second appeal, but we had been approached from Washington—the Army, the Chemical Warfare Division—asking us to investigate the possibility of producing arsenic, as our ore contains arsenopyrite. We made the investigation. Such investigations had been previously made, and it was established that it would not be economical. We made them again at that time and submitted the information that we could, with the installation of a very small amount of equipment to concentrate the arsenopyrite out of the ore, produce at full capacity ten tons of arsenic per

day, and at any reduction in production a correspondingly reduced amount.

Mr. Walker, our system manager, came to Washington in December to confer with regard to that.

By Mr. Rigney:

Q. That would be 1942?

A. December, 1942, yes.

We presented arguments with regard to our ability to [fol. 888] produce arsenic at the appeals hearing. But later on, some months later—I don't remember the date—we were advised that they would not call on us for any arsenic production.

By Mr. Barnes:

Q. Let me show you this document and ask you whether you recognize that as a copy of the letter that Mr. Walker wrote relating to the arsenic production?

A. (Examining document) Yes, that is such letter.

Offers in Evidence

Mr. Barnes: I offer that in evidence as Defendant's Exhibit No. 6.

Mr. Rigney: No objection, subject to verification, Your Honor.

The Commissioner: Yes. It may be admitted.

(Said copy of letter from Mr. Walker regarding arsenic production was marked "Defendant's Exhibit No. 6," and was admitted in evidence and made a part of this record.)

By Mr. Barnes:

Q. Let me show you this document, addressed to Homestake Mining Company, dated December 18, 1942, signed by A. N. Holcombe, Chairman, Appeals Board, and ask you whether that represents, to your recollection, the final disposition of that matter?

Mr. Rigney: No objection.

The Commissioner: Admitted.

[fol. 889] (Said letter, dated December 18, 1942, to Homestake Mining Company from A. N. Holcombe, Chairman,

Appeals Board, was marked "Defendant's Exhibit No. 7," and was admitted in evidence and made a part of this record.)

(Whereupon, the pending question was read by the reporter.)

The Witness: That is correct.

With reference to my previous answer, I was not thinking of that as a re-appeal. It was just a letter back and forth, and Mr. Walker came on and met, not with the Appeals Board, but with someone from the Chemical Warfare Division, to discuss our ability to produce arsenic.

By Mr. Barnes:

Q. Where is Mr. Walker now?

A. Lead, South Dakota.

Q. What leads you to believe that no hearing was held on that?

Mr. Rigney: If Your Honor please, he didn't say no hearing was held.

The Witness: I didn't think of it as an appeals hearing.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Wouldn't the presence of arsenic in your mine produce acidity?

A. No.

Q. What effect would it have?

[fol. 890] A. The oxidation of the sulphides in the ore or the arsenopyrite and pyrrhotite, and the oxidation was not sufficiently rapid to produce any acid water.

Q. Even if it was allowed to stand in the sumps for settling purposes?

A. Even when it is allowed to stand ~~in the sumps~~ for settling purposes.

Q. What do you mean when you say that you could have adjusted your activities after October 8, 1942, by eliminating development work? What would you have actually eliminated?

A. Eliminated all of the drifting, cross-cutting, razing, and diamond drilling.

Q. In other words, you wouldn't have extended any,

what to a layman are tunnels, any farther from the shafts, is that correct?

A. That is correct.

Q. How far did those drifts extend? Was there any uniform length from the shaft, or does that vary?

A. Oh, no. They are very irregular in their distribution, many of which are driven to find the ore, to locate it. Some of them do not find ore, and the work in that area isn't carried any further. Where ore is found, then additional drifting and cross-cutting is done to more exactly delimit the ore, and diamond drilling is done with a sampling of the diamond drill core to delimit the ore, and event-
[fol. 891] ually it is made ready for mining.

Q. How large are those drifts? Not in length.

A. Our standard drifts are seven by seven in cross-section.

Q. When you actually start your mining—and you had some plans here that illustrated the method of your operation, which I think were marked as Exhibits 143 and 144—looking at Exhibit 143, which I think you said represents the type of mining you would have done during the period of limitation, is that correct?

A. Yes, we would have extracted ore from these shrinkage stopes.

Q. How large are those stopes?

A. Those are 60 feet in the long dimension of the ore body, and the full width of the particular ore—some of them may be at right angles to this section, 15, 20, 30 or 40 feet wide, and some of them may be as much as 200 or 300 feet wide.

Q. You would have had to cut those out, then, for that full area?

A. That is the extraction of ore, yes.

Q. How high did those veins run? You say that the width varied. Did their height vary, too?

A. Oh, yes. They are that shape (indicating), this being the width and this the height, which will run several
[fol. 892] hundreds of feet in various places. The length of the ore chute is the length down the dip, down the pitch.

Q. Which is not a horizontal distance or measurement, then?

A. No. It is an incline distance.

Q. So actually these stopes that you would have had

to cut out, the shrinkage stopes, would have been of varying sizes. One dimension would have been 60 feet.

A. Yes.

Q. That would be the only constant, is that right?

A. That would be the only constant.

The Commissioner: We will recess until 2:00 o'clock.

(Thereupon, at 12:30 o'clock p.m., a recess was taken in the hearing until 2:00 o'clock p.m.)

[fol. 893] AFTERNOON SESSION

(The hearing was resumed, at the time above mentioned, pursuant to the recess previously taken.)

The Commissioner: Had you finished your direct examination?

Mr. Rigney: Yes.

Mr. Barnes: I was on cross-examination, sir.

The Commissioner: All right.

GUY N. BJORGE, resumed the witness stand, and was examined and testified as follows:

Cross-Examination (Resumed).

By Mr. Barnes:

Q. If Homestake had limited its production to the shrinkage stopes as you suggest, what would have been the situation at the end of three years, say, of operations solely on shrinkage stopes, in the mine?

A. The tons of ore available for shrinkage stoping would have been reduced by the amount of production during that period.

Q. And would you have completely abandoned the pillar stopes?

A. Oh no, they would have been mined subsequently.

Q. They are a more expensive form of mining, didn't you say?

[fol. 894] A. They are somewhat more expensive, yes.

Q. Both in reduced output per man hour and in increased use of materials?

A. Yes, but a slightly higher grade ore because of more selective mining.

Q. What do you mean by "more selective mining"?

A. I mean more selective than the ore that is being produced in the shrinkage stopes. There are certain ribs of material that do not carry enough gold to pay their way, but must be taken. It is not possible to leave them in that type of mining, while in the square set stope you can leave even a very limited area of low grade material.

Q. Is it possible for the miner to recognize whether he has got low grade material or not?

A. We do it by sampling.

Q. But at the end of a period of two or three years of taking only shrinkage stopes you would have had left a considerable volume of pillar stopes that would have had to be removed, is that correct, or would have had to be mined?

A. Yes.

Mr. Rigney: When you say "pillar stopes" you are refering to the same thing that is described as square set stoping, is that right, Mr. Barnes? I mean, the testimony as I recall it up to now has distinguished between shrinkage stopes and square set stopes.

[fol. 895] The Commissioner: They used the word pillar in the testimony. If it was not this witness it was the first witness, Dr. McLaughlin.

By Mr. Barnes:

Q. What is the correct terminology to apply to the material that is left in between the shrinkage stopes?

A. That is the pillar, and it is mined by the square set method of stoping.

Q. And why do you use the words "square set"? Does that refer to the manner of breaking?

A. Because of the set of timber, there are four posts set on the corners of the square, and the caps and ties across the top, so that each set of timbers is a little square. It is actually a little—well, not a cube, because it is not actually cubical, but it is a cubical shape.

Q. As I follow your description, in mining the shrinkage stope you start from the bottom of the vein and work up, is that correct?

A. Yes.

Q. Now, I am not sure I understand, but in the same order of progression, how do you mine the square set stope?

A. We start at the level or a sub-level which is made midway between the two levels, which would be at 75 feet —the levels are 150 feet apart—and we begin at the top section, that is, the top level or sub-level, that has less [fol. 896] than 75 feet of ore above it, and mine to the top of the ore.

By the Commissioner:

Q. Going up?

A. Going up. Then we drop 75 feet below that portion that has been stoped and take another section of 75 feet, and again drop 75 feet and come up with another one until we have reached the bottom and mined out the entire pillar.

Q. How is the ore removed?

A. The ore drops to the botom in each section that you are mining and is drawn out of the chutes into cars and hauled out.

Q. I am thinking about what appears to be a form of flooring in those photographs that were introduced.

A. There is a complete floor on the working floor.

Q. Yes.

A. The miners put down 6-inch material for a floor to work on, and when they have broken ore onto that floor they speak of "turning it down," they pull up a portion of that floor and turn the ore down and it drops down to the bottom of the stope where it goes into chutes from which it is drawn into cars.

By Mr. Barnes:

Q. Do you use blasting in the square set stopes?

A. Yes.

Q. So that actually, if I follow you description, what [fol. 897] you do is that in each of these 75-foot sections you are working upward, but your progression of sections is downward; is that correct?

A. That is correct.

Q. Now, on the shrinkage stope, at what point do you withdraw the broken ore?

A. When the stope reaches a height that is regarded as the maximum for safe operation.

Q. Is that a criterion of management or is that determined by outside safety engineers, for example?

A. No, that is a criterion of our supervision.

By The Commissioner:

Q. You actually stand on the broken ore to work from above, don't you?

A. You stand on the ore to drill above and blast down more ore.

Q. So you use that for a floor?

A. Yes. And that is generally stopped at about 25 feet above a mine level. If that is not the top of the ore, the stope is drawn entirely empty, all of the ore cleaned out carefully, and it is then filled with waste. That will be some coarse waste from the development work and our sand tailings go back into the mine for fill, and then on top of that, at the elevation of the mine level, they lay fills and set a drift, you might say, of timbers with chutes, ore [fol. 898] chutes, and then they again fill with sand to about four feet above the top of those timbers, and then they draw the sand out to make hoppers in the sand above the chutes and start working on top of that sand to take the next lift of the stope up. And they continue and repeat that operation for whatever number of times is necessary for the vertical height of ore in that particular place.

By Mr. Barnes:

Q. Do you use the same type of machinery in working in the square set stopes and in the shrinkage stopes?

A. The machine drills and drill steel are all the same, and tugger hoists for hoisting material into the stope. In the square set stope there is the large additional quantity of timber that must be brought into that stope.

Q. What about hoisting material? You do not have to do any hoisting in the shrinkage stopes, do you?

A. The drill steel is let down into the stope through a raise from the level above. Drill steel on the machines.

Q. By the drill steel do you refer to what would be, in effect, a bit on a home drill, the actual cutting tool that fits into a drilling machine?

A. That drills the hole in the rock.

Q. Would you describe what one of those drills looks like?

A. Well, the drill steel that we were using at that time [fol. 899] was what was called a one-inch, quarter octagon. It means one inch square with a small bevel taken off on each corner. That steel is cut into the required lengths for the operation in the drill shop.

Q. What lengths do you use for that?

A. Oh, they vary from 2 to 10 feet long, with a bit forged on the end of that steel. And that steel is then operated in the air drill and drills the hole.

Q. Does it drill it by rotation or——

A. By impact, it is a hammer drill.

Q. Like a star drill?

A. But it rotates also. The blow is hit and then it rotates a little and another blow is hit and it continues rotation so that the bit is on a cross bite. They have edges in a cross and they rotate so those cutting edges cut at a different point to keep rotating all of the time as they are drilling.

By The Commissioner:

Q. Is it a slow rotation?

A. Well, it is a fairly fast rotation.

By Mr. Barnes:

Q. But it does not rotate at the moment of impact, it rotates between impacts, would that be a correct statement?

A. Those impacts come very rapidly, and it is just rotating all the time, so that the cutting edge is not in the [fol. 900] same position in the hole all the time. Every blow is at a different position in order to cut that rock and chip it and grind it fine enough so that it can be washed out of the hole.

By The Commissioner:

Q. That can be compared to the air drills that we see out in the street?

A. Yes. That is a jack hammer that we use in drilling holes for secondary blasting. We use many of those jack hammers of the same type you see in street work.

By Mr. Barnes:

Q. And these things you call drilling machines are pneumatically operated impact machines?

A. Impact machines operating with 100 pounds air pressure.

Q. Where does that air come from?

A. From the compressor plant on the surface.

Q. And you have permanent piping down to within a certain point of the place where the men are working; is that correct?

A. There is permanent piping to almost directly at the place they are working, and then they attach a rubber hose to the end of that for carrying the air to the machine, and also a water hose for washing the cuttings out and keeping the cuttings all wet to prevent the dissemination of dust.

Q. Is that a water spray that is running continuously? [fol. 901] A. The water goes down through a hole in the center of the drill steel.

Q. So you have to have water lines that come to the same point?

A. Yes.

Q. Where does that water come from?

A. That water comes from the surface.

Q. You do not use any of the water that has been collected in the sumps, then?

A. No, that is all pumped to the surface.

Q. Wouldn't it be simpler to use the water that was already in the mine?

A. Well, there has to be a supply with proper pressures, and what-not, coming down through the various tanks at various levels to reduce pressures, and so forth.

The Commissioner: Let me see those Exhibits 143 and 144, please.

By Mr. Barnes:

Q. So that within the mine you have three sets of pipes, is that correct, or maybe there are four? You have one set for removing water that has been collected in the mine, is that right?

A. In the shafts.

Q. In the shafts.

A. They don't extend around the mine, they are just [fol. 902] from the pump station up the shaft.

Q. You have one set that brings in air under pressure, is that right?

A. That is right.

Q. You have one set that brings in water, is that correct?

A. That is right.

Q. Are there any other pipe lines?

A. There is another set of pipes that brings high-pressure air for the hauling system. Our locomotives, except for two storage battery locomotives, are compressed air locomotives that operate on air that has been compressed to 1,000 pounds pressure, and the high-pressure air lines reach certain points on every level where the locomotives stop to recharge their receiver.

Q. In effect, then, they are not permanently connected to the high-pressure line, but they have a storage tank that——

A. There is a tank on the locomotive, and it is recharged at the necessary intervals. And the man has a gauge that shows his pressure, with a reserve tank that he may use if he runs his pressure too low to get back to a charging point again.

Q. Now, what pressures do you use for those locomotives? What does that line carry?

A. That is 1,000-pound air.

[fol. 903] Q. Referring to Plaintiffs' Exhibits 143 and 144, where is the shaft in relation to the work that is shown there?

A. Well, it may be quite a long distance away. There are two main operating shafts. The openings that are shaded in half of the opening at the line across the approximate middle of that drawing are——

Q. You are referring to which one, you are referring now to 143?

A. 143, yes.

—are the cross-cuts which connect with drifts that come from the shaft.

Q. There are three horizontal lines appearing there, and the half shaded——

A. This diagram represents a section through three

levels. There is a level there, and one there, and one there (indicating), and they are 150 feet apart. And these half shaded squares represent a cross-cut, or tunnel, if you wish to call it that.

By the Commissioner:

Q. That is what you call your development?

A. That is part of the development, yes. And the access to the stoping area is through those cross-cuts from the drifts that go to the shaft, and there are miles of drifts on every level.

By Mr. Barnes:

[fol. 904] Q. Now, referring to Plaintiffs' Exhibit 143 for the moment, the two cross-cuts that appear in the upper right-hand corner of that in the area which is shaded blue, I take it, are part of your development work that produced negative results; is that correct?

A. No, not necessarily because it is right in the ore area, and there might be ore in those cros-cuts at other points in the cross-cuts. This is diagramatic, and the colors, the blue represents what the geologists call the ellison formation which overlies the ore-bearing formation, and the pink is the ore-bearing formation, and in an area of this kind would be substantially all ore, and the green down below is the schist which they call the poorman formation that underlies the ore. But these are highly folded veins, so that the trace of one of those formations, either on a horizontal level or on a vertical section, will be extremely crooked lines or crooked belts. And they are so irregular that—as I said, this is purely diagramatic—but 50 feet or 100 feet off this section there might be ore in the area of that cross-cut.

Q. Referring to the one in the upper right-hand corner of Plaintiffs' Exhibit 143.

A. Yes.

Q. Now, connecting those cross-cuts at the various levels are certain vertical lines or shafts. What do you call those?

[fol. 905] A. They are raises. There are three names for vertical openings in mines. A shaft is a vertical opening,

beginning from the surface and extending vertically down in the mine. A winze——

Q. How do you spell that?

A. W-i-n-z-e—is exactly the same kind of an opening, but it begins at a mine level and it is driven by sinking from that level. A raise is a vertical opening that is driven by starting at the bottom, at our mine level, and drilling and blasting and continue that upward until it connects with the level above. It does not necessarily have to connect with the level above, it may stop short of that, but all of these that are shown are from level to the other.

Q. Do miners and equipment move through those raises?

A. Yes.

Q. By what means?

A. Well, miners will climb ladders.

Q. What about equipment?

A. I will take you on a good work-out by taking you underground and climbing you around a few of them.

Q. What about equipment? Do you have some sort of mechanism for moving equipment?

A. Tugger hoists, small operating hoists, mounted on a column, the same type as the machine drills or drifters are mounted on, with a steel cable on it, and a drum, and [fol. 906] they are used for [illegible]sting material into the stope. In the great majority of cases the material is lowered into the stope from the level above rather than to be hoisted from the level below. It is done the easier way whenever it is possible to do it.

Q. In other words, when you lower it all you have to use is a brake?

A. Yes.

Q. When the men are working, for example, in the shrinkage stope, which is the next to the left hand one shown in Plaintiffs' Exhibit 143, they get access to the working level, I take it, through the raise, and then through these lateral drifts, do you call those still, that are set off from that stope?

A. Yes, they are little drifts or cross-cuts. And there is always access into that stope from a minimum of two places and very often three or four, as a matter of safety. There will be the connection to the level above through

which materials are lowered. In most cases there will be a connection through a raise from the level below, and in the second stope from the right shown here, that has a =5 on it, there will almost continuously be a connection to one or the other of the raises in the pillar with these short drifts or cross-cuts. The levels of those short drifts and cross-cuts are staggered as between two pillars, and when the one that is the lowest connection in the raise to the right is closed off by broken ore, in usual practice, the [fol. 907] connection has already been made to the next higher one on the one on the opposite side of the stope.

By the Commissioner:

Q. You have not quite made it on this drawing yet.

A. We have not quite made it on this drawing. These drawings are purely diagrammatic.

By Mr. Barnes:

Q. In September of 1942, were you familiar with any of the inventory regulations that had been issued by the War Production Board?

A. Yes.

Q. Had Homestake Mining Company, to your knowledge, filed appeals or requests for relief from the provisions of any of those inventory regulations?

A. I am not sure that I know exactly what you mean by filing appeals for relief, but we had, of course, made efforts to obtain as good a priority situation as possible, and we had in February of 1942 made a request for a special consideration to order and reorder and replace gears on the hoists at the raw shaft that failed. We had gear failures on those hoists and asked for priority on assistance to replace those gears.

Q. Now, there was one point that I was not clear about in your description this morning. Apparently some items you say you charge to operating expense and others you [fol. 908] charge to inventory.

A. That is correct.

Q. Would you explain——

A. As of 1942 and prior years, and some years after that.

Q. Would you explain what the difference is, in the first place, from an operational standpoint, in charging them to one account or the other?

A. Certain materials, and a great many of them, the majority of materials, are received and are charged to an inventory account number and are carried as inventory in the inventory account until the supplies department receives an order for some of that material for use in any of the departments. They then issue the material and charge it to the department, to the job that it is requested for, and, of course, credit the inventory by the amount of material that has been taken out.

Certain materials are used—mine rail is an example of that—which was usable only by the mine. Instead of charging it into inventory when a carload of rail was received and then charging it out to operations whenever it was sent down into the mine, the entire carload was charged to the mine when received, and never appeared in inventory.

Q. So that if, for example, a carload of rail had arrived at the mine on December 30 in any year your inventory report as of December 31 would not show that at all, is that [fol. 909] correct?

A. No, that would have been expensed and charged into operations.

Q. And it would have been charged as an operating expense for the year in which it was received or paid for?

A. That is right. It was deemed at a time prior to that time a saving in accounting, and it did make costs erratic by that amount when your costs came in for one month. You might for the mine, say, have the charge of an entire carload of rail and then you might not have any charge for many months again until the next carload of rail was received.

Q. Incidentally, looking at Exhibits 143 and 144, in any of the tunnels—to use the generic term to apply for everything—shown on there, would rails have been laid?

A. Yes.

Q. In which ones of them would rails have been laid?

A. Rails were laid in all of them originally. Every foot of tunnel underground has a track laid as it is driven. Years later, when a level or a portion of a level has been

worked out, and we would have no more ore on it, then that track is torn up.

Q. Now, let me ask you this specifically: you would not lay it in the short drifts that go from the raise into the shrinkage stopes, would you?

A. The ones on the levels. There are no tracks laid [fol. 910] in those short drifts that go into the stopes, except at the sub-level in square set stoping. In the stoping in the pillar there is a sub-level midway between two levels which is not very long. It may be 100 or 150 or 200 feet long, and the track is laid in that.

Q. Can you show us one of those on Plaintiffs' Exhibit 144?

A. In the section near the upper right-hand corner marked 2 there is a half shaded area at the bottom with an indication of chutes coming into it from either side. That is a sub-level cross-cut which will have a track in it. Those are temporary. That will be in there until the ore above that has been mined out, and also the ore below. When it is mined down to the next level, then the tracks in that cross-cut will be taken out and reused in another location.

Q. Now, looking at the point that is marked 4 on there, is that the same type of thing, that has a half shaded area there?

A. That is on the level there, and again the track will be in that cross-cut not only until that immediate ore is mined out, but as long as transportation through that cross-cut is required by any of the operations.

Q. Now, I notice that in the various stopes that are shown here as having been shaded in dark color, as having been filled with waste, at the level, the intermediate level [fol. 911] that appears on Exhibit 144, there is an indication which, I take it, was originally a cross-cut through each of those; is that right?

A. That is right.

Q. Are those still maintained open?

A. Sometimes the future need for them is eliminated when that particular stope is finished, and they are abandoned. But in the majority of cases they are kept open for ventilation ways and possibly for transportation to the other ore areas and under one that has just been mined here.

Q. How are they kept open?

A. They are timbered through the section that has been stoped, and that timber is replaced as it either rots or crushes. With the sand filling that we do now and have done, and were doing in 1942, that sand solidifies to such an extent that those openings stand very well. You can go into them where timber is rotted to the point of having very little strength left, but they are standing perfectly well because the sand around it has become solidified.

Q. Are there still tracks maintained through those, then?

A. In most cases, yes.

Q. Do you have a firm enough base that you can operate your trains and mine cars through there without having to continually put ballast or something akin to it——

[fol. 912] A. Trains operate through them whenever necessary all the time.

Q. Well, are there some items that are purchased that are treated in your accounts as capital items?

A. Yes.

Q. What are those?

A. Everything that the Internal Revenue Department requires that we capitalize for income tax purposes.

Q. Are your mine cars and locomotives treated as capitalized, do you know?

A. The locomotives that are in operation now, with the exception of the two battery locomotives, were purchased long before there was income tax, and there was no accounting of that kind. The battery locomotives, I don't think, were capitalized because the Internal Revenue Department had a ruling for many years that equipment that went underground could be expensed when it went underground. That is with the exception of major installations of pump stations and things of that sort. Of course, all permanent installations, every piece of equipment fixed on a firm foundation, the structure housing it and everything of that sort, is capitalized, and then so much depreciation taken.

By the Commissioner:

Q. How about your new shafts you put down?

A. That was set up as capital and depreciated over a [fol. 913] period of years. All kinds of mobile equipment, the portable compressor, a truck, and automobile, are all

charged to the capital account. A thing like an automobile would be set up for five years life for depreciation, and other types of equipment may be set up for ten, fifteen, or twenty years life for depreciation.

By Mr. Barnes:

Q. Down to March, 1942, when your serial number was revoked under P-56, had you been using the A-8 priority under P-56 for purchasing for the mine?

A. Yes.

Q. What priority did you use up to that date?

A. A-10 under things that needed priorities.

Q. Do you recall whether or not Homestake at any point prior to October 8, 1942 made application for special ratings on PD-1-a or any other form?

A. We made application on PD-1-a for the replacement of the gears that had failed in February of 1942, and received a rating of A-1-a for those gears, I think.

Q. Had you made any other applications that you can recall?

A. I think that is all.

Q. You listed here a number of different items that were what you said essential to the operation of the mine, sir. Limiting ourselves to the period from about October 1, [fol. 914] 1941 to October 1, 1942, do you recall the quantity of explosives that were purchased by Homestake during that period?

A. That was a year's operation, and I should think, therefore, that the quantity of explosives purchased would be approximately one million and one half pounds.

Q. Would that all have been dynamite?

A. That is all dynamite, yes.

Q. What about fuses?

A. Well, the fuse would also have been purchased, and caps.

Q. What quantities of those, do you know?

A. Well, the quantity that was on hand at that time was 1,300,000-some-thousand feet, which was sufficient for a little bit over a year.

Q. I think you will find it was 1,365,760.

A. I am off on my figures, maybe.

Q. You have got the exhibits here. You can use 146 on that one.

By the Commissioner:

Q. That was on fuse?

A. Fuse, yes.

By Mr. Barnes:

Q. I got that figure from 148. Directing your attention to Plaintiffs' Exhibit 148 on page——

A. Correct, I misspoke, 3,165,000. I reversed the figures. [fol. 915] Q. Let me ask you this: during the preceding year had Homestake's inventory remained approximately constant?

A. Yes.

Mr. Rigney: Preceding what?

Mr. Barnes: The year preceding October 1, 1942.

The Witness: 1942. The total inventory had decreased somewhat in that period.

By Mr. Barnes:

Q. With respect to explosives, do you know whether that increased or decreased?

A. The dynamite was relatively stable, because we ordered dynamite every month for delivery the following month. And fuse was always received in large quantities, because we purchased a carload at a time. So that as of any given date the inventory of fuse would depend on whether we had just received a carload or were just about ready to receive one.

Q. I notice that you had some 45 blasting machines of various sizes. Do you know whether you acquired any during the preceding year?

A. Those are not replaceable very often. They are used for a long time.

Q. Do you recall whether you bought any?

A. I cannot recall whether any were purchased in that year or not.

Q. The next item I see under that heading of Explosives [fol. 916] is reels. What are reels?

A. They are the reels of wire.

Q. What size wire is that?

A. It is a fine wire that goes from the blasting machine to the circuit that is to be blasted.

Q. That is not recovered after the blast?

A. Yes.

Q. It is?

A. The short pieces of wire on which the holes are wired up are not recoverable, but the wire from the blasting machine to that ponit is reeled up and reused many times.

Q. And do you recall the extent to which you had purchased copper wire of that type during the preceding year?

A. I am afraid I cannot. At that time I signed practically all of our purchase orders, but with the volume of them purchased in the course of a year it would be impossible to remember just which ones were purchased and which ones were not.

Q. Did Homestake have a purchasing agent?

A. We have a man who was not designated as purchasing agent, but Chief Storekeper, and the purchase orders came down from the supplies department and were signed in our office.

Q. Was he in charge of purchasing items, whether they were to be charged to operating expense or to inventory?

A. He received the orders from the various departments, in the majority of cases. In some cases the routine orders [fol. 917] for dynamite, for example, would come directly from the mine department down to our office and be signed, and then a copy of it would go back to the supplies department.

Q. Do you recall with respect to this copper wire about what the general magnitude of your general usage was in a year?

A. No, I cannot give that, but it was not very large.

Q. One reel, ten reels?

A. Nearly all of our blasting at that time was by fuse rather than by electric blasting. There were rare cases when electric blasting was used. Electric blasting was used in raises.

Q. What about galvanometers? For what purpose were they used?

A. To check the charge given off by the blasting machine. The blasting machine is an electric pull-up machine that sends out an electric current, and that was to check the measurement of that.

Q. Why was it necessary to check that?

A. You have to know whether the current that is going out is the proper current for setting off the blast.

Q. Can't you hear whether the blast is going off or not?

A. Well, you don't want to use a faulty machine, and take the risk of having missed holes. Of course, you have got to hear it and the miners count the holes as they hear them going off to determine whether they have missed a hole or not.

[fol. 918] Q. I noticed you have 45 blasting machines and 18 galvanometers. How do you match them up?

A. They are not matched up, because a galvanometer is used to test these machines at intervals, not at every blast.

Q. Under normal operations, say, in January 1942, how many blasting machines would be in use in the mines at one time?

A. I cannot answer that exactly, but there would not be very many, because they were used for two raises. I am quite sure there would not have been half of these in use at any one time.

Q. Your next item is blasting caps. How long would that supply of blasting caps have lasted you?

A. I am afraid I don't have a recollection of the rate of use of blasting caps.

Q. Well, how much dynamite would you put in a hole?

A. That varies with the hole. In the mining operation it runs to about one pound per ton of ore broken.

Q. I see. The next item is marked electric blasting caps, all delays.

A. That means, the electric blasting caps are with different delays from the time that the electric shock hits that cap, there is a very short period of delay, and in blasting holes they have to be blasted in the proper order, and the caps of varying delays are used in order to get [fol. 919] those holes to go off successively.

Q. In other words, you would have to have a group that would fire blasts in the order, one, two, three, four, five, six, for example?

A. Yes.

Q. Is it possible that you might find yourself with a lot of caps that had a #6 delay and none of the #5?

A. Well, the aim was always to keep them balanced. As I said before, nearly all of our blasting was fuse blasting. All of the blasting in drift headings and all of the blasting in stopes was set off by a fuse.

Q. But you had 45 blasting machines?

A. Right.

Q. And your lead-in wire, which is the last item shown there, would similarly be used in electrical blasting, is that right?

A. Yes.

Q. Do you have any recollection of how much of that you used in the course of a year?

A. No, I do not.

Q. The next item you were asked about was the item of pipe, which I think also shows in Plaintiffs' Exhibit No. 148 under the heading "Air Distribution Equipment".

Now, I take it that the pipe shown there is the type of pipe that was used to bring air in from your compressors to [fol. 920] your drills; is that correct?

A. Those are practically all the distribution lines. There are two or three items of 3- and 4- and 6-inch diameters, but the others, the smaller pipes, are the ones that are used for distribution directly to the working face. The larger pipe is a permanent installation distributing air through the mine, and then as the drift heading is advanced, the pipe, air line and water line, are carried into that drift heading, and extension put on every few days as required by the advance of the heading.

Q. Going back to Plaintiffs' Exhibit No. 143 for the moment, where we show shrinkage stopes, and taking the one on the extreme right, for example, which is marked with the #4, where I take it work is just starting—is that correct?

A. That is correct.

Q. From what source would the air line for that stope have to be brought?

A. The air line is in all probability in the cross-cut immediately above that, installed when that cross-cut was driven, and then it is extended from that point into the point where they need it in the stope.

Q. And what size is that air line in the cross-cut?

A. I think the air lines in the cross-cut would probably be two inches.

Q. Two inch?

[fol. 921] A. Yes.

Q. Then you put, I take it, some kind of a junction on that line in the cross-cut?

A. That is right.

Q. And tap it?

A. We put a T on the end of the line and carry another line down to the stope.

Q. Do you use a two-inch line there too?

A. In some cases we use two-inch line and in some cases it might be 1½-inch line.

Q. As that stope progresses upward, where is the line maintained?

A. The line would generally be maintained in the raise from above. It would come down the raise from the level above, possibly 150 feet, and then as the stope advanced sections would be taken off that pipe as the stope became higher and higher. The air and water lines would come down so that they would not be disturbed except at the actual advance of the stope.

Q. So that then when we get over to the center stope that is shown on that exhibit, where you have just passed one level, would your air lines still be coming from the level above that?

A. Right.

Q. Would they have been coming from that level at all [fol. 922] times during that particular operation?

A. In practically every one of those stopes I think the air lines and water lines come from the level above. That line installed is fixed and permanent, and only has to have sections taken off as the stope advances. The end of the pipe will be the distance from which they can connect their rubber hose.

Q. Now, in the raise above it attaches to the line in a cross-cut, is that right?

A. Yes.

Q. And what happens when, as we see in Exhibit 144, the operation of one of those stopes passes the cross-cut? What happens to the lines that are in the cross-cut during that period time?

A. They will be taken out. And when they get above the level there will be a new set of lines coming in from the level above. In some cases there may be pipe lines in that cross-cut from which they can connect from below and go into the stope for a while, but in a great majority of cases the air and water lines will come from the level above.

Q. Where are all of these lines that, as you said, would have allowed you to continue operating indefinitely by a process of cannibalizing? Where would all of them have been left in the mine?

A. There are upwards of 100 miles of active level workings in the mine, and there are many of those that were [fol. 923] not in active stoping areas at the time from which pipe lines and rail could be removed and taken where they were needed.

Q. Then, in other words, you would have been forced under those circumstances into a potential double or triple handling of that type, is that right, because if those stopes afterward became activated when materials were again available you would have to reinstall the pipe, is that correct?

A. That is correct. That is a very small item of work as compared with the total stoping operation.

Q. Now, if that was the case, if you had so much pipe available throughout the mine, why did you maintain any inventory of pipe at all?

A. We were doing development work and were extending drifts, and there was pipe necessary for us in those extensions.

Q. But aren't there some drifts which have been extended to the boundaries of your property, or something of that kind, so they are no longer in use?

A. There are always some drifts that we at times abandon, but in normal operation that will wait a long time, because at one given time we may not feel sure that that drift has yet served its full purpose.

The Commissioner: A question suggests itself to me, and I like to get the questions out as they suggest themselves because they frequently develop other questions on the part of both counsel.

[fol. 924] Mr. Barnes: If you are like me, sometimes I forget them if I do not ask them when I think of them.

The Commissioner: That is another reason.

By the Commissioner:

Q. How much of these various operations that you have been testifying about is performed by miners and muckers?

A. The mining operation is all men that are classified as miners.

Q. What do you include in the mining operation?

A. Well, the development drifts, cross-cuts, raises, all of the ore extraction, the actual drilling and blasting of the ore in stopes.

Mr. Barnes: He wants to know about the installation of these pipes.

By the Commissioner: That is what I was thinking of, wiring, and——

A. They are done by pipe men. Tracks are laid by track crews.

By Mr. Barnes:

Q. What about wiring, electrical wiring?

A. That is done by the electrical department. As a matter of fact, we don't let anyone except the electricians do electrical work.

By the Commissioner:

Q. So that you have a good many men besides miners and [fol. 925] muckers doing underground operations then?

A. Yes, that work underground in these operations, and the haulage of ore to the shafts is a matter of the chute pullers. They are not miners. That is one of the early jobs that inexperienced men go on, pulling ore out of the chutes into the cars. There are motor men, and there are track cleaners, keeping the drifts and cross-cuts clean, and there are the dumpers that dump ore trains at the shaft, the skip tankers that tend to the drawing of the ore, loading the skips and hoisting it to the surface, the cagers that haul the men on mine cages. In a city building you would call them an elevator operator. They are cagers in a mine.

Q. Percentage-wise, how many of the employees of Homestake work underground as distinguished from above the surface?

In answering that question I don't necessarily mean underground all the time, but wherever their operations include underground work.

A. At full capacity operation, prior to 1940, or to the

shut-down, our Mine Department payroll had approximately 1200 or a little under 1200 men.

By Mr. Barnes:

Q. Does that include your electricians, for example?

A. No, they are in the Electrical Department.

Q. But there are some electricians that work under-[fol. 926] ground too?

A. Part of the time, yes. And the surface departments, exclusive of the lumber and timber operation, would at that time have had about 800 men. And out of the men that were working underground immediately before the shut-down 47% of the men that were on the Mine Department payroll were classified as miners.

Q. But some of these 800 that you classed as surface employees would occasionally have worked underground?

A. Yes.

Q. Electricians, and so forth?

A. Electricians.

Q. Pipe men?

A. The major part of the work of the Electrical Department is to maintain, to operate the hydro-electric plants and the steam plant, and to service all of the electrical equipment, most of which is on the surface, as you know, electric motors that drive all kinds of machines are largely on the surface, and a small part of the crew would be delegated to underground work of making extensions underground. There are the installations and the wiring to the pump stations, and an underground hoist station that we have that were completed with permanent wiring. They extend the wiring for lighting all over the mine. But there are no electric circuits into many of these drifts. The main drifts, [fol. 927] the haulage ways are electric lighted, but most of the secondary ones, the cross-cuts and so forth, have no electric wiring.

Q. What about the pipe men you refer to? Are they included in the mine?

A. They are included in the Mine Department payroll.

Q. Do you have pump tenders or anything like that on the pumps?

A. We have pump men.

Q. Are they in the Mining Department?

A. No, they are in the Mechanical Department.

Q. So they would be part of the 800 that you listed?

A. That is right.

Q. Are there any other groups in the 800 surface employees who would be employed at least part time underground?

A. Hoisting engineers are all on the Mechanical Department payroll, and men that are operating hoists.

By the Commissioner:

Q. Most of those would be above the ground?

A. We have one underground hoist station on the winze, and the others would be on the surface.

By Mr. Barnes:

Q. Now on the question of your inventory of rails that you read from, which I believe again was on Exhibit 148 down at the bottom of page 4——

A. Right.

[fol. 928] Q. I notice you said that you now use entirely 40-pound rail, is that right?

A. The tracks in the the mine are 40-pound rail throughout.

Q. I notice your inventory includes 25-pound rail and 15-pound rail.

A. Small quantities of lighter rails have been used in special places.

Q. Where, for example?

A. I don't think there are any of them in the main mine. If we go out and drive a little prospect tunnel in some surface area we probably would put in lighter rail. The 15-pound rail we practically never use. The 300 feet listed here may have been something that has been in stock for a long while.

Q. But the ratio of your 25-pound rail and your new 40-pound rail is a ratio of about 1 in 10? Isn't it?

A. Just about, yes. But that would be something that would not be a moving stock while the 40-pound rail would be reordered and used all the time.

Q. What about your used 40-pound rail? What do you do with it?

A. Used 40-pound rail?

Q. Yes.

A. We reuse it.

Q. I thought you said in the mine you had used new 40-[fol. 929] pound rail as a matter of practice.

A. We lay new 40-pound rail in practically all of the drift headings. We lay very good 40-pound rail in all of the major haulage ways. But where the rail is taken out, it is always salvaged unless the ball of the rail is too far gone, and it is reused.

Q. How long prior to 1942 had Homestake been using a 40-pound rail?

A. Well, since very long before I came there.

Q. Is it ever necessary to replace any of that rail?

A. Occasionally, yes. They last a long time. But when, as I said, the ball of the rail gets worn down too far then the new rail will be laid. But the replacement of rail in a period of three or four or five years would be very small indeed.

Q. Do you have any idea what it would amount to in magnitude, either in feet, tons or any other measure?

A. Well, I would say that we have probably operated for a length of time when there would be no replacement of rails in most of the haulage ways, and certainly a few thousand feet would take care of that work for a long period.

Q. What do you mean by a few? 2000? 3000?

A. 2000 or 3000 or 4000.

Q. Do you know whether the company had bought any rail during the twelve months preceding October 8, 1942? [fol. 930] Mr. Rigney: I do not know whether Mr. Bjorge wanted to add something to his answer there, Mr. Barnes.

The Commissioner: If he did, he may do so.

The Witness: I think I was just going to say that in that kind of operation, restricted operation we have been talking about, there would be ample recovery of rails underground to more than fulfill any needs.

By Mr. Barnes:

Q. Do you know whether Homestake had purchased any rails during the twelve months preceding October 8, 1942?

A. I am quite certain that they purchased rails during that time.

Q. Do you have any idea what quantity of rail they purchased?

A. I would not be sure, but in all probability, a couple of carloads.

Q. How many feet would that represent? Do you know?

A. I have to calculate it and transpose—we use it in feet all the time.

Q. Your 40-pound rail means 40 pounds to the yard, doesn't it?

A. Correct, so that——

Q. A 40,000-pound car——

A. A 40,000-pound car would be——

Q. A thousand yards?

[fol. 931] A. A thousand yards? It would be more than that. That would be only a thousand yards.

Q. 3000 feet.

A. 3000 feet. And we would be driving possibly 18,000 feet of drift during the year, and that is with two rails. It would take 36,000 feet of rail. I was way off. I made no mental calculations.

Q. On rock drills and parts, I believe you referred to both Exhibits 148 and 149, and I do not know whether you can find the place in Exhibit 149 that you referred to or not because there was some difficulty on page numbers.

A. That is the repair parts.

Q. Repair parts I was going to ask you about specifically. Are these items that are listed in Plaintiffs' Exhibit 149 under the heading "Mine, Rock Drill Repair Shop Inventory as of November 18, 1942" are those items that would be used to repair the drills which are shown on Plaintiffs' Exhibit 148 under the heading "Air Drills and Equipment"?

A. Yes.

Q. And how can you identify the repair parts with the various types of drills? Is there any way of doing that?

A. I cannot do that, no. In some headings here they are listed, Ingersoll X59 Jack hammer parts, Ingersoll X72 drifters, Chicago Pneumatic CP 44 Stopers. And they are distributed through the inventory according to the [fol. 932] machines for which they are repair parts.

Q. Plaintiffs' Exhibit 148 does not show the types of machines in that detail?

A. This simply shows the total number for, for example, there are 222 3½-inch drifters.

Q. What is a drifter, incidentally?

A. A drifter is a machine that is mounted on a column for drilling around in a drift. It gets its name from that, though we also were using them, the same type drifter, column-mounted, in the stopes.

Q. In both types of stopes?

A. In both types of stopes. We were using the column-mounted drifters for the primary drilling and blasting, and jack hammers for the secondary blasting. That is, drilling and blasting the pieces that were too large for handling that had to be reblasted.

Q. Let me see if I follow your description. A drifter is a machine that is basically designed for working in a horizontal position into a face that is vertical to it; is that correct?

A. It obtained its name from that because it was initially, when pneumatic machines were first developed, a machine that was used in drifting.

Q. And when you were working in a stope you were working overhead, were you not?

[fol. 933] A. Yes, drilling flat holes.

Q. What do you mean by "drilling flat holes"?

A. Nearly horizontal. In a shrinkage stope the machine is set up on a column and then drills as many holes as they can fan out from that set-up. In a square set stope, the raised set that I spoke about the other day, one set is raised above with the use of a stoper, which is used to drill vertical or near vertical holes, at least a stope inclination.

The Commissioner: We will recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearing.)

[fol. 934] By Mr. Barnes:

Q. If you will look at the photograph which is marked Plaintiffs' Exhibit 139, I take it that represents a drifter working more or less normally at the end of a drift, is that correct?

A. That is correct.

(Here followed discussion off the record.)

By Mr. Barnes:

Q. I am afraid the reporter, because you were speaking in a low tone of voice to the Commissioner, didn't get that. Will you explain that again for the record now?

A. In this picture——

Mr. Rigney: Referring to Plaintiffs' Exhibit 139?.

The Witness: 139.

—two drifters are mounted on vertical columns which are blocked against the back, and they have a screw arrangement for making them tight. They have an arm which may be moved up and down on the column, or turned to either side of the column, and the machine drill is mounted on that arm and can be positioned to place the holes where they desire. In a drift heading like that, about 28 holes will be drilled in order to blast around.

By Mr. Barnes:

Q. That column that you refer to, I take it, then, is somewhat akin to what, in my experience, might have been [fol. 935] one of these jacks put under a sagging floor that can be screwed up or down?

A. There is a jack at one end of it. They set it on a block at the bottom and put a block at the top, and drive wedges in until it is practically tight, and then give the jackscrew a few turns in order to tighten it so it will stand with the operation of the machine.

Q. I will then direct your attention to Plaintiff's Exhibit 141. Will you tell us what that represents?

A. That represents a picture, inner shrinkage stope, with one drifter mounted on a column, drilling the holes for blasting the back of that stope. A second miner is working with a jackhammer drilling one of the boulders from the previous blast which is too large to go through the chutes, and sometimes require re-blasting. You see a number of the boulders on that pile are much too large to go through any chute, so they have to be redrilled and blasted.

Q. If, as is shown in that picture, the drifter is used in the stope to keep drilling holes at an angle deviating very slightly from the horizontal, how did you ever succeed in getting the top of the stope down?

A. There will always be a high point in the stope. They work from that and drill and advance. With nearly horizontal holes, the blast breaks to a bench ahead, and then they drill into that bench again. If the stope should [fol. 936] be entirely flat, no high point from which to start, they would take a stoper and drill a hole in the back, several holes, and blast it down and get a high point from which to start with this type of drilling.

Q. Do we have a picture here—for example, is there a stoper shown in Plaintiffs' Exhibit 140?

A. No. That picture has three column-mounted drifters, and one jackhammer doing the secondary drilling.

Q. Similarly, I take it the tool shown in Plaintiffs' Exhibit 145 is a drifter, is that correct?

A. That is a column-mounted drifter.

Q. In Plaintiffs' Exhibit No. 146, there is no tool whatsoever.

A. There are no machine drills.

Q. In Plaintiffs' Exhibit 142—frankly, I had some difficulty deciding which is the top and which is the bottom of it—if we put the legend on the left-hand side, would we be looking at the picture right?

A. Yes, that is right.

Q. What is that tool?

A. That also has a column-mounted drifter and a jackhammer doing secondary blasting.

Q. So, none of these pictures shows a stoper?

A. None of them shows a stoper. A stoper is a drill with a mounting on an air-feed leg, so that compressed [fol. 937] air passes also into the leg, which is really a cylinder with a long piston on it, and that pushes the machine against the back. Most of the drilling with it is reasonably steeply inclined, but you can drill 45 degree angle holes.

Q. Counsel has just handed me another picture which hasn't been marked—does that show a stoper?

A. That is a stoper. The end of it, a spike end, is set into this plank beside the rail, and the air feed leg will push the machine up against the back so that it is tight against the bottom of the hole all the time.

By the Commissioner:

Q. In other words, as it pushes into the hole, it gets longer?

A. That is right.

By Mr. Barnes:

Q. I take it that you actually have a stoper in that picture operating a drift, is that right?

A. This particular man is probably drilling a hole to insert a bolt for handing pipe or something in the drifter.

Mr. Rigney: May I suggest that this be marked and admitted into evidence as Plaintiffs' Exhibit next in order?

Mr. Barnes: No objection.

The Comissioner: Admitted.

(Said photograph, showing stoper in operation, was marked "Plaintiffs' Exhibit No. 150," and was admitted in evidence and made a part of this record.)

[fol. 938] By Mr. Barnes:

Q. I see among the other tools you have listed in Plaintiffs' Exhibit 148 are something called sinkers. What are those?

A. It is substantially the same as a jackhammer, like the machine the Commissioner asked about a while ago. It is a machine with which you drill down holes. There is no mounting whatever. The operator of the machine simply holds it with the two handles and drills down holes that are steeply pitched. They are used in sinking shafts, and that is the way they get the name sinker.

Q. You use them in distinction to a jackhammer. You show 234 jackhammers, and then 12 sinkers in Exhibit 148.

A. I think the sinkers would be larger machines than the jackhammers. The jackhammers are used in the stopes for the secondary drilling, while the sinkers are used in the actual sinking of a vertical opening, drilling deep holes. It is therefore a larger machine.

Q. Referring to the drifters, the stopers, jackhammers — I take it that from time to time they need certain repairs, is that correct?

Q. What nature of repairs do you have to make to them?

A. We have a small drill repair shop solely for the repair of rocks drills and the hose, air hose and water hose, [fol. 939] in which normally there would be three men working, two men on rock drills and one on repairing hose. Any machine that is not operating satisfactorily is sent up to that little drill repair shop which is immediately adjacent to the shaft, and the repairman in there will put it in working order. It may be just some little item of repair. It may be something that is simply stuck. There may be dirt in the machine, or what-not, so they just clean it up and send it back. Or they may find it worn in some place so they have to put in a replacement part. In some cases it may be a machine that is fairly far gone, and they have to put in a number of replacement parts. They put the machine back in good working order and send it back to the mine again.

Q. Has there ever, in your experience, been any so far gone that it wasn't worth repairing?

A. Oh, my, yes.

Q. How frequently does that occur under normal operations?

A. They can be made to work for a long time

Q. If you disregard the economics of the proposition, they can be made to work, is that right?

A. Yes. They can be made to work. There is no fixed point that I know of for discarding a machine and starting up with a new one.

Q. But it sometimes reaches the point that the repair is economically unwise, is that correct?

[fol. 940] A. Yes, where the air consumption of the machine is too great. Like every machine, it ultimately wears out. By the replacement of parts, sometimes replacing a cylinder or drilling out the cylinder and putting in a slightly larger piston, and what-not, it is made to work efficiently again.

Q. Incidentally, are these carried as capital items, do you know?

A. No.

Q. They are not?

A. The list on Exhibit 148 is a full inventory of all the machines that we had at that time, new and old; and the

general supplies inventory, Exhibit 149, has a listing of the machines that were new. They are also included in this other list. The rock drills have been an item that has been an expense to operation when it was sent underground.

Q. In your experience you know of no normal measure of the life of a rock drill, is that right?

A. No exact measure. Some years prior to 1942, I made a study of that, inquired of rock drill manufacturers, of their engineers, what they considered a good basis for life, of other mine operators; and from mine operators I found no general practice at all. Various ones had different rules, and in our operation we have discarded a machine when it was determined that it had served its useful life and that it was economy to buy a new machine. [fol. 941] Q. Do you keep any records with respect to individual machines, as to the number of hours or anything else that they operate.

A. We have the number of hours of operation for the various makes of machines in order to try to determine whether one make of machine gives us longer life than another one.

Q. Have you been able from those to draw any conclusion as to the number of hours of operation that you can obtain, on the average, from one of these rock drills before——

A. I don't think we could.

Q. But there are figures that the company has maintained for that purpose, are there not?

A. We have reports that show the comparative footage of holes drilled by various machines, and the comparative repair costs. But the number of machines here would be decidedly ample to take care of the restricted operations that we have talked about, for a much longer period.

Q. How many rock drills had Homestake purchased during the 12 months preceding October 8, 1942, do you know?

A. I can't answer that.

Q. Had it bought any?

A. Yes, I think so.

Q. Do you know whether it would be ten, one hundred?

A. It wouldn't be one hundred, I am sure.

Q. With respect to that inventory of repair parts that [fol. 942] is shown in Plaintiffs' Exhibit 149? since Plain-

tiffs' Exhibit 148 does not show the makes of the drills that the company had, is it possible to tell whether that list of parts was adequate to repair those drills, or not?

A. You couldn't tell from this alone, but it was certain that great effort was made to keep the repair parts in balance with the machines so as to have parts for the various machines.

Q. Had the company purchased any repair parts during the 12 months preceding October 8, 1942?

A. Certainly.

Q. Do you know the quantity?

A. No.

Q. You listed, I think, nine different types of mine cars in Plaintiffs' Exhibit 148. Why do you have so many different types?

A. The one-ton end dump flat-bottom cars are used in development work because of the convenience of dumping them into a worked-out stope or a raise; that you can just push the car to the end of a drift and dump it from the end.

Q. So if you had not done any development work, those 146 cars would not have been used, is that correct?

A. They could have been used for hauling ore. There were 706 one-ton side dump gable-bottom cars, which are our older type of ore-haulage car. Some years before that—it wasn't very long before 1942, I think in 1939, after a [fol. 943] great deal of study, we succeeded in getting a 2-½-ton and 3-ton car. Before that, no satisfactory car had been available in that size to operate on 18-inch gauge track. That has been difficult. That is the reason for the small cars. It definitely is too narrow a gauge for a mine of our production capacity, but we had it and had to get along with it.

We finally got these 187 three-ton and 57 two and one-half-ton cars. They have a special dumping arrangement with a wheel on one side that engages the track at the place where the ore is to be dumped, and dumps as the train is pulled through. They, as I say, were relatively new at that time.

The 45 five-ton bottom-dump cars are the cars used on the surface tramway. I say "surface." It is mostly underground. It is a tramway with a port operating to

the surface, hauling the ore from the two shafts to the mill.

That is the total number of mine cars. The others are timber trucks for transporting the mine timbers underground, the steel trucks for transporting the drill steel from the drill sharpening shop to the working places, and miscellaneous cars that are used for various purposes. Whether they include the latrine cars or not, I don't know.

Then there are 21 passenger cars for transporting the men from the shafts to somewhere near their working places.

Q. With respect to the material which was used to fill up the stopes, was that moved in these cars at all?

[fol. 944] A. All of the waste rock broken in development work was dumped in a worked-out stope that had an opening from the level on which it was developed, if that were possible. In development work below the lowest production level, that material had to be hoisted in cars and taken off the cage at the shaft on a level where there was an available stope in which to dump it.

When the sand tailings after the treatment of the ore is also run back into the mine for stope filling, that is run back by gravity.

Q. Does it go by gravity all the way to the stope?

A. All the way to the stope. It is run at about 55 to 60 per cent solids, sand in water. It flows into the stope.

Q. Do you know whether or not any mine cars had been purchased by Homestake during the 12 months preceding October 8, 1942?

A. I am quite certain that the last cars purchased were the large Granby cars, which I think were purchased in 1939.

Q. During your connection with the company, had any mine cars worn out to the point where they were disabled for operation?

A. Yes. Cars are built and repaired in our own shops.

Q. Do you build your own cars?

A. We build a great many of these cars. There have been none of those small cars purchased since I have been at Homestake.

[fol. 945] Q. When you say you build them, do you buy certain sub-assemblies?

A. No.

Q. You cast your own wheels?

A. We cast the wheels in our own shop and build the truck from structural steel shapes, and build the body of the car from steel plate and the necessary reinforcing pieces of steel.

Q. Are there tires on those wheels?

A. No.

Q. Steel tires?

A. They are cast iron wheels.

Q. With no tires?

A. With no tires.

Q. Doesn't that mean that you get a greater wear at the wheel and greater need of replacement than if you had tires on it?

A. Not in proportion to cost.

Q. What about the body? Does the body have a tendency to wear out before the understructure does?

A. Yes.

Q. How frequently do bodies have to be replaced or repaired?

A. I don't know whether I can give a timing on that, but on an average, they will be in the mine a long time before [fol. 946] the body has to be replaced, unless they get into a wreck and are damaged in that way.

Q. Is there sometimes a wreck?

A. You don't have transportation without having a car jump the track or go into the wall sometimes. They are not frequent, but there are cars that are damaged by that.

Q. The bodies, I take it, are made of steel plates?

A. Yes.

Q. Of the one-ton car, what is the dimension of the body? Do you recall that, approximately?

A. The one-ton car is about a 20 cubic foot car, and the side dump cars are slightly larger. They are about 22 cubic foot capacity.

Q. Are they square or not?

A. The flat-bottom cars are practically a square cross-section, and longer than their width or depth. The gable-bottom cars have an inverted "V" in the middle, with doors on the side that open, so they go out on each side of the car.

Q. Is a mine like the Homestake Mine subject to inspection by any regulatory authorities?

A. There is a State Mine Inspector for the State of South Dakota, but due to the fact that mining has been a very small industry in the State, and Homestake has always been recognized as going well beyond any State safety code in its safety practices, the mining code for the State is very [fol. 947] short, and the inspections of our property are very rarely made by the State Mine Inspector.

Q. What do you mean by "very rarely"? Does he come there once a year?

A. No.

Q. Once every five years?

A. It would be one in several years. I can't give the year now, but sometime, I think before 1929, they decided that the employment of a State Mine Inspector for the one mine operating in the State was an unnecessary expense and, although the law provided for a State Mine Inspector, one wasn't appointed until 1934, when some other mining activity started, and they again appointed a State Mine Inspector, and there has been one in office regularly since.

Q. But he inspects Homestake only once every three or four years?

A. He hasn't been at Homestake for more than a year now.

Q. How many other mining activities are there in the State, do you know?

A. There is the Bald Mountain Mining Company, the feldspar operation that I spoke about, the bentonite operations, which are all shallow surface cuts, and then a number of very small operations in some of the rarer things.

Q. Do you know whether or not he inspects those?

A. I presume that he does. I haven't followed him [fol. 948] around.

Q. You measure the life of the ropes on the hoists which, I take it, are not ropes at all, but cables?

A. They are steel cables.

Q. You measure the life by the number of tons that will be lifted by the cable, is that correct?

A. That is correct.

Q. Is that a standard measure of life?

A. We keep a record every time that a rope is replaced. We make a record of the date that that rope was placed on the hoist, and the date it was taken off, and the number of tons hoisted by it. That is for the ore hoists.

The cage hoist, which handles such a variety of material and such a variety of loads from the empty cage to fairly heavy loads, we just keep a time record on.

Q. For how long have those records been maintained, to your knowledge?

A. I think they have been maintained maybe always, I don't know. They have been maintained since I have been at Homestake.

Q. When was it that you went with the company?

A. 1932.

Q. Referring to Plaintiffs' Exhibits 148 and 149, what do you find there that indicates an inventory of electrical wiring or electrical wiring accessories?

[fol. 949] A. Exhibit 149 doesn't seem to have any electrical equipment. Electrical wiring and supplies inventory, 56 pages.

Q. It is the first section of the book, is that correct?

A. The first section of the book, yes.

Q. All of that, for further identification, goes back to the point where handwritten material appears in the inventory book, is that correct?

A. Yes, there is handwritten material on paint supplies. That is the paint department supplies.

Q. How is that inventory made up, Mr. Bjorge?

A. That inventory is made up by the actual physical count of all of the various items listed, by employees in the electrical department. It is headed at the top with the name of the person who entered it, and the person who priced it, which in some cases is the same person; and in some cases is a different person.

Then there is a spot-check made of these inventories by someone from the supplies department, and when our auditors come annually, they make a spot-check by simply picking out at random the inventory of certain items and going to the several departments and making a check of the particular things that they have picked out as a sample.

Q. Looking here, for example, at what is marked page 2 of the electrical inventory, I see some items have been stricken out. Do you know who did that or when it was done?

[fol. 950] A. No, I do not. There is one item on that page.

Q. Then over on page——

A. There is one item on page——

Q. 4½, the back of page 4.

A. These are sheets, not pages, that are 56.

Q. Then on page 5, I notice several items have been stricken through in red. Do you know what that is?

A. No, I do not.

Q. Then at the bottom of that page, I notice that several quantities have been stricken out, quantities that were typed in there, and red quantities and different prices inserted.

A. Apparently they are corrections of these items up here in the top part of the page that have been eliminated.

Q. Let's look at them and see, now. The first item at the bottom of the page was originally put down as 3,277 feet of half-inch galvanized rigid iron conduit, and it has been changed in red to 1,830. It hasn't been increased but has been decreased, hasn't it?

A. That is correct.

Q. So it hasn't been because of the elimination of the items at the top of the page.

A. I was referring back to this. That is a change in those figures. I think that what had been done was that the original figure had included salvaged conduit and had been [fol. 951] corrected to be only the new conduit.

Q. Do you know that, or is that a supposition that you are making?

A. I am certain that is the case.

Q. I am asking, do you know it?

A. Not absolutely.

Q. You don't think perhaps those might have been some of the items that have been checked by either the storekeepers or auditors and found to be in error?

A. On the basis probably that I suggest.

Q. Now, I notice that on the back of sheet 5, there are some items that have been crossed out in black, and on sheet 6 there have been some items——

Mr. Rigney: If Your Honor please, I think we ought to be specific.

By Mr. Barnes:

Q. There are three lines crossed out in black on the back of sheet 5. On sheet 6 there is one line crossed out in black, is that correct?

A. On the back of sheet 5 there are three lines which cover an item amounting to a value of $5.18, and on page 6 there is one item with a value of 55 cents that is crossed out.

Q. I notice that in some places beside some of these items on page 6 or sheet 6, there are red checkmarks beside some of the items. Do you know what those represent?

[fol. 952] A. No, I don't know what that mark represents.

Q. That is a type of mark normally used or frequently used by auditors?

A. It may be for the auditors to check on.

Q. Again, there is one item amounting to 92 cents stricken out on the back of sheet 6, and one item amounting to 35 cents, and one amounting to $31.11 stricken out on sheet 7, is that correct?

A. That is correct.

Q. Do you know when any of those deletions were made?

A. No. I am quite sure that they were made at the time of the taking of the inventory or immediately afterwards.

Q. When these inventories are made by the Department, what is done with them?

A. These inventories, after their audit, then become the basis for the supplies inventory listed in our annual report.

Q. Do they come to your attention at any time at or shortly after the time they are made?

A. Yes. I look them over.

Q. When?

A. Shortly after the first of the year when they are completed.

Q. Do you know whether or not these items which are [fol. 953] stricken out were stricken out in there at the time you saw them?

A. I don't remember with regard to this particular inventory.

Q. If they had been stricken out, wouldn't you have made inquiry as to the reason for it?

A. Probably, yes, if they were items of any consequence.

Q. Do you think it makes any difference whether your balance sheet is 55 cents off or $55 off?

Mr. Rigney: I object to that.

The Commissioner: Sustained.

By Mr. Barnes:

Q. What about those changes that were made in red there? Do you know whether or not those had been made before you saw it?

A. No, I don't.

Q. Is one of these made up in each department, an inventory of this type?

A. These inventories are made in the several departments. These names here are all electrical department employees.

Q. When it says at the top there, "Entered by," and a name, does that mean that is the person who made the physical count, or does that mean that that is the person who wrote it down on this sheet of paper? Do you know? [fol. 954] A. It is entered on the sheet by that person from sheets turned in by the men who are counting them.

Q. Let me direct your attention, since you called attention to some 55-cent items that have been stricken out, to Sheet 51.

A. I only read those that you were showing me.

Q. Look at Sheet 51. There are four different transformers that are listed there, each of which is priced at $205.10, which have been stricken out, is that correct?

A. That is correct.

Q. Similarly on the preceding sheet, the back of sheet 51, there are two other transformers similarly priced at $105.10 each, which have been stricken out, is that right?

A. I am certain that those are used transformers that had been put in the inventory in error.

Q. You didn't make any inventory of used but usable materials on hand?

A. The supplies inventory was all new material, not salvaged material.

Q. Did you record anywhere in the company the salvaged material that was considered to be usable?

A. No, that is not inventory.

Q. And not recorded anywhere?

A. No.

Q. Then, I notice that the material which is headed [fol. 955] "Paint Supplies" is written in pencil. Do some departments submit their inventories in that form, or did they in 1942?

A. They apparently did.

Q. I notice that although that is described as "paint supplies," the first sheet seems to relate entirely to glass, is that correct?

A. That is correct. All of our glass stock is in the paint shop, because the painters are the ones who replace broken glass.

Q. I take it, then—I just noticed the material on the back of the sheet represents paint, is that correct?

A. The first sheet has glass on one side and paints on the other. The second one has glass on one side and varnishes on the other, varnishes and lacquers. The third sheet has glass on one side and polished wire glass on the other. The fourth sheet has brushes on one side, brushes on both sides. The next sheet has paints and oils on one side, and also on the other.

Q. I started to say that I hadn't seen any paint at all, and I realized it was on the back there.

For the next one, the department is given as General Supplies. What is that?

A. That is the general supplies department.

Q. Where your storekeeper is located?

A. Yes, but in many cases the general supplies depart- [fol. 956] ment does not have the physical control of the materials which are listed. For example, these mill supplies and cyanide supplies are delivered directly to the metallurgical department. They are carried under the general supplies numbers, but they are under the supervision of the head of the metallurgical department.

Q. Do you know who makes the physical count of those at the end of the year, the general supplies department or the metallurgical department?

A. The metallurgical department makes the count, with some spot-checks by the supplies department and by the auditors.

Q. Looking at that sheet, I see, for example, there is no notation as to who entered it or who priced it. Under the heading "Extended by," the date December 31, 1942, appears. Was there any requirement that the people who entered and priced the material had to have their names appearing?

A. It obviously wasn't done regularly. The first one has

a one-letter initial on it. The next one, for the mill, has W. H. Todd, who was the foreman of the south mill.

Q. Now, you are in the metallurgical department, aren't you? I was referring to general supplies.

A. These were metallurgical supplies on that first sheet, also, in the metallurgical department.

[fol. 957] Q. In one case we have a pencil sheet which is headed under the department General Supplies. In the next case we have a typewritten sheet under the heading of the department Metallurgical, isn't that correct?

A. That is correct.

Q. Is there any indication as to who made the entry or did the pricing on the sheet relating to or headed General Supplies?

A. Not for certain. It has an "M" on it, but that may be a reference to the Metallurgical Department.

Q. How many different departments made inventory tabulations of this type?

A. The Supplies Department, the Mechanical Department, the Electrical Department, the Lumber and Timber Department, the Mine Department.

Q. And the Paint Shop?

A. And the Paint Shop, yes.

Q. I think the inventory of cyanide at the end of the year appears on that page that you were just referring to, the handwritten page with the heading General Supplies, is that correct?

A. That is correct.

Q. I see that there are two different types of cyanide listed there. Are they usable interchangeably?

A. Yes, but the one that is regularly used is the Aero [fol. 958] brand cyanide. The other, the smaller quantity, called flotation cyanide, is undoubtedly what remained of a carload of that ordered for special purposes. Our regular ordering month by month was of the Aero cyanide.

Q. How much cyanide did the company use in a year, normally, do you know?

A. That would be in the neighborhood of a million and a half pounds.

Q. How much zinc dust did the company use, do you know?

A. Zinc dust—I may have to do a little calculation on that. It would run between 40,000 and 50,000 pounds.

slightly over 3/100ths of a pound per ton of ore. So for a total operation of 1,400,000 tons, my calculation figures out between 40,000 and 50,000 pounds a year.

Q. What about mercury? You used mercury too, didn't you?

A. We did.

Q. Not all of that is recovered, is it?

A. No. There is a little consumed all the time.

Q. Percentage-wise, how much of it is consumed? Is there any way of measuring that in percentages?

A. There is, but I don't know the exact percentage now.

Q. In normal operation, do you know how much mercury you had to buy each year?

A. Yes. In our full normal operation, we had a consump-
[fol. 959] tion of around 600 or 700 pounds of mercury per month. Early in 1942, we were restricted to 1,040 pounds per quarter, and we got along with that. We used more than was necessary as an absolute safety factor in normal operations.

Q. You say you were restricted. By what means?

A. By the materials control department here, the War Production Board.

Q. You didn't secure your mercury, then, I take it, by use of your AA priority under P-56?

A. No. That restriction was a use restriction. We had been reporting regularly the consumption. There were forms for reporting the consumption of mercury, and they gave us instructions that we were restricted to a consumption of 1,040 pounds per quarter, and we were able to live with that amount.

Q. What do you use lime for?

A. Lime is used in the metallurgical department to get the proper alkalinity to the solution.

Q. With respect to balls, I think you said that you had made those in your own foundry, is that correct?

A. Yes, we cast the balls in our own foundry.

Q. From your own scrap?

A. From our own scrap.

Q. Had you ever encountered regulations of the War Production Board which placed restrictions on the use of scrap materials by other than steel mills?

[fol. 960] A. I don't recall. I know that there were re-

ports made out regularly as to the consumption of pig iron and scrap.

Q. You had shipped some iron and steel scrap out of the plant prior to October 8, 1942, hadn't you?

A. We had.

Q. In what quantities, do you know?

A. No, as of that date I don't know.

Mr. Rigney: I might suggest that if the witness cares to refer to his records that he has, they might aid him in refreshing his recollection on this point. I think he has something there which might help him.

The Commissioner: All right.

Mr. Rigney: You were asking this witness, and I thought he might be able to give us some very accurate records.

The Witness: We had shipped 543 net tons of scrap in 1941, and 3,660 tons in 1942.

By Mr. Barnes:

Q. You still had a substantial quantity of scrap?

A. We still had a substantial quantity of scrap on hand.

Q. There must have been something around the mill that was wearing out.

A. We had an accumulation of scrap from 65 years of operation.

[fol. 961] Q. You never shipped any scrap before that?

A. I don't believe that there was ever any scrap shipped. It wouldn't pay its way.

Q. Do you know what scrap prices were during World War I?

A. No, I do not, but I don't think there was any scrap shipped at that time. I know that we had shipped scrap in World War II that had been there since before World War I.

Q. In World War II, scrap sold at $21 a gross ton delivered Pittsburgh. Do you recall that?

A. We didn't ship any to Pittsburgh. We shipped it to Pueblo, Colorado.

Q. The price was $16.50 delivered at the mill, wasn't it?

A. No, it must have been more than that. I think we received something over $20 for it at Lead. We received whatever the ceiling prices were. They weren't under ceiling price.

Q. Are you talking now about steel or pig iron, cast iron?

A. Steel.

Q. Steel scrap?

A. Yes.

Q. Were you shipping on the basis of allocation made by the Scrap Section of the Steel Division of the War Production Board? Do you know?

[fol. 962] A. I don't know. We were shipping under whatever regulations there were, I am certain of that.

Q. From the standpoint of the price, it made some difference whether you were shipping under an allocation or not. That is why I asked you whether you knew whether or not you were shipping under an allocation.

A. I can't answer that.

Q. Who had charge of arranging those sales of scrap?

A. Whenever we had scrap ready to ship, we advised the Colorado Fuel and Iron, and they sent us in an order for it, and we shipped it.

Q. I mean, who in Homestake had the responsibility for collecting the scrap, loading it and notifying CF&I?

A. The Mechanical Department had the responsibility for gathering and loading.

Q. Who notified CF&I when it was ready for shipment?

A. I think the notices went either from me or Mr. Walker, the assistant manager.

Q. What about your liners for your grinding mills. What type of material were they made out of?

A. The liners for the ball mills we cast in our own shops. The liners at that time in our rod mills were purchased steel liners, but we had previously cast liners in our own foundry for the rod mills, also, a few years previously.

Q. The steel liners that you were purchasing for the [fol. 963] rod mills were what type of steel? Was that an ordinary carbon steel?

A. Yes.

Q. About a 10/40 steel, do you know?

A. I wouldn't attempt to give that analysis.

Q. What about the rods? Were they purchased?

A. The rods were purchased carbon steel.

Q. Do you recall what quantities of rods had been purchased during the 12 months preceding October 8, 1942?

A. The rod consumption was about one pound per ton, and with a year's production of 1,400,000 pounds, the prob-

ability is that approximately that quantity was purchased. [fol. 964] Q. What about the liners? What had been the consumption of that?

A. The liners consumption is a little more than a tenth of a pound to a ton of ore.

Q. What about your cones and mantles for the crusher?

A. I said a little more. A little more than a tenth, perhaps closer to one-eighth.

Q. With respect to cones and mantles for crushers, is it possible to measure their consumption in the same way by the ton of ore produced?

A. I don't have that figure in mind, but of course it is possible to get that figure.

Q. Do you know whether or not the Homestake had purchased any cones or mantles in the twelve months preceding October 8, 1942?

A. No, I am not sure of that.

Q. What about your stamps, shoes, and dies? Had you purchased any of them in the twelve months preceding October 8, 1942?

A. I am not sure that we did that. I made an error in the direct testimony in giving the life of those. I gave it more life than the stock that we actually had at that time. We cast our own dies, and the shoes had been cast previously but were being purchased at that time. They could be cast in our own foundry.

[fol. 965] Q. Incidently, what are stamps, shoes and dies that we are talking about? (Laughter)

A. Well, a stamp mill is a thing that is practically out of the picture now. Our stamp mill crushing will be finished sometime this year. The stamp mill consists of a cast iron mortar in which there are usually five stamps. They have stems with a shoe on the end, which drop on to the die, with a shaft up above with a series of cams on it. These stamps are alternately lifted and then just dropped by their own weight as they go off the end of the cam.

Q. And the die is merely the portion of the plate that they hit?

A. The crushing is between the shoe and the die, and there is a screen on the front of the mortar. There is water mixed with the ore. The ore is fed in to the mortar along with water, and whatever size screen is used on the front of the mortar, the material splashes and washes through when it is fine enough to go through the screen.

Q. You say that that type of crushing is practically out. Are you going to jaw crushers or something of that type now?

A. We have already completely revamped our crushing. We used to crush to minus one and one-half inch in two stages, and at the present time our crushing plants are three stages, in closed circuits with screens, so we crush to minus [fol. 966] one-half inch, and the material from that is going directly into the mills.

Q. What do you use for your crushing now that you didn't use then?

A. That was a two-stage crusher, the first, in a gyratory crusher set at six inches, and the second was a Symons cone crusher set at one and one-half inches. Now we have a new larger gyratory crusher for the first stage of crushing to about four inches, followed by a Symons standard cone crusher, which is set at about one and one-eighth inches, I believe it is. Then a second Symons short-head crusher which is set at one-half inch. That is in closed circuit with half inch screens, so the material comes out of the crusher carried by a conveyor belt to a screen and the material that goes through the screen goes down into the ore bin to be hauled to the mill, and the material which is still too coarse to go through the screen goes back into the crusher again.

Q. Aren't there parts that wear out or have to be replaced on those crushers other than the cones and mantles that you referred to?

A. They are the direct wearing parts that are worn in the crushing of the ore by abrasion with the ore.

Q. But there are other parts to the crusher, are there not? [fol. 967] A. There are the shafts from the drive motor that drives the eccentric and keeps the crusher revolving.

Q. There are gears?

A. They are not the rapidly wearing parts. They will last for years.

Q. You still have failures sometimes, don't you?

A. There is no machine that doesn't have a failure sometime.

Q. These are all powered by electric motors, I take it.

A. That is right.

Q. Occasionally you have to make repairs to some of the electric motors, do you not?

A. Very, very rarely. Those electric motors will operate year in and year out with very little repair work.

Q. What does the mill operate on, an eight-hour day?

A. The mill operates twenty-four hours a day, three hundred sixty-five days a year.

Q. You say there are very few repairs needed to be made to these electrical motors?

A. Very few on the drive motors for those shafts.

Q. Are those individual motors for the various machines?

A. There is a motor for each machine, yes, sir.

Q. How large were those motors?

A. I don't think I ought to try to give that from memory. [fols. 968-975] Q. Do you know whether or not Homestake purchased any electrical motors for the mill during the twelve months preceding October 8, 1942?

A. No, I am sure that we didn't. We had completed an extensive construction program early in 1942, and there was no equipment of that kind purchased after that.

Q. Do you know whether or not you purchased any repair parts for electrical motors during that same period of time?

A. Possibly a very small amount.

Q. Were those all new in 1942?

A. No.

[fol. 976] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

Transcript of Testimony — February 3, 1953

TESTIMONY FOR PLAINTIFFS (Resumed)

The hearing was resumed, at the time above indicated, pursuant to the recess previously taken.

Present: (The same appearances as previously noted.)

The Commissioner: You may proceed, Mr. Barnes.

GUY N. BJORGE, a witness for the plaintiffs, resumed the witness stand, and was examined and testified as follows:

Cross-Examination (Resumed)

By Mr. Barnes:

Q. Mr. Bjorge, what was the Sublette Division?

A. The Sublette Division was an operation we had under an agency contract with Metals Reserve. Sometime follow-

ing August in 1942, we were approached by Metals Reserve [fol. 977] to enter into an agency contract to develop vanadium in Lincoln County, Wyoming, and we sent three geologists out to make preliminary investigations before any contract was signed. The actual negotiations and contract were delayed by the amount of time consumed in Washington by the preliminaries to L-208, and then subsequently closing the mine down. The contract was signed on October 27, 1942.

Q. Directing your attention to Plaintiffs' Exhibit 135, it was on October 8, wasn't it, that Metals Reserve Company submitted to you the proposed contract for that operation? I think you will find the date on the first page, the paragraph lettered "A."

A. Yes, the contract was offered October 8, but we had been in discussion with them for some time before that. The contract was executed, I think, on October 27.

Q. Do you recall receiving from the War Production Board a document which authorized you to transfer equipment to the Sublette Division?

A. We had authorization later on. I don't remember the exact date now.

Q. I show you this document, a copy of a letter dated December 16, 1942, and ask if you recall receiving the original of that?

A. Yes, we did receive such a letter.

OFFERS IN EVIDENCE

Mr. Barnes: I offer that in evidence as Defendant's Ex- [fol. 978] hibit No. 8.

Mr. Rigney: No objection.

The Commissioner: Received.

(Said letter, dated 12-16-42, from the WPB to Homestake, was marked as "Defendant's Exhibit No. 8," admitted in evidence, and made a part of this record.)

By Mr. Barnes:

Q. Mr. Bjorge, that letter, among other things, requires you to report to Metals Reserve Company transfers of equipment to the Sublette Division?

A. Yes, sir.

Q. Do you recall whether or not such reports were made?

A. Such reports were made.

I should make a correction, that the actual contract with Metals Reserve was executed in the name of our wholly-owned subsidiary, the Wyodak Coal and Manufacturing Company, because Wyodak was qualified to do business in Wyoming, and Homestake was not. Wyodak was definitely a Homestake operation, and it was all carried out in the name of the Sublette Division of Wyodak Coal.

Q. Let me show you this document, a letter dated December 28, 1942, which appears to have been signed by Mr. Walker. Was he Assistant General Manager of the Company?

A. He was.

[fol. 979] Q. Do you recall his sending a report of that type?

A. Yes. I have in my memorandum here a summary, a listing of these reports that were submitted within the next few months.

Mr. Barnes: I offer this in evidence as Defendant's Exhibit 9, Your Honor.

Mr. Rigney: No objection.

The Commissioner: It may be received.

(Said letter, dated 12-28-42, to the WPB, and signed by Mr. Walker, was marked as "Defendant's Exhibit No. 9," admitted in evidence, and made a part of this record.)

By Mr. Barnes:

Q. In the interest of expedition, Mr. Bjorge, I will show you at one time a group of letters dated February 1, 1943, March 1, 1943, April 1, 1943, May 1, 1943, and July 1, 1943, and ask you whether those are subsequent reports covering transfers of equipment to the Sublette Division?

A. They are.

Mr. Barnes: I offer these in evidence as Defendant's Exhibits 10, 11, 12, 13, and 14.

Mr. Rigney: I think there is no objection to these, Your Honor, and to expedite the matter we have no objection to their being received, subject to verification and check.

The Commissioner: They may be received.

[fol. 980] (Said letters, dated 2-1-43, 3-1-43, 4-1-43, 5-1-43, and 7-1-43, were marked as "Defendant's Exhibit Nos. 10, 11, 12, 13, and 14," admitted in evidence, and made a part of this record.)

By Mr. Barnes:

Q. Mr. Bjorge, did Homestake also operate a manganese property in Lower California?

A. Yes.

Q. During what period of time?

A. In the summer of 1942, a manganese property in Lower California, approximately across the Gulf from Guaymas, was investigated by Homestake, and an option taken on that property. By October, we were mining from 12,000 to 15,000 tons per month of crude ore from that property, which was hand-sorted, and a chemical grade manganese shipped.

Later we had a pilot plant for mill test work on the property, and built a mill and produced substantially larger quantities.

Q. Did you transfer to that property any of the equipment from Lead?

A. I think there was one power shovel that was overhauled and reconditioned in our shops at Lead and shipped to that property.

Q. Did you transfer to that property any employees from Lead subsequent to October 8, 1942?

[fol. 981] A. Only staff employees who were there on investigational work. Mr. Herz, our metallurgical superintendent, was there for a time. Mr. Tario, our electrical superintendent, was there for a time. Mr. Stonefelt, from our auto repair shop, went down to supervise the reassembling of this power shovel. There were no laboring men. The men for all of that work were local Mexican labor. There may have been two or three other men down there. I

think probably there was a carpenter foreman to supervise the construction of the mill, for which, by the way, we framed all of the timber. The structure was designed and the timber was framed in our shops at Lead, and shipped by way of Nogales to Guaymas, and then by boat across the Gulf to Gavilan.

Q. Incidentally, what was the name of that company?

A. That was the Compania Manganeso.

Q. Was it Compania Mexicana de Manganeso, S. A.?

A. Yes, "S. A.," which is the equivalent of our "Inc."

Q. Directing your attention to Plaintiffs' Exhibit 147, I just happened to open it at page 43, and I notice that opposite the second name on the list on that page, Harold Gustafson, the notation appears "Transferred 12-29-42 to Sublette Division."

A. He was a mechanic sent down for the erection of the equipment in the mill, as was Mr. Lawrence Sutter, the foreman of our crusher repair crew, who was sent down for [fol. 982] the mill construction, and Mr. Edward L. Kruskamp is a mechanic who was sent down on that construction work.

Q. Opposite Mr. Kruskamp and Mr. Gustafson, the referent is the Sublette Division rather than to Mexico.

A. Gustafson was sent to the Sublette Division.

Mr. Rigney: That is what he said.

The Witness: And Sutter to Mexico, and Kruskamp also to the Sublette Division.

By Mr. Barnes:

Q. Going back to Plaintiffs' Exhibit 147, was this prepared under your supervision?

A. Yes.

Q. Did you enter in here transfers either to the Sublette Division or to the Mexican company if they appear in your records?

A. I think they are all there.

Q. There were more personnel transferred to the Sublette Division from Lead than there were to the Mexican company, is that correct?

A. Yes. We sent six men to Sublette immediately after the contract was signed, and it reached a maximum of 110 during the time that camp construction was under way. In

visits with the Metals Reserve officials here, they suggested that we contact the War Plants Corporation for the financing and building of a townsite at Sublette. We didn't feel [fol. 983] that that was justified in the initial stages, and we negotiated with the Forest Service and obtained a CCC camp which we moved from Jackson Hole, a part of Yellowstone Park, to Sublette, and erected a mess house, a dormitory, a small shop, an office building, and so forth, from those CCC buildings. The maximum crew at Sublette was during the period of that construction.

Q. Mr. Bjorge, I was questioning you yesterday as to the quantities of materials of various types that Homestake might have purchased during the 12 months preceding October 8, 1942, and with respect to many of them you said that you had no recollection.

Let me show you this letter, dated December 24, 1941, addressed to Dr. Wilbur A. Nelson, which purports to bear your signature, and I ask you, first, whether that is your signature?

A. That is my signature.

Q. Do you recall sending that letter to Dr. Nelson?

A. I certainly sent it.

Q. Did that purport to give an estimate of the requirements of Homestake for the year 1942 for various types of material and supplies?

A. It is so headed.

Mr. Barnes: I offer that in evidence as Defendant's Exhibit 15.

[fol. 984] Mr. Rigney: No objection.

The Commissioner: Admitted.

(Said letter, dated 12-24-41, to Wilbur A. Nelson, signed Guy N. Bjorge, was marked as "Defendant's Exhibit No. 15," admitted in evidence and made a part of this record.)

By Mr. Barnes:

Q. With respect to a number of the items of inventory that we discussed, you referred to the fact that you had an adequate supply to have lasted during the entire period of the shutdown, that is, until June 30, 1945, and I believe at an earlier point in your testimony you referred to the fact that at some point prior to June 30, 1945, the War Produc-

tion Board gave you authority to begin purchasing again.

A. Yes.

Q. Let me ask you whether that authority was given following this letter of September 8, 1944, which you wrote to Mr. Arthur S. Knoizen?

A. That letter is dated September 8, 1944, and it was later in September that we received permission to place orders for materials that would be needed on resumption of operation.

Mr. Barnes: I offer this in evidence as Defendant's Exhibit 16.

Mr. Rigney: No objection.

[fol. 985] The Commissioner: Admitted.

(Said letter, dated 9-8-44, Bjorge to Arthur S. Knoizen, was marked as "Defendant's Exhibit No. 16", admitted in evidence and made a part of this record.)

By Mr. Barnes:

Q. Mr. Bjorge, prior to October 8, 1942, had Homestake had the practice from time to time of listing for sale surplus material which it had on hand?

A. Not as a general practice, but it is probable that under the War Production Board suggestions we made such listings in that year.

Q. Let me show you these four documents, dated January 4, 1942, March 21, 1942, April 13, 1942, and May 19, 1942, and ask you whether you recall those listings having been issued?

A. These are photostatic copies with no signature, but have a rubber stamp, "Homestake Mining Company, Lead, South Dakota," and were undoubtedly listed.

Q. Let me show you this, which is a photostatic copy of what I believe to have been the letter of transmittal, although the files that I received were in such form that they were not physically connected.

The Commissioner: Is there a question?

Mr. Barnes: I was going to wait until he had an opportunity to examine the letter, Your Honor.

The Commissioner: There is no question.

By Mr. Barnes:

[fol. 986] Q. Do you recall that letter going from Mr. Walker to the War Production Board?

A. This letter is dated August 25, 1942, and it is signed by Mr. Walker.

By Mr. Rigney:

Q. Do you have personal knowledge about this particular matter now, Mr. Bjorge, that Mr. Barnes is inquiring about?

A. I think undoubtedly these and a list were sent in as surplus material.

Mr. Barnes: I offer these in evidence, Your Honor, the covering letter and the four lists together, as Defendant's Exhibit 17.

Mr. Rigney: They are pretty bad photostats, Your Honor.

Mr. Barnes: I might state, Your Honor, these are not photostats. These are some material that the War Production Board microfilmed. These come from the microfilm records and have been blown up from the microfilm. I agree that some of it could have been a little more legible.

Mr. Rigney: No objection.

The Commissioner: Admitted.

(Said letter dated 8-25-42, from Mr. Walker to WPB, together with four listings of surplus material of Homestake, were marked as "Defendant's Exhibit No. 17," admitted in evidence and made a part of this record.)

[fol. 987] The Commissioner: Let us get this marked.

Mr. Rigney: I would like to have the record reflect that the letter is dated August 25, 1942, and says, "The attached correspondence and lists are self-explanatory." I don't see any correspondence attached, but I am not going to raise the objection that the document is not complete, and let it go in for what it is worth. I don't know that we can conclude from this that these are the lists that accompanied this letter, but we raise no objection to the admissibility for what it is worth.

The Commissioner: All right.

By Mr. Barnes:

Q. Mr. Bjorge, I hand you copies of two documents, one addressed to Republic Steel Corporation, dated August 3, 1942, and one addressed to Stephens-Adamson Mfg. Co., dated August 13, 1942, both of which have stamped at the bottom of them, "Homestake Mining Company, Lead, South Dakota," and appear to be copies of letters prepared for the signature of the General Manager. I ask you whether you recall those letters?

A. I do not recall the particular letters. The first one, the letter of August 3, 1942, addressed to the Republic Steel Corporation, has the initials RRP, and that is R. R. Pullen, our Chief Mechanical Engineer, and was doubtless dictated by him and sent for my signature.

[fol. 988] The other letter, strangely, has no initials for dictation, but it does have the rubber stamp "Homestake Mining Company." I do not definitely recall the letter myself.

Mr. Barnes: I would like to offer these in evidence, Your Honor, as Defendant's Exhibits 18 and 19.

The Commissioner: Off the record.

(Here followed discussion off the record.)

Mr. Rigney: I shall raise no objection to the admissibility of these.

The Commissioner: Admitted.

(Said letters, dated 8-3-42, to Republic Steel Corp., and dated 8-13-42, to Stephens-Adamson Mfg. Co., both bearing rubber stamp of Homestake Mining Company, were marked as "Defendant's Exhibit Nos. 18 and 19," admitted in evidence and made a part of this record.)

By Mr. Barnes:

Q. Was there an Edward G. Ross connected with Homestake?

A. Yes.

Q. What was his position?

A. Mine Superintendent.

Q. Was there someone in the Rock Drill Repair Department by the name of Cudlip?

A. There was an office man by the name of William Cudlip.

Mr. Barnes: Will you mark that Defendant's Exhibit 20 [fol. 989] for identification?

(Said document was marked for identification as Defendant's Exhibit No. 20.)

By Mr. Barnes:

Q. I show you this document which has been marked Defendant's Exhibit 20 for identification, which purports to be a copy of a memorandum from Mr. Cudlip to Mr. Ross, and I ask you whether you recall the transaction to which that refers?

A. That is a photostatic or at least a copy, without signature. It says, "By Cudlip" at the bottom, and it was presumably sent in along with a letter.

Mr. Barnes: Would you read the question back to the witness?

(The question was read by the reporter.)

The Witness: Not the single one, but undoubtedly this was a memorandum submitted with respect to a purchase request.

Mr. Barnes: I offer this in evidence as Defendant's Exhibit 20. The date under Mr. Cudlip's name is 6-23-42.

By Mr. Rigney:

Q. Mr. Bjorge, do you recall seeing the original of this document?

A. I do not recall the original document.

Mr. Rigney: We have no objection, Your Honor.

The Commissioner: Admitted.

[fol. 990] (Said memorandum, dated 6-23-42, from Mr. Cudlip to Mr. Ross, was marked as "Defendant's Exhibit No. 20," admitted in evidence and made a part of this record.)

Mr. Rigney: It is difficult, Your Honor, to read these things. It takes a little time.

By Mr. Barnes:

Q. Mr. Bjorge, directing your attention to Defendant's Exhibits 17, 18, and 19, do you know whether or not any

of the material listed on those exhibits appears on the two inventories which are in evidence here as Plaintiffs' Exhibits 148 and 149?

A. I do not see any of them, on either one of them.

Q. You see nothing on either one of them that appears on the two inventories?

A. No, I do not.

Q. Directing your attention, for example, to Plaintiffs' Exhibit 149, and calling your attention, for example, to the list of pipe fittings that appears attached to Defendant's Exhibit 17, are there any pipe fittings listed in Plaintiffs' Exhibit 149?

A. Yes, there are, I am sure.

Q. I notice at the page you were just referring to there was a reference to case "Y" branches. I see some of those are listed in the schedule attached to Defendant's Exhibit 17. Have you compared those?

[fol. 991] A. There are many pages in this, and it would require a detailed comparison as to whether they are in the inventory, or whether they might be material which we regarded as obsolete and were taken out of inventory.

Q. Did you sometimes take obsolete material out of inventory?

A. Yes.

Q. Even though it was new and unused?

A. Even though it was new.

Q. Is there anything about a cast "Y" or any other plumbing fitting to make it obsolete?

A. There might be some size. I imagine that most of these are in the inventory if we took the time to go through them and pick the individual items.

Mr. Barnes: That is all.

The Witness: There are many pages of pipe fittings here. In this particular section of the inventory there are pages 19 to 43 on pipe fittings.

Redirect Examination.

By Mr. Rigney:

Q. Mr. Bjorge, did you take some time last night to examine carefully Plaintiffs' Exhibit 149, the General Inventory?

A. I did.

Q. How many pages are there in that inventory?

[fol. 992] A. There is a total of 363 pages.

Q. Did you examine every page in that inventory last night?

A. I looked at every page in that inventory.

By Mr. Barnes:

Q. Because of a misunderstanding, are you referring to 363 pages or sheets?

A. Pages. The inventory from some departments is numbered by sheets, and from other departments numbered by pages. I took the number of actual pages.

By Mr. Rigney:

Q. You physically counted the number of pages yourself, is that right?

A. I took the numbers that run through. For example, there is one section that runs to 122 pages. And I marked down all the various sections, the number of pages in each section.

Q. Can you tell us the total number of divisions or breakdowns, by department or otherwise, in that inventory as it is set up?

A. The breakdowns by departments or subject matter are 17 in number.

Q. Did you examine all 17 of those divisions to determine how many contained deletions of any item?

A. I did.

[fol. 993] Q. How many of those 17 divisions did you find contained any deletions whatsoever?

A. Two.

Q. What were those?

A. The Electrical Department and the General Supplies, Bender Park. Bender Park is a carpenter shop that has some supplies.

Q. So there were 15 divisions or subjects in the inventory which contained no deletions whatsoever, is that it?

A. That is correct.

Q. Directing your attention to the General Supplies, Bender Park ——

A. Yes?

Q. —how many deletions did you find were made in that section, Mr. Bjorge?

A. One.

Q. What was that deletion?

A. That is one 12-inch mill bastard, valued at 30 cents.

Q. What is that?

A. It is a file.

Q. Directing your attention to the Electrical Department, what deletions did you find there? How many deletions did you find there?

A. The Electrical Department has a total of 114 pages. There is a total of 192 deletions which are distributed on [fol. 994] 53 pages.

Q. Do you find in that inventory a section preceding the Electrical Department which you examined last night?

A. Preceding the actual inventory of the Electrical Department there is a list covering five pages which is headed, "Following Material Dropped from Inventory," and the total value of the items listed on those five pages is $3,921.23.

Q. Will you look at the last page of that inventory under the Electrical Department and see whether or not there is a statement there?

A. On the last page of the Electrical Department inventory, the inventory is totaled at $55,502.89. Then there is a statement, "The total value of obsolete and secondhand material dropped from inventory, $3,921.23, making the inventory as of January 1, 1943, $51,581.66," which is the total that is incorporated in the inventory.

Q. Were there other deletions in the Electrical Department, other than this total of $3,921.23 that you have just referred to?

A. Yes. For example, on the back of Sheet 50 and the front of Sheet 51, there are seven items with lines drawn through them, six of which are apparently identical transformers with the same value placed on each one. The original totals, with no changes or erasures, are the totals [fol. 995] of the remaining items on the page.

Q. Excluding the items——

A. Excluding the items that had been crossed out as secondhand material before the pages were totaled.

By Mr. Barnes:

Q. How do we know it is secondhand material?

A. The Electrical Department, as I have testified before, had a tremendous quantity of secondhand and reconditioned material, reclaimed from the plants that had been abandoned during our construction period of several years before 1942.

Q. My question was how you knew these specific items were secondhand material?

A. Because that would have been the thing that was done. The inventory was inspected, and they were checked off as being not inventory material.

Mr. Barnes: I object and move to strike the witness' statement, Your Honor, as being a surmise on his part.

Mr. Rigney: Let me ask this question:

By Mr. Rigney:

Q. Did the practice of striking or excluding from inventory these items about which you have just been testifying—did that practice conform to your usual and normal practice with respect to setting up your inventory?

A. They were a part of the checking of the inventory.

[fol. 996] The Commissioner: The remark about its being secondhand may be stricken.

By Mr. Rigney:

Q. Was this inventory spot-checked by Homestake's regular auditors, Mr. Bjorge?

A. Yes.

Q. Is that the firm of McLaren, Goode & Co.?

A. That is the name of the firm. They had been auditors for the company for a number of years.

Q. They are in San Francisco, is that correct?

A. They are. Their head office is located in San Francisco.

Q. Was this inventory, Plaintiffs' Exhibit 149 for identification, used as a basis for Homestake's annual statement as of December 31, 1942?

A. It was.

Mr. Barnes: I object to the form of the question as being leading.

Mr. Rigney: "Was it" was the question.

The Commission: Overruled.

Mr. Rigney: Your Honor, Plaintiff now offers in evidence Exhibit 149 for identification.

Mr. Barnes: No objection.

The Commissioner: Admitted.

[fol. 997] (Said document, being General Inventory of Homestake Mining Co., marked as "Plaintiffs' Exhibit No. 149," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. On cross-examination of you yesterday, Mr. Bjorge, Mr. Barnes inquired of you with respect to drill steel. Will you tell us what quantity of drill steel Homestake had on hand as of October 8, 1942?

A. The new drill steel on hand at that time is in the inventory, but that was not the total of the drill steel. On every underground level near the several main working areas on each level there is a rack with a supply of steel, ma'e-up steel. By "made-up," I mean cut to length with the bits forged on the end of them, to be available to that working area. With those stocks on 29 levels in the mine, that made up a large additional stock.

In addition to that, the drill sharpening shop had a stock of made-up steel, steel that was charged out to operations when it was made up in the shop.

Q. Do you recall now how much of this drill steel was on hand at those various levels in the underground workings?

A. The count of that stock of different lengths, and measuring in feet and then calculating to pounds, amounted to about 470,000 pounds.

[fol. 998] Q. Do you recall how much of it there was in the drill shop?

A. About 90,000 pounds.

Q. That is in addition to what is set up in the inventory?

A. Set up in the inventory. The exact figure is in the inventory. It is 187,000-and-some pounds.

Q. Can you tell us how much drill steel Homestake used in the year 1942? That would be for approximately ten months of operations in 1942.

A. About 100,000 pounds.

Q. What can you say——

By the Commissioner:

Q. What do you mean by "used"?

A. Eventually the drill steel as it is—it isn't just used. It is used to destruction. The drill steel, of course, as it is used for drilling, and is resharpened and reused again, becomes shorter and shorter, and then it is used for the shorter lengths, and eventually due to fatigue, as they call it, in the steel, it breaks and the broken pieces get too short for further use. It then becomes scrap.

By Mr. Rigney:

Q. Perhaps "consumed" would have been a better word. So you would say Homestake consumed approximately 100,000 pounds of it in ten months of 1942?

[fol. 599] A. Yes.

Q. What can you say with respect to whether or not the amount of drill steel which Homestake had on hand would have sufficed to enable you to continue normal operations during the period of the shutdown?

A. The total of that steel, with the stocks in the mine, discounted for the use they had already had, would have taken care of about four million tons of production.

Q. That would have carried you beyond the end of the shutdown period, under normal operations?

A. Yes.

Q. You were asked yesterday about electricians working underground, Mr. Bjorge. I would like to ask you now, how many electricians you have working underground for checking and replacement work as distinguished from any new development?

A. There would be normal electricians working full-time underground. There would be one to two electricians working part-time underground. They made regular routine inspections of the charging stations for the two storage battery locomotives, and they made other trips underground whenever called on by the mine department, the mine superintendent, which would be relatively infrequent.

The Commissioner: We will take a five-minute recess.

(Thereupon, a five-minute recess was taken in the hearing.)

[fol. 1000] By Mr. Rigney:

Q. Mr. Bjorge, I show you Defendant's Exhibit 17, being these lists of January 14, March 21, April 13, and May 19, 1942, with the letter of August 25, 1942, signed by Mr. Walker, and ask you to tell us how much of the equipment listed, or appearing on those lists was sold by Homestake?

A. I don't think we ever had a sale of any of it.

Q. Would you look, please, at Defendant's Exhibit 19, being the letter from Homestake to Stephens-Adamson Manufacturing Company of August 13, 1942, and tell us what that machine is that is described there.

A. That is one 6-A Style No. 9 revolving screen, often called a trommel. I note here that it was purchased from Stephens-Adamson Manufacturing Company, and it gives our order number, dated September 23, 1927.

We have no cylindrical screen of that type installed in any part of our plant. 1927 was before I came there, and it was probably purchased for experimental work or possibly for the screening and washing of rock for concrete work. I don't know, it was before my time, but it has never been used in my time, and there is no such piece of equipment in any part of the Homestake plant.

Q. Directing your attention to the equipment which was sent to Sublette, about which you have testified, could you tell us how much of that equipment could be used underground?

[fol. 1001] A small part of it, the rock drills, drill steel, track pipe.

Q. Could you give us your best judgment as to the proportion of the machinery which could be used underground to the total? What the relative proportions were? Would you say a quarter of it or a half?

A. I think it would be less than a quarter, because a substantial part of the equipment was surface equipment, trucks, compressors, that was sent over there on a rental arrangement.

Q. Now, could you tell us what the ratio was between the equipment sent to Sublette and Homestake's total equipment which you owned at that time?

A. Well, related to the total equipment of all kinds in our plant, and also the supplies and portable equipment, I should say it would be certainly well under one percent.

Q. In other words, Homestake sent less than one percent of its total equipment to this Sublette operation?

A. I should say substantially less.

By the Commissioner:

Q. Is that one percent of the value or one percent of what?

A. I am thinking in terms of value.

By Mr. Rigney:

Q. What was the eventual outcome of this Sublette operation, Mr. Bjorge? What happened there?

[fol. 1002] A. Our contract with Metals Reserve provided that we should proceed as rapidly as possible to obtain production of 500 tons per day of a given minimum grade. That was based on estimates that had been supplied to Metals Reserve by the United States Geological Survey, and the United States Bureau of Mines. By the end of January we had done enough work with surface trenching through the vanadium-bearing bed to enable us to sample it at the surface and with a tunnel at the bottom of the gulch to prepare our own estimate, which we sent to Metals Reserve——

Q. Was that January, 1943?

A. That was the end of January, 1943.

——which had a lower average grade than those that had been submitted by the two governmental departments that I referred to. We then received telegraphic instructions very promptly to expand operations to plan for a production of 1000 tons a day as rapidly as possible. That was early in February.

Q. Were these instructions from Metals Reserve?

A. From Metals Reserve.

Early in March we received instructions to curtail, and all of the work at Sublette was finished by July 15, 1943. In the meantime, in February, the Metals Reserve company had asked us to do some development work at the Paris-Bloomington property a few miles from Montpelier, Idaho. [fol. 1003] And we sent some men to this property for the Sublette operation, and we had a maximum of 60 men at Paris-Bloomington. That 60 is included in the maximum of 110, which was the maximum number we had at the com-

bined properties at any one time. And the work at the Paris-Bloomington property was soon curtailed and was all completed by November, 1943.

Q. Do I understand that the Sublette operation was completely at an end by July of 1943?

A. Yes.

Mr. Rigney: May these be marked the next for plaintiffs' exhibit numbers?

(Said documents were marked for identification as Plaintiffs' Exhibits Nos. 151, 152, 153, and 154.)

By Mr. Rigney:

Q. I show you Plaintiffs' Exhibits 151, 152, 153 and 154 for identification, and ask you what those letters are?

A. Those are copies of letters from Mr. Walker to the War Production Board with regard to the transfer of equipment from Homestake to the Sublette division.

Q. And is it correct to say that these four letters on the dates which they bear reported to the War Production Board that no machinery had been transferred to Sublette as of the period referred to in the particular letter?

A. No equipment was transferred during the month of May, during the month of July, during the month of August, [fol. 1004] and during the month of September.

OFFERS IN EVIDENCE

Mr. Rigney: We offer these in evidence to complete the picture with respect to Sublette.

Mr. Barnes: No objection.

The Commissioner: Admitted.

(Said letters dated 6-2, 8-6, 9-8, and 10-5, 1943, from Homestake to W.P.B., marked "Plaintiffs' Exhibits Nos. 151, 152, 153, and 154," respectively, admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. When you concluded these two operations that you spoke about, Sublette and the Idaho proposition, was the machinery and equipment which remained returned to Homestake?

A. All of the equipment that was on rental was returned to Homestake, and the supplies that were still usable at Homestake were returned.

Q. Would you describe for us in a little more detail this manganese operation in lower California that you were asked about on cross-examination?

A. That was a deposit of chemical grade manganese. There are two grades of manganese, the metalurgical grade used in the steel industry, and the chemical grade which has a variety of necessary uses in the chemical industry.

We, as I stated, took an option on the property and began [fol. 1005] working originally an American superintendent on the job, and all of the remaining help was Mexican. And we were mining by open cut and sorting and sacking the high grade pyrolucite, which is a manganese oxide. Then we expanded the operation, first adding scrapers to the mining operation, scraping the broken material into trucks for haulage to the mill that had been built by that time.

Q. What period of time now, sir, is this?

A. Well, I don't know that I can give you the dates.

Q. Approximately, I mean.

A. But it was probably by that time the end of 1943, because it took time to build a mill. And the scrapers did not prove satisfactory, and we sent down the power shovel. The milling plant did not give the results that the pilot plant had given. The pilot plant was operated for us by consulting metalurgists during the test work. And we operated down there for a total of something like three years, I think. It was a rather sad story, because it resulted in a substantial financial loss.

Q. In other words, it was a complete failure as far as results were concerned?

A. Yes. The only benefit derived from it was the materials shipped during the period we were operating, all of which, as I remember it, went to the Tennessee-Eastman Company at Nashville, Tennessee.

[fol. 1006] Q. You testified under cross-examination yesterday, Mr. Bjorge, as I recall it, that Homestake's needs for normal full-scale operation, so far as cyanide was concerned, were about 1,500,000 pounds.

A. Yes.

Q. That is, per year. What was the situation so far as

obtaining cyanide was concerned at the end of 1942, the last quarter of 1942, and later?

A. We use in our operation the Arrow Brand or crude cyanide, which is a calcium cyanide, and that was not under restriction at any time. In our operation, in the six months after our appeal, we needed more cyanide, and ordered and received in February without priority.

By the Commissioner:

Q. Did you testify yesterday that dynamite was put in the same category?

A. Yes.

By Mr. Rigney:

Q. From whom did you buy your cyanide?

A. The American Cyanide Company.

Q. With respect to zinc dust, can you tell us this: you were interrogated yesterday about that by Mr. Barnes. Can you tell us what supply of that you had on hand as of January 1, 1943?

A. That figure is in the inventory for January 1, 1943.

[fol. 1007] Q. If I suggest to you that it is approximately 43,000 pounds, would that accord with your recollection from your reference?

A. I can find it here very quickly. 43,081 pounds.

Q. That was the quantity on hand January 1, 1943, is that right?

A. That is right.

Q. Now, under normal full-scale operations, how long would that have lasted?

A. That would have lasted about a year or a normal tonnage of about not quite 1,400,000 tons.

Q. Were there any steps that you could have taken, if necessity required you to do so, to extend the use that could have been made of that quantity?

A. That use could have been stretched to nearly double that amount. The amount of zinc dust added is a small item in cost, and as an absolute safety factor the feed is generous. In case of necessity the feed could be reduced down toward half as much as what we are using.

Q. Now, I think you testified yesterday that there came

a time when there was some restriction upon zinc dust; is that right?

A. I think there was a restriction on zinc dust throughout 1942, and I am not quite certain of the dates now, but I think it was in December in 1942 that the alloys company [fol. 1008] from whom we purchased zinc dust advised us that they could fill orders for less than 5 tons per month without priority.

Q. Do you recall whether that was in December of 1942 or December of 1943 that that lessening of the restriction occurred?

A. I am not quite certain of that.

Q. But, anyway, when the restriction was lessened what amount were you permitted to order?

A. We could place orders for deliveries of less than 5 tons per month, and our use at full normal operations was about in the range of 2 tons per month.

Q. Or, to put it another way, you could order up to 5 tons per month?

A. Up to 5 tons per month, that is correct.

Q. What would your normal consumption of zinc dust be per month?

A. Approximately 2 tons per month.

Q. You were asked yesterday about mercury, Mr. Bjorge. You testified that Homestake had around 600 or 700 pounds, or used around 600 or 700 pounds per month in normal operations. Can you tell us how much mercury you had on hand as of January 1, 1943?

A. We had 5,500 pounds in inventory, and approximately 1,500 pounds in the circuits in the mill operation.

Q. How long would that have lasted under normal full- [fol. 1009] scale operation?

A. Well, at full-scale operation of around 600 pounds per month, it would have been ten months. But we had in 1942 been restricted to 1,040 pounds per quarter, and had gotten along with that quantity. On the basis of 1,040 pounds a quarter, the quantity would have lasted about a year and a half.

Q. Do I recall that you said that was a use restriction?

A. Yes, I recall that that was a use restriction.

Q. Assuming that Homestake had no mercury at all to use, could you have continued operations?

A. Yes.

Q. What step would you have taken?

A. We would have put in mineral jigs, which are a simple piece of equipment that could have been built in our own shops, and obtained a high-grade gold concentrate in the jigs.

Q. You recall yesterday being asked about the use of electric wire, blasting wire.

A. Yes.

Q. Now, is that an essential item for the operations of your gold mine?

A. No.

Q. And if you had had none of that at all, was there some alternative method which you could have used?

[fol. 1010] A. Electric blasting was used only in raises, which would be a limited number of working places, and the blasting in those raises could have been done by fuse instead of electric blasting.

Q. What was the inventory situation of Homestake, Mr. Bjorge, with regard to timber as of January 1, 1943?

A. As I have testified before, Homestake had its own logging and lumbering operation, and on January 1, 1943, the stock of frame mine timber at the sawmill was 4,376,226 feet.

Q. How long would that have lasted Homestake?

A. With a shrinkage operation as we have outlined, consuming one board foot per ton of ore mined, it would have lasted for 4,300,000 tons.

Q. Now, Mr. Bjorge, with reference to this concentration on shrinkage stopping, in a situation where there might be a shortage of labor and material that you have described in considerable detail on your direct and also on your cross-examination, I would like to ask you whether Homestake has had any actual experience in recent years with that type of operation?

A. We did that substantially on resuming operations after July 1, 1945 in order to obtain substantial production as rapidly as possible. And for the remaining six months of 1945 the production from square set stopes was slightly more than 3% of the total production.

[fol. 1011] We were also faced at that time with the fact

that our shrinkage stopes had been emptied, to a large extent. They were not quite all empty, but they had been emptied during the extension period which we were given after our appeal. And in stocking shrinkage stopes we were only able to draw out of those stopes and hoist and haul to the mill one ton for every three tons that were broken. In December of 1945 we sent approximately 25,000 tons from shrinkage stopes to the mill, which meant an additional 50,000 tons had been broken, but it was deferred until at such time as the shrinkage stope was finished and we could draw it empty.

Q. How long would you say, after resuming operations in 1945, did Homestake continue to concentrate largely on shrinkage stoping?

A. Well, we did not reach a full balance between shrinkage stoping and square set stoping until some time in the last year.

Mr. Rigney: Thank you, sir. I have nothing else, except that I would like to call your attention, your Honor, to what appears to be an error in the record of Mr. Bjorge's direct examination at page 817, where the question appears:

"What was Homestake's maximum generating capacity so far as its power plant was concerned in 1942?

"A: I gave the installed capacity, and we had in one year produced as much as 65 million kilowatt hours."

[fol. 1012] I think the capacity was 85 million; is that correct?

The Witness: I think I gave that we had produced in one year 85 million. That was the maximum that we had ever produced.

Mr. Rigney: So we would like the record to be corrected in that respect.

The Commissioner: You can go ahead and make the changes in the copy that you have, and the reporter will make the changes in the further copies.

Mr. Rigney: Very well, sir.

The Commissioner: Are there any further questions?

Mr. Rigney: That is all, sir.

Recross-examination.

By Mr. Barnes:

Q. Mr. Bjorge, referring to Plaintiff's Exhibit No. 149, there were certain items in there that we noted yesterday where changes had been made in the quantities in red. Do you recall those?

A. Yes.

Q. Do you count those as being deletions in making your count?

A. Deletions or changes. I headed my tabulation when I was doing it: "Deletions or changes".

Q. Do you know whether those changes made in red were made at the same time or by the same persons who crossed [fol. 1013] out the items in black?

A. No, I do not know who made the changes, except that they were doubtless made by the heads or near heads of the department that knew which items were new, and which were second hand.

On page 5, for example, there is a correction in red on the number of feet of one half-inch galvanized rigid iron conduit, and also ¾-inch conduit of the same kind. And on the first page of the list of materials dropped from inventory there are two items, 1447 feet of one half-inch galvanized rigid iron conduit and 480 feet of ¾-inch galvanized rigid iron conduit, which are the changes that are made on page 5.

Q. Now, what was the operation which you said Homestake transferred following the close-down of the Sublette operation?

A. The Paris-Bloomington operation. It overlapped partially.

Q. What is that, Paris——

A. Paris-Bloomington.

Q. That is B-l-o-o-m-i-n-g-t-o-n?

A. Yes. That was a property a few miles from Montpelier, Idaho, where the headquarters for the Sublette operation was at Montpelier.

Q. Was that also a vanadium property?

A. Yes.

Q. You also operated that under contract with Metals Reserve?

[fol. 1014] A. Yes.

Q. With respect to the usage of materials and supplies in a gold mining operation, is there any overall dollar figure that is generally applied per ton of production as a measure of what the cost of materials and supplies is going to be?

A. No, I don't believe so.

Q. You have never made such estimates at Homestake, to your knowledge?

A. We had, and we have figure studies from time to time of the dollar use of supplies during the year, but those figures include both construction and expendable supplies. I don't have in mind the dollar value.

Q. It is a figure that is sometimes expressed in terms of dollars per ton?

A. It could well be.

Q. Incidentally, with respect to mercury, isn't the normal measure of mercury a flask rather than a pound?

A. A flask is 76 pounds. They are purchased in flasks.

Q. Now, I take it that after the mine was finally closed down following the year of extension, that your lumber division, your foundry and your machine shop continued operating on other activities; is that correct?

A. Yes.

Q. How many employees were employed in those operations, approximately, do you recall?

[fol. 1015] A. Well, the lumber and timber operations had a total of about 200 men at the sawmill and in the woods operations, and the mechanical department and foundry, which included the shops and foundry, had in normal operations prior to the war around 280 men. That was expanded as our war production, the manufacture of things in our shops, increased.

By the Commissioner:

Q. What was done with the production of your timber operation?

A. The sawmill sawed commercial lumber throughout the war, which was sold commercially under whatever priority regulations were in effect. The stock of mine timber was framed and in lengths that were not suitable for commercial lumber, and that stock was substantially all there at the time that we resumed operations.

By Mr. Barnes:

Q. Mr. Bjorge, directing your attention for the moment to Plaintiffs' Exhibits 137 and 138, the note which has been added to 137, which you said you thought was probably added following receipt of the telegram, Plaintiffs' Exhibit 138, says: "This order subsequently modified to show that 60 men are in addition to 730."

What is the 730 figure?

A. That is the total number of men on the Homestake payroll at that time.

[fol. 1016] Q. That included the men in the lumber division, in the foundry and machine shop?

A. Yes, the electrical department, power plants, pumping stations, all of the men on the payroll.

Q. Now, with respect to some of these items of inventory such as mercury, which you were discussing with Mr. Rigney just a few moments ago, if you had continued using mercury at the rate of 1,040 pounds a quarter, how long would your inventory on December 31, 1942 have lasted?

A. About a year and a half.

Q. At that time you would have had a zero inventory except for the material in the circuits, is that correct?

A. Yes.

Q. You could not have continued operations after that date without adding material to the material in the circuit, is that correct?

A. Yes. As I said previously, we could have installed mineral jigs which could have been built in our shop, which are simple machines, built largely of wood, with a small amount of metal parts, and they could have made a high-grade ore concentrate.

By the Commissioner:

Q. How would that have taken place with the use of that mercury? That was not clear to me.

A. We would run the pulp, which was the finely ground [fol. 1017] ore and water, through these jigs, and the jig is a concentrator that would have retained a substantial part of the gold and some of the sulphides and made a high-grade concentrate.

Q. How would the use of this affair that you mentioned compare with respect to the result achieved?

A. Substantially the same. The gold would have been extracted from that quality of concentrate by cyanidation, and the remainder of any gold that was not caught in the jigs would pass on to the cyanide plants, the same as it does now after amalgamation.

The Commissioner: I see. All right.

By Mr. Barnes:

Q. It would then have required a greater use of cyanide because you would have had to use the cyanide treatment on all of your concentrates; is that right?

A. A somewhat higher consumption of cyanide, yes.

Mr. Barnes: That is all.

Mr. Barnett: Your Honor, may I ask a question?

The Commissioner: Yes.

Redirect examination.

By Mr. Barnett:

Q. Mr. Bjorge, you stated that you spent approximately fifteen-odd years in San Francisco, and during that period of time you had occasion to visit the Mother Lode country in California?

[fol. 1018] A. Yes, I visited the Mother Lode and Grass Valley area several times up to the late 20s.

Q. Would you say that gold mining in the Mother Lode country of California is conducted on the same general plan as that you have described here as being conducted at Homestake?

A. There are, of course, a great many similarities, the sinking of shafts, the development work to drive to the ore bodies, develop them and make them ready for mining, and the haulage of ore to the shaft, hoisting, crushing, and a large part of the milling would be very similar. The mining methods would be generally designed to fit the particular ore body.

Q. Now, in describing the use of quicksilver as you have just described it, and your improvising by these jigs, that

goes more or less to the amount of gold actually recovered from the ore, is that not true?

A. Yes.

Q. So that it is highly possible that under certain restrictions your improvising would mean a lesser recover, is that true?

A. A very slightly lower recovery.

Mr. Barnett: That is all, your Honor.

Recross-examination.

By Mr. Barnes:

Q. Are soil conditions in the Mother Lode or in the Grass Valley areas substantially identical with those described [fol. 1019] at Homestake?

A. Well, soil is only a matter of a few feet deep at the surface.

Q. I thought you used the phrase that your method of mining would be dependent upon soil conditions. If you used some other phrase I misunderstood you.

A. No, I think I said that it would depend on the type of ore body and closing rocks.

Q. Are the types of ore bodies identical in the two locations?

A. The ore bodies on the Mother Lode are vein deposits, tabular deposits, dipping at steep angles, angles of, my recollection is, 60 to 70 degrees. The wall rocks are not as strong as at Homestake, so that timber support is required to a greater extent.

Q. Do you know whether or not they use the same general methods of stoping that you described?

A. I was through a number of stopes in several mines up there that were mined by the square set method.

Q. Do they have to mine by square set entirely, do you mean?

A. No, I don't think so. I think they did some open work. There were places where the walls were very much better than in other places.

Q. And they could operate a shrinkage stope there sim- [fol. 1020] ilar to the method you described at Homestake?

A. I don't recall that I saw a shrinkage stop in the mines that I visited.

Mr. Barnes: That is all.

By the Commissioner:

Q. How do you explain the absence of the use of shrinkage stoping?

A. Shrinkage stoping is a method that requires strong walls, so that the walls will stand while you are drawing the ore out of a stope. The broken ore supports it to a considerable extent while you are mining, but when you have finished mining and draw all that ore out, the walls have to stand, and if they are not strong enough to stand for the size of the opening that you want to mine, then you won't be able to mine by the shrinkage method.

Q. Is there any further explanation that might explain the absence of the use of the shrinkage stoping?

A. They may have used it, but I don't recall seeing any in the visits that I made there.

Q. Are the ore bodies as massive?

A. They are not as large, they are relatively narrow. I think probably the widest stope I remember seeing in the mines in the area of Central Eureka were possibly 30 feet.

Q. Would that be another reason?

A. No. You could mine a narrow vein by shrinkage if the [fol. 1021] walls are strong enough.

Redirect examination.

By Mr. Barnett:

Q. They are both hard rock mines, aren't they, Mr. Bjorge?

A. Yes. The Mariposa slates on the Mother Lode are not as hard as they are at the Homestake mine by any means.

Q. By your statement as to shrinkage stopes you do not mean to convey the impression they did not use it, but you have just no recollection?

A. I don't recollect seeing shrinkage stopes in the visits I made.

Q. But from your knowledge and experience, it is your opinion that they may have used them?
A. They may have used them.

By Mr. Orick:

Q. Mr. Bjorge, have you ever been in the Idaho Maryland mines?
A. I have never been in Idaho Maryland.
Q. You know where it is located?
A. I have been in the other two mines in that district.
Q. What is that district known as?
A. The Grass Valley District.

Mr. Orick: Thank you.
Mr. Barnes: I have no further questions.
[fol. 1022] Mr. Rigney: There is just one matter that is susceptible of mathematical proof, if we can get the necessary papers together, and I wanted to check Mr. Bjorge's testimony on it because I think there may be a correction required. I may be in error, and it may not be necessary to put him back on, but I thought it would be more expeditious to put our next witness on, and if we determine in checking at lunch that any correction is needed we can make it after lunch, with your Honor's permission.
Mr. Barnes: I have no objection.
The Commissioner: Very well.

(Witness excused.)

Mr. Rigney: Mr. Jones?
The Commissioner: Will you be sworn, Mr. Jones?

Whereupon, W. E. Jones, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and, in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Rigney:

Q. What is your full name, Mr. Jones?
A. W. E. Jones.

Q. By whom are you employed, sir?

A. By Climax Molybdenum Company.

[fol. 1023] Q. What is your position there?

A. Personnel Manager.

Q. How long have you been in that position?

A. Since 1948.

Q. How long have you been employed by Climax all together?

A. Since 1936.

Q. What are your duties in your present position as Personnel Manager?

A. I am in charge of all of the phases of their industrial relations program, which includes the keeping of all the records of any employees that we may hire, recording such things as the dates they were hired and when they were separated.

Q. Have you produced here, pursuant to the request of Homestake Mining Company, certain of your personnel records relating to employees hired in 1942 by Climax?

A. Yes, I have.

Q. And have you prepared a compilation based upon your original personnel records with respect to employees hired by Climax in October and November, 1942, in Lead, South Dakota?

A. I did.

Q. May I see it?

(The witness produced a document.)

Q. Now, do you know whether or not Climax was recruiting labor in Lead, South Dakota, in the months of October [fol. 1024] and November, 1942?

Mr. Barnes: I object, unless the source of the witness' knowledge is shown. The present position dates back only to 1948.

The Commissioner: Sustained.

By Mr. Rigney:

Q. Where were you in 1942?

A. I was in Climax, Colorado.

Q. Working for the Molybdenum company?

A. That is right.

Q. Do you have any knowledge about whether or not Climax was recruiting labor in Lead in those months, October and November of 1942?

Mr. Barnes: Your Honor, I think the witness should be instructed that that question should be answered with a yes or no answer.

The Commissioner: Yes, it should be answered yes or no.

By Mr. Rigney:

Q. Do you have that knowledge, that is?

A. Yes.

Q. And what is the fact as to whether or not Climax was recruiting labor in October and November of 1942?

Mr. Barnes: I still object unless the source of the witness' knowledge is shown.

Mr. Rigney: This man worked for Climax since 1936. [fol. 1025] He has been the Personnel Manager since 1948. He has original records here with him by his own testimony, your Honor, from his employment files. It seems to me that——

The Commissioner: That would be a reason for having the source of his information explained. I will sustain the objection.

By Mr. Rigney:

Q. Tell us what the source of your information is in this regard, Mr. Jones, about this recruiting. How do you come to know about it?

A. In 1942 I held the position of Director of Safety and Industrial Hygiene for the Climax Molybdenum Company. Part of our program at that time was to give safety examinations to all employees who were placed on the payroll. And at that time many employees came from Lead, South Dakota, where a recruiter was sent to obtain them, and they all came through my office and I talked to each one of them, probably personally.

Q. And did they say anything about whether or not they had been recruited in Lead, South Dakota, by somebody representing Climax?

Mr. Barnes: I object on the ground that would be hearsay.

The Witness: I am sorrry, I cannot recall that.

Mr. Rigney: Your Honor, all I am trying to do is shorten the examination here now. If we have to take up each one [fol. 1026] of these people individually, this man is here with cards of 51 employees that were recruited in Lead, South Dakota, original cards pertaining to their employment and recruitment by Climax Homestake people. If we have got to go through each one of these individually we can't do it. It does not seem as though the Government is going to insist upon us doing that. I cannot for the life of me imagine that there should be such an objection interposed.

Mr. Barnes: I have done some strange things.

The Commissioner: We are here to receive evidence as it is presented.

Mr. Rigney: All right.

Let this be marked Plaintiffs' Exhibit No. 155.

(Said document was marked for identification as Plaintiffs' Exhibit No. 155.)

By Mr. Rigney:

Q. Mr. Jones, look, please, at Plaintiffs' Exhibit No. 155 for identification, and tell us what that document is.

A. This document is a list of employees hired by our recruiter in Lead, South Dakota, during October and November of 1942.

Q. And can you tell us from what was this prepared?

A. That was prepared from the original files of each em-
[fol. 1027] ployee that our recruiter obtained up there, the original employment cards that were made out at the time the employee was placed on the payroll.

Q. And who prepared it?

A. It was prepared under my supervision.

Q. Do you have those cards here now?

A. Yes, I do.

OFFERS IN EVIDENCE

Mr. Rigney: I offer this in evidence.

Mr. Barnes: Do you intend to offer the cards in evidence?

Mr. Rigney: Not unless I have to.

Mr. Barnes: Your Honor, I object on the ground that this is not the best evidence.

The Commissioner: Sustained.

Mr. Rigney: The man wants to take the cards back with him. I don't know how long he can leave them here.

By Mr. Rigney:

Q. What is the situation about that, Mr. Jones? If these cards which you have produced can be photostated here, would you be able to leave these originals long enough for us to obtain photostats?

A. Yes.

Mr. Rigney: Then, under those circumstances, we will offer the originals with the understanding that photostats of them will be actually substituted for the originals.

Mr. Barnes: I have no objection to that.

The Commissioner: You have no objection to what?

Mr. Barnes: I have no objection to the substitution. I [fol. 1028] haven't seen one of the cards.

Mr. Rigney: May we see the cards, Mr. Jones?

(The witness produced some documents.)

Mr. Rigney: Let this be marked Plaintiffs' Exhibit 156 for identification.

(Said document was marked for identification as Plaintiffs' Exhibit No. 156.)

By Mr. Rigney:

Q. I show you Plaintiffs' Exhibit No. 156 for identification, and ask you if that is a typical employment card which you produced here in connection with these Homestake employees?

A. This is the card that was used at that time for all employees placed on our payroll, including the ones recruited at Homestake or at Lead, South Dakota.

Q. In addition to the card for each employee of the 51 listed on Plaintiffs' Exhibit 155, is there also a slip of paper accompanying it which reflects the time his employment ended?

A. Yes. With each employee whose name appears in

this list I have brought a slip showing the date on which he was separated from the company.

Q. And whose slips are also kept in the regular course of your business as well as these cards, is that right?

A. That is right.

Q. Is it true that in connection with some of the cards [fol. 1029] you also have a slip which is headed "Climax Molybdenum Company, Employment Notice"?

A. That is correct.

Q. Is it the fact that in connection with some of these employees this slip "Employment Notice" is missing?

A. In one or two cases it is missing.

Q. But is it the fact that in all cases the date of their commencement of employment is reflected on the card?

A. That is true.

Q. So that your records as reflected in the cards and these slips which are headed "Time Order", of which you say you have one for every one of the 51 employees, they reflect completely the date of commencement of employment and the date of conclusion of employment; is that right?

A. That is right.

Mr. Rigney: I offer Plaintiffs' Exhibit No. 156 for identification in evidence.

The Commissioner: I think that they should be marked A, B, and C since there are three items there bearing the same number.

Mr. Rigney: Yes, your Honor.

Mr. Barnes: Your Honor, with respect to Plaintiffs' Exhibit No. 156, it seems to me the basic question is that it reflects something that is not at issue in this case. The issue in this case is whether L-208 was arbitrary at the [fol. 1030] time it was issued, which was October 8, 1942. These documents reflect transactions at a date subsequent to that, and it seems to me they can have no relevance and materiality. They can not, obviously, have been known to WPB officials on October 6, when the decision was made to issue the order, and on October 8 when the order was issued. I do not see how they can be binding on the Government, or on the issues as the Court has delineated the issues before us here. I object to the reception of this and to all the other documents which, I assume, are going to be offered along that same line on that basis.

The Commissioner: Overruled. It will be received.

(Said employment card, marked Plaintiffs' Exhibit No. 156, admitted in evidence and made a part of the record.)

Mr. Rigney: I wonder, your Honor, if perhaps we could have these marked in the light of your Honor's suggestion as to the marking of the cards, with the accompanying papers as 156-A, B and C. I think it would be well to mark the card, perhaps, 156-A, the Employment Notice 156-B, and the Time Order 156-C.

The Commissioner: The reason I made that suggestion was because I thought there was going to be some more extended discussion concerning them, and I wanted them to be identified. But if will not be necessary to mark each one of the additional cards if you are going to offer them. [fol 1031] Mr. Rigney: I see, sir. Then we can just mark the cards in normal sequence with the assumption that the appropriate accompanying papers will be attached to the particular card.

The Commissioner: I think that will be all right.

Mr. Rigney: I should like at this time to renew the offer of Plaintiff's Exhibit 155.

Mr. Barnes: Your Honor, on the understanding that the balance of the time records that are reflected in 155 are going to be marked——

Mr. Rigney: Yes, the remaining 50 cards.

Mr. Barnes: —I have no objection to letting it be received subject to verification against the original document.

The Commissioner: Then the other cards may be all marked at one numbering.

Mr. Rigney: As one number, sir?

The Commissioner: Yes.

Is there any possibility of avoiding the necessity for photostating that bundle of cards? Can you compare it with the list?

Mr. Barnes: I have not seen the list or a copy of it yet, sir.

The Commissioner: You saw what it looks like. I saw it from the bench.

Mr. Barnes: I don't know what information is reflected on it. There was a great deal of information which I think

[fol. 1032] may be material on the cards, which obviously is not reflected on this, this list, your Honor.

The Commissioner: Then you do not think that there is any way that we can avoid the necessity for photostating?

Mr. Barnes: Your Honor, the point I had in mind is this: looking at Plaintiffs' Exhibit 156, which shows on the back the previous employment of the individual, that he worked for Walter Schultz Company, Casper, Wyoming, and I cannot be sure whether it is five or six years; for the Police Department in Lead for six months; for the Homestake mine for six weeks, and for the Kelley Distributing Company in Rapid City, South Dakota, for two months.

He first reported at Climax apparently on October 18, 1942. There is grave doubt in my mind as to whether he was an employee of Homestake on October 8, on the basis of the information shown on this card, who was displaced by the order. If Plaintiff is offering this to reflect that, I think the information appearing on the back of the card showing his previous employers, and the order of sequence of them, the length of time he worked for them, may be very material. That is not reflected in any way in Plaintiffs' Exhibit 155.

The Commissioner: All right.

Are you going to further examine the witness?

Mr. Rigney: Just to have these identified, your Honor. Just this batch of cards.

[fol. 1033] Mr. Barnes: With respect to Plaintiffs' Exhibit No. 155, your Honor, I had just seen the sentence at the bottom of the page, which seems to me to be incompetent, and I think it should be stricken before the document is received under any circumstances. It obviously is not a digest of any of the employment records that are being produced here.

Mr. Rigney: Well, further examination might make that admissible with that on it, I don't know. But if your Honor wanted to suspend now for lunch we might be able to determine that fact by the time we resume.

The Commissioner: All right, we will suspend until two o'clock.

(Thereupon, at 12:32 o'clock p. m., a recess was taken in the hearing until 2:00 o'clock p. m.)

[fol. 1034] AFTERNOON SESSION

(The hearing was resumed, at the time above-mentioned, pursuant to the recess previously taken.)

Mr. Rigney: I would like to ask Mr. Bjorge to resume the stand a moment, Your Honor, to straighten out the matter I mentioned before lunch.

GUY N. BJORGE, resumed the witness stand and was examined and testified as follows:

Re-direct examination.

By Mr. Rigney:

Q. Mr. Bjorge, I show you a copy of Plaintiffs' Exhibit 137, being a letter of the War Production Board dated November 25, 1942, to the Homestake Mining Company, and bearing the name of Ernest Kanzler, Director General for Operations, at the bottom of the letter. In connection with this exhibit my recollection is that Mr. Barnes asked you with reference to the notation appearing at the bottom of Exhibit 137, in parenthesis: "This order subsequently modified to show that the 60 men are in addition to the 730."

My recollection is that the question was then asked you if that 730 was the number of men on Homestake's payroll at that time. Assuming that that question was asked you, what is the fact?

A. The fact is that the figure of 730 is an estimate arrived [fol. 1035] at during the appeals hearing as the number of men who would be required on a shutdown basis. The reduction in force after L-208 became effective could not be accomplished as rapidly as that, and the average number of men on the payroll, which in September had been 1868, in October was 1382, in November 1206, and in December 916. These are all 1942.

Q. So if the record does reflect that in answer to any question of Mr. Barnes you stated that the 730 figure appearing here at the bottom of Exhibit 137 was the number of men on the payroll at the time in question, that was an inadvertent or erroneous answer?

A. Yes, that would be an erroneous answer.

Mr. Rigney: That is all.

Re-cross examination.

By Mr. Barnes:

Q. From what source did you read those figures you just gave *gave* as to average employment in the months of October, November, and December?

A. That is the statement of the average number of employees on our payroll submitted to me by the employment office every year, a tabulation of the number of men.

Q. Does this cover just the year 1942?

A. This covers the year 1942.

Mr. Barnes: No further questions.

(Witness excused.)

[fol. 1036] Mr. Rigney: Mr. Jones, will you resume the stand, please?

W. E. Jones, resumed the witness stand and was examined and testified as follows:

Direct examination (resumed).

The Commissioner: It is my recollection that there was an objection raised just before we recessed, and you were going to ask some further questions to see if you could dispose of the objection.

Mr. Barnes: That relating to the sentence that appears at the foot of Plaintiffs' Exhibit 155.

Mr. Rigney: Yes.

By Mr. Rigney:

Q. Do you know from any conversations that you had in your official capacity with Climax in October and November, 1942, any conversations you had at that time with newly hired Climax employees who came there from South Dakota, whether or not a recruiter from Climax had interviewed those people in Lead, South Dakota, before they came to Climax?

Mr. Barnes: I object to that as calling for hearsay on the part of the witness.

The Commissioner: Sustained.

Mr. Rigney: I don't think it is important, Your Honor. We will physically excise this notation at the bottom here, and with that proviso, may the Exhibit 155 be received, with [fol. 1037] the further understanding that we are going to offer in evidence photostats of these 31, I guess there are, employees' record cards.

Mr. Barnes: I have the basic objection which I expressed to Plaintiffs' Exhibit 156 when it was offered this morning, which I still wish to reserve, and also the right to verification of Plaintiffs' Exhibit 155 against the employment cards when they are received.

The Commissioner: Exhibit 156 is in evidence, and I had thought you had already indicated that you didn't have any objection to 155 as long as it would bear the scrutiny of comparison with the exhibits to be offered.

Mr. Barnes: Your Honor, I expressed an objection to 156 which you overruled this morning.

The Commissioner: That is correct.

Mr. Barnes: To the extent that this is a tabulation of 156, I want to reserve that same objection.

The Commissioner: If you have any objection to 155, state it. I thought it was already in evidence.

Mr. Rigney: I thought so, too, Your Honor.

Mr. Barnes: The objection which I stated to 156 was——

The Commissioner: I know what that objection is. You don't need to repeat it.

Mr. Barnes: This is a tabulation of 156 and similar cards. I am preserving the same objection that I stated to [fol. 1038] 156 with respect to this: that I think it is immaterial because it relates to a period of time subsequent to the issuance of L-208.

The Commissioner: Since we have a new reporter here, I don't suppose this reporter was present or has what took place before we recessed for lunch, but I don't think you stated that objection when it was received in evidence before that time, before we recessed.

Mr. Barnes: I don't think it was received in evidence, because I also raised the objection with respect to the note at the bottom of the page.

The Commissioner: You did that later. And I was considering the suggestion with respect to the note after you had waived any objection to the admission of the document.

Mr. Barnes: If there is any misunderstanding and 155 has been received, I now move to strike it on the ground stated with respect to 156: that it relates to a period of time subsequent to the issuance of L-208 and is therefore irrelevant and immaterial.

The Commissioner: Overruled.

(Said list of employees hired by Climax Molybdenum Co. in Lead, S. D., in October and November, 1942, marked "Plaintiffs' Exhibit No. 155," admitted in evidence and made a part of this record.)

Mr. Rigney: 156 has been received in evidence, I believe. [fol. 1039] The Commissioner: Yes.

Mr. Rigney: May this be marked Plaintiffs' Exhibit 157 for identification.

(Said document was marked for identification as Plaintiffs' Exhibit No. 157.)

By Mr. Rigney:

Q. Mr. Jones, I show you Plaintiffs' Exhibit 156 in evidence, and ask you if that card is the employment record card of one Elmer E. Maki?

A. It is.

Q. Is that the same man whose name appears first on this list here which is Plaintiffs' Exhibit 155?

A. That is right.

Q. Now, I show you Plaintiffs' Exhibit 157 for identification, and ask you to look at those employment cards and to tell us if those are the cards of the remaining 50 people whose names appear on that list? I believe you have them in the order in which they appear here on this list. Isn't that correct?

A. That is correct.

Q. Would you like to have the question read which was addressed to you?

A. Please.

(Thereupon, the question and answer were read by the [fol. 1040] reporter.

Mr. Rigney: When he said "That is correct," I think he was addressing himself only to the last portion of the question, that he had them in order.

By Mr. Rigney:

Q. Now, are these cards which constitute Plaintiffs Exhibit 157 for identification, the cards of the 50 persons whose names appear on the list, Plaintiffs' Exhibit 155, beginning after the name Elmer E. Maki?

A. That is true, with the exception of the two cards that we did not include in this group because of the fact that we had no evidence that they ever worked for the Homestake Gold Mining Company.

Q. Do you have the cards of those two people?

A. Those are the two people whose cards are not in this group.

Q. Can you find for me their names and their number on this list, Exhibit 155?

A. No. 43, Berle L. Brooks, and No. 26, A. F. Peterson.

Mr. Rigney: Then let these two cards be marked Plaintiffs' Exhibit 158 for identification.

(Said cards were marked for identification as Plaintiffs' Exhibit No. 158.)

By Mr. Rigney:

Q. Do I understand that Plaintiffs' Exhibit 157 for [fol. 1041] identification, this quantity of cards, covers 48 of the 51 employees listed on Plaintiffs' Exhibit 155?

A. That is right.

Offers in Evidence

Mr. Rigney: I offer Plaintiffs' Exhibit 157 for identification in evidence, Your Honor.

Mr. Barnes: I make the same objection I did with respect to Plaintiffs' Exhibit 156, Your Honor.

The Commissioner: It will be received.

(Said cards, 48 in number, Records of Employment with Climax Molybdenum Co., marked as "Plaintiffs' Exhibit

No. 157," admitted in evidence and made a part of this record.)

By Mr. Rigney:

Q. Showing you Plaintiffs' Exhibit 158 for identification, being two of your employment cards relating to employees Berle Brooks and A. F. Peterson, I ask you where those men were recruited?

A. They were recruited in Lead, South Dakota.

Q. I believe you just said that their cards do not reflect prior Homestake employment?

A. That is correct.

Mr. Rigney: I offer these in evidence merely by way of completing the story with respect to the recruitment of these people.

Mr. Barnes: I make the same objection that I did with [fol. 1042] respect to 156, Your Honor.

The Commissioner: It will be received.

(Said cards, Records of Employment with Climax Molybdenum Co., of Berle L. Brooks and A. F. Peterson, marked "Plaintiffs' Exhibit No. 158," admitted in evidence and made a part of this record.)

Mr. Rigney: That is all, Mr. Jones.

Cross-examination.

By Mr. Barnes:

Q. Mr. Jones, how was it possible for you to sort this group of 51 cards out of your file? How were they filed which made it possible to separate them?

A. During the time covered by the discussion with these people here, which was in October and November of 1942, the Employment Office, which was then called the Personnel Department, wrote a monthly report, and in this monthly report they put down the names of the people who were hired during the month and where they were hired, because at that time there was considerable interest in trying to determine where we could obtain the greater number of employees.

Q. So you looked at those reports for those two months, took the names of the employees who were reported there

as having been employed in Lead, and pulled out their cards; is that correct?

A. That is right.

[fol. 1043] Q. Do you know whether or not Climax may have employed in Climax some people who were former employees of Homestake?

Mr. Rigney: Other than these, you mean?

By Mr. Barnes:

Q. Other than these?

A. I couldn't quote any names, but I am sure that that would be true to a limited extent.

Q. Do you know whether or not Climax employed any people who had formerly been employed in gold mines other than Homestake?

A. I can't say. I don't know.

Q. Do you know whether or not Climax employed any men who had formerly been employed by Homestake at a period of time subsequent to November, 1942?

A. There again I can't give you any definite names, but I am sure that we employed them both before and after that date.

Q. I take it from examination of these employment cards that each of your new employees had to have a physical examination; is that correct?

A. That is true.

Q. Do you know whether or not you recruited any employees in Lead who were rejected on physical grounds when they reported to Climax?

A. No, I don't.

[fol. 1044] Q. Attached to Plaintiffs' Exhibit 156, for example, is the slip which you said showed the termination of the man's employment, which is headed "Time Order." Where were these filed?

A. Each man who has worked for Climax Molybdenum Company has just an ordinary manilla folder, and in that folder is everything that we have accumulated relative to the man while he was in our employ or even since he left our employ. They came out of that folder.

Q. Are these folders in your custody in your present position?

A. Yes, they are.

Q. Do you know whether or not Climax reemployed any of the men whose names appear on Plaintiffs' Exhibit 155 after the date when they left your employ?

A. Offhand, I don't know. It would be necessary to check the records to find out.

Q. Do you know whether or not during, let's say, the last three months of 1942, Climax employed any people in California?

Mr. Barnett: You mean from California?

Mr. Barnes: Yes.

The Witness: We had a recruiter out in that area, but I can't recall exactly what months he was there.

[fol. 1045] By Mr. Barnes:

Q. Do you know whether or not you employed any persons in or from the State of Nevada?

A. I can't mention specifically, but I am sure that we had, because at that time we were hard pressed for men, and wherever we could find someone to work for us, we put him on the payroll.

Q. Do you know where you had recruiters working at that time, on the basis of these monthly reports which you said you examined?

A. We had the one in Lead, which we have discussed already. We had our representative in Denver, also. The representative in Denver also toured a great part of the State of Colorado, the smaller towns.

Q. At some point, you had one in California, but you are not sure when, is that correct?

A. That is right.

Q. Do you know whether you had one at approximately this period of time at any other locality?

A. The same gentleman who was in Lead also went to several Army camps in various parts of the country, both before and after the period he was in Lead.

Q. Do you know whether or not you ever had one in the State of Montana?

A. I don't know.

[fol. 1046] Q. Do you know whether you had one in Idaho?

A. I don't know.

Q. What about Arizona?

A. I don't know.

Q. Utah?

A. Mr. Doepke went to an Army camp in Utah, I believe, to recruit some military personnel.

Q. You referred to the fact that Climax was short of employees. Was that limited to underground employees, or were they short of all types of employees?

A. It was largely underground employees.

Q. Was there any shortage of employees above the ground?

A. Some.

Mr. Barnes: That is all.

By the Commissioner:

Q. How many additional people did you hire within the last quarter of 1942?

A. I only have records for two months with me. I could refer to them. That is the closest I could come to answer your question.

Q. With respect to those two months, how many would there be? What months are they, by the way?

A. These are October and November of 1942.

Q. That is good enough.

A. In October of 1942, we hired 251 employees; and in [fol. 1047] November of 1942, we hired 311 employees.

The Commissioner: Any further questions?

Redirect examination.

By Mr. Rigney:

Q. Do you know how many people left your employment during those two months, October and November, 1942?

A. Yes.

Q. What was that number?

A. In October, the number of separations was 162; and in November, 187.

By Mr. Barnes:

Q. Did that include draft, and everything else?

A. That is any reason for separation.

Mr. Rigney: That is all, sir.

The Commissioner: You may step down.

(Witness excused.)

Mr. Rigney: Now, as I understand it, Your Honor, we are going to undertake to photostat these employment cards and substitute those photostats for the original cards. May we have permission to do that in New York sometime in the next day or two? We will get a better rate there.

The Commissioner: Just furnish to the reporter within the next few days the photostats, so he can include them with the record.

Mr. Rigney: Thank you, sir.

[fol. 1048] Mr. Davis!

Jim C. Davis, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Rigney:

Q. May I have your full name, Mr. Davis?

A. Jim C. Davis.

Q. What is your employment?

A. I am Personnel Manager with the Anaconda Copper Mining Company in Butte, Montana.

Q. How long have you held that position?

A. I have been with them five years.

Q. Would you give us a description of the duties of your position there?

A. I have charge of all the personnel records for the Anaconda Copper Mining Company for the Butte operations, over 112,000, all the records since December 2, 1912.

We keep the tabulations of all starts and quits for the full Butte operation, the seniority on all crafts, the vacations for all the ACM employees—Anaconda Copper Mining employees—and now we have just taken over the pensions.

Q. The records with respect to pension rights of these employees?

[fol. 1049] A. Right.

Q. Who held the position in 1942 which you now hold as Personnel Manager?

A. George Lentz. He held it from 1912 until about six years ago, I would say, when he died.

Q. As a result of a request made to your company on behalf of Homestake Mining Company, you had occasion to examine the records kept in your office with respect to the employment of former Homestake employees after October 8, 1942?

A. I went through about 6,000 records to pick out the men who were employed or showed employment at Homestake on or after October 8, 1942.

Q. Did you sort out from these records which you say you examined, the employment cards of those employees of Anaconda who showed that prior Homestake employment that you just referred to?

A. Yes.

Q. Do you know the total number of such cards which you found?

A. It was 114 who showed their last employment at Homestake for the Butte operations.

Q. Right there, perhaps I should ask you to describe briefly what your situation is so far as Anaconda is concerned. You refer to the Butte operations. What does that consist of?

A. I have the records for the Butte operations, the [fol. 1050] Anaconda Smelter operations, which is 26 miles from Butte, the same company, and the Defense Chrome Account, which is out at Billings. The company operated that for the Government during the war. And also the International Smelting and Refining Company at Tooele, Utah. There are four ACM records that I have.

[fol. 1051] The Commissioner: Are they all included in your term, "the Butte operations"?

The Witness: Butte and Columbus is the Anaconda smelter which is twenty-six miles from Butte. I went over there and got those records. I got the personnel officer to send them to me.

By Mr. Rigney:

Q. You were referring to a total of 114, I believe, which related to the Butte operations?

A. To the Butte operations.

Q. All right.

A. Then there were twenty-one with the Anaconda Reduction Works. There were thirty-seven for Columbus——

Mr. Barnes: What do you mean by "Columbus"?

The Witness: The Columbus Chrome Account. — and twelve for Tooele. I believe that totals up 184, is that correct?

By Mr. Rigney:

Q. Right.

Mr. Rigney: May this be marked Plaintiffs' Exhibit No. 159 for identification?

(Document entitled "Anaconda Copper Mining Company employees hired during October, 1942—January, 1943, listing Homestake Mining Company as last employer," was marked for identification as Plaintiffs' Exhibit No. 159.)

[fol. 1052] By Mr. Rigney:

Q. I show you Plaintiffs' Exhibit No. 159 for identification and ask you, Mr. Davis, if you prepared this document.

A. Yes, sir.

Q. Was that prepared from your employment cards and records to which you referred?

A. From the personnel cards and records.

Q. Was the information which appears in this exhibit assembled by you from those cards and records?

A. Absolutely.

Q. You have those cards here with you?

A. Yes, sir.

Q. Does this exhibit, Exhibit No. 159 for identification, contain the names of those persons hired by Anaconda Copper Mining Company during the period October, 1942, through January, 1943, who listed Homestake Mining Company as their former employer?

A. Yes, sir.

Mr. Rigney: Plaintiff offers this summary in evidence, Your Honor.

Mr. Barnes: Your Honor, we come back to the same best evidence objection. I was going to make the suggestion to counsel that since the basic records from which this was prepared are here, if an oportunity can be given to us at some reasonable time to compare this against those records, [fol. 1953] I am willing to waive the best evidence objection, because it seems to me it is a burden to take 180-odd personnel cards that we are now talking about here and put them all in. Unless that can be done I am going to have to press the objection.

Mr. Rigney: I think it might be possible to work out something along that line if it could be done fairly soon. Mr. Davis is not in a position to leave the cards and records here with us. If it would be possible, Mr. Barnes, for some one of your associates in the department to do that within the next twenty-four hours so Mr. Davis could be released to take his records and return to Anaconda, that is perfectly all right.

Mr. Barnes: I was going to suggest that I understood that because of Mr. Herrington's continued illness, Idaho-Maryland would 't be able to go on this afternoon and there was a possibility that we might finish somewhat before four thirty and we might be able to spend the time right then doing that.

The Commissioner: Do you want to take a look at one of the cards and see if any particular problem presents itself?

Mr. Barnes: That might be helpful.

(Discussion off the record.)

By Mr. Barnes:

Q. Mr. Davis, you produced two papers here relating to an employee named Stephen J. Champeau, one of which is [fol. 1954] marked "Anaconda Copper Mining Company—Service Record." Would you tell me what this represents so far as your files are concerned?

A. That shows the different jobs that he had in the Butte operations. You will notice he worked at—I don't know how many mines there, four or five different mines. We have about twelve mines in operation there. He may work

at Leonard today and quit at eleven o'clock and be hired between twelve and one by a mine foreman and go out and work again. That is the start date, quit date, the mine he worked at, the name of the boss that he worked for, the job held for the last shift, and the reason for termination.

Q. Do your foremen compete against each other in taking men from one mine to another?

Mr. Rigney: I think that is objectionable, Your Honor, as facetious.

By Mr. Barnes:

Q. Looking at this particular entry, I take it that this man was first employed on January 5, 1943, is that correct?

A. Correct.

Q. He was employed at the Anselmo Mine, is that correct?

A. Yes.

Q. He stayed there until February 3, 1943?

A. Yes.

Q. At which time he quit, giving as his reason that he [fol. 1055] had another job, is that right?

A. That is quite common.

Q. Is that what your records show?

A. That is quite common.

Q. Then he started working at another one of your mines the following day?

A. The following day. That happens quite often. It doesn't necessarily mean that he contacted that foreman. These are contract miners. He may have talked to a miner at the other mine that needed a partner and it was a good contract and he made the move.

Q. Then he stayed at the other mine for a matter of some five years?

A. That is possible.

Q. This other document is marked "Application for Recommendation" and bears the heading, "Butte Mutual Labor Bureau." What is that?

A. That is the personnel office.

Q. That is your personnel office?

A. Yes, the employment office at Butte, Montana.

Q. Is this the application that is filed by the individual miner, by the individual applicant for a job?

A. Yes. The applicant fills out the front side of it. That is in his own handwriting. The backside is filled out by the clerk in the employment office.

[fol. 1056] Q. So what appears here for example under "Employment Record" on the back is something the clerk filled in?

A. Yes, from information from the man, from the applicant.

Mr. Barnes: On the basis of these two documents, Your Honor, I would anticipate no substantial difficulty in checking this form against the documents. I would like it to be clear, however, that with respect to Plaintiffs' Exhibit No. 159 I am preserving exactly the same objection I have previously stated to Plaintiffs' Exhibit No. 156; in other words, that it relates to a period of time subsequent to October 8, 1942, and is therefore immaterial and irrelevant to any of the issues involved in this case, but on the understanding that we may be able to verify it perhaps this afternoon against the original records.

The Commissioner: We will withhold ruling on it until we meet tomorrow.

Mr. Rigney: Did you want to have a beginning made on that, Mr. Barnes, now, and you remain here so that we can go ahead and put in documents that we want to offer?

Mr. Barnes: I think that can be arranged. Mr. McGrail might be able to start on that now.

Mr. Rigney: There are no further questions at this time of Mr. Davis.

Mr. Barnes: I would like to ask Mr. Davis one or two [fol. 1057] questions.

Cross-examination.

By Mr. Barnes:

Q. Does Anaconda have any copper mining operations other than in the Butte area?

A. Not that I know of right now.

Q. Did they in 1942 have any non-ferrous mining operations other than the ones that are included in Plaintiffs' Exhibit No. 159?

A. Yes. They operated in Nevada.

Q. Where else, do you know?

A. They have had prospects all over the West. That would be a hard question for me to answer because I am not connected with that. I am in the Butte operations, not with the general staff.

Q. My other question is this: I take it from what you said that you examined all cards of employees who were hired at these four locations, starting with October 8, 1942, is that correct?

A. I didn't say that I examined the cards of International Smelting and Refining at Tooele. I called them and had their personnel man go through his records there.

Q. And he sent you the cards that he pulled out, is that correct?

A. That is correct.

[fol. 1058] Q. But you started with October 8 and went through to the end of January, did you?

A. Towards the end of February.

Q. Did you include only those employees who had shown Homestake as their last place of employment?

A. They had been working at Homestake on 10/8/42 or after because from looking at these records—I don't know the Homestake operations, but from looking at these records they did not terminate all their men on 10/8 or 10/9. I found a few who had worked a few days over. When they showed their last employment as of 10/8 or up to 10/20 I took them.

Q. Did you make any investigation as to the number of employees who may have been hired by these operations from any other gold mines other than Homestake?

A. What is that again?

Q. Did you look for employees who may have been obtained from gold mines other than Homestake?

A. Yes.

Q. Did you find any?

A. A few.

Q. How many, if you know? Do you have any record with respect to them?

A. Eight from Cripple Creek.

Q. Any others?

A. No.

[fol. 1059] Q. Do you have their cards here?

A. Cripple Creek?

Q. Yes.

A. No.

Q. You received none from any of the California mines?

A. No, sir.

The Commissioner: I don't guess there is very much dispute between the parties that there was a great need for copper miners on or about October 8, 1942.

Mr. Rigney: No.

The Commissioner: If there was, we have a good man here to fill in the gap.

The Witness: We were seriously short then.

By Mr. Barnes:

Q. Were you short of employees other than underground men?

A. Underground men was it.

Q. Did you have any other shortages?

A. Very few. I am talking about the Butte operations again, because when you go over to Anaconda and the Smelter you have another picture. You go to Tooele and Columbus and it was surface as well as underground. I am talking about the Butte operations now.

Q. I know, but you have included these others here.

A. But that last statement was to cover Butte.

[fol. 1060] Q. Did the Smelter need men?

A. Oh, yes.

Q. Did Tooele need men?

A. Yes, and Columbus needed men.

Q. Those were not underground men?

A. Partly. Columbus was partly underground and surface both, and smelters also.

Mr. Barnes: That is all I have.

Mr. Rigney: I think, Mr. Davis, if you would perhaps take these cards and records that you have outside, there is a table out there, and maybe Mr. McGrail is ready to proceed.

Mr. Barnes: Do you have an extra copy of this exhibit that we can check on, which we can mark to see where we are going? Here is one here.

(Witness excused.)

Mr. Barnett: May I ask Mr. Jones one question, please?

W. E. Jones, resumed the witness stand and was examined and testified as follows:

Direct examination.

By Mr. Barnett:

Q. Mr. Jones, you stated that your firm employed some 562 people during October and November of 1942, and listed a certain number of them as coming from Homestake. [fol. 1061] Did you examine the list to ascertain whether any of those 542 came from California?

A. Yes, I looked down the complete list of both monthly reports to see where those particular employees came from.

Q. Did you find any from California?

A. There were none mentioned on that list as having come from California.

Q. Or from the Central Eureka Gold Mining Company?

A. No, none from there, either.

Mr. Barnett: Thank you.

Cross-examination.

By Mr. Barnes:

Q. Do you have that list here?

A. Yes.

Q. Could I see it, please?

A. This is the list of the hired, and this is the separations on this side. This shows the location where the men were hired.

Q. What does "Army S. L." stand for?

A. S. L. means Salt Lake. In fact I know Mr. Doepke was there recruiting part of the time.

Q. I see the word "Nearing." What is that?

A. That is Emil Nearing, who was recruiting for us at that time, mainly in various parts of Colorado.

Q. You did, however, during that month, which is what— [fol. 1062] the month of November?

A. Yes.

Q. —hire certain people both at Climax and in Denver, did you not?

A. That is correct.

Q. Referring to this report, which is for the month of October, 1942, does it show where the people were employed?

A. Not in every case.

Q. Looking at the first page where we have forty-five names that appear, with respect to eight of them it shows where or by whom they were hired, is that right?

A. That is right.

Q. On the second page, only four names show where or how they were employed?

A. Right.

Q. On the third page no information of that type is given as to where or how the men were employed?

A. That is right.

Q. And the same thing is true on the fourth page?

A. No. We assumed when we went through these reports that the "L" stood for Lead, so we pulled these names out of the file, and the record which you have already taken as evidence substantiated the fact that they were hired at Lead.

Q. Where a pencil "L" appears?

A. That is right.

[fol. 1063] Q. That is true of ten on this page?

A. Yes.

Q. Then on page 5 there are fifteen that show the "L," is that correct?

A. Yes.

Q. Then there are some down here. What is that first abbreviation, that word "Rana"?

A. That is Earle Rana. He was also recruiting for us, largely in Colorado.

Q. Then the next one is "Denver bix." What does that stand for?

A. No, I don't know what that means.

Q. Then on page 6 there are indications with respect to all of the employees as to where or by whom they were recruited, is that correct?

A. Yes.

Mr. Barnes: No further questions.

Mr. Rigney: Nothing else.

Mr. Barnes: I have just one question, Mr. Jones.

By Mr. Barnes:

Q. Do you know whether or not there were any gold mines in the State of Colorado?

A. Would you repeat that, please?

Q. Do you know whether or not there were any gold mines in the State of Colorado in 1942?

[fol. 1064] A. Yes.

Q. Were there?

A. There were.

Mr. Barnes: That is all.

The Commissioner: That is the Cripple Creek operation?

The Witness: Yes.

Mr. Rigney: Nothing else.

The Commissioner: The witness may step down.

(Witness excused.)

Mr. Rigney: I am going to offer some exhibits now, Your Honor.

The Commissioner: Yes. Go ahead.

OFFERS IN EVIDENCE

Mr. Rigney: Plaintiff now offers in evidence, Your Honor, Exhibit No. 41 for identification, being the letter of May 24, 1943, from Senator McCarran to Donald Nelson, Chairman of the War Production Board.

Mr. Barnes: I assume this is being offered for the same purpose as some of these other congressional letters, not to show the truth of the statement made in the letter but merely to show that it is a communication to the Board.

Mr. Rigney: That is correct.

Mr. Barnes: I object to this, Your Honor, on the ground it relates to a period of time in May, 1943, which is some seven months after the issuance of L-208 and has no relevance or materiality with respect to the circumstances at [fol. 1065] the time of the issuance.

The Commissioner: It may be received.

(Said document, entitled "Letter of May 24, 1943, from Senator McCarran to Donald Nelson," admitted in evidence and made a part of this record.)

Mr. Rigney: Plaintiff now offers, Your Honor, Exhibit No. 42 for identification, being a letter of May 24, 1943, to

Donald Nelson, Chairman of the War Production Board, which letter is signed by a considerable number of senators, thirty-five in number, I believe.

Mr. Barnes: I make the same objection as with respect to the preceding exhibit, Your Honor; it is dated exactly the same day.

The Commissioner: The exhibit will be received.

(Said document, entitled "Letter of May 24, 1943, from thirty senators to Donald Nelson," admitted in evidence and made a part of this record.)

Mr. Rigney: Plaintiff now offers in evidence, Your Honor, Exhibit No. 13 for identification, being a report on gold mine Order L-208, its effect and accomplishments, by Edward H. Rott, May 24, 1943, with a covering letter from Mr. Rott to Mr. A. S. Knoizen, War Production Board, dated May 26, 1943.

Mr. Barnes: Your Honor, my objection to that goes only to the ground that the attachment is incomplete in that [fol. 1066] Appendices 1, 2, and 3 to it are not attached to the copy which has been offered. I have here a complete copy in the original file folder of the War Production Board which I would be glad to tender to counsel if they desire to use it in lieu of the incomplete copy.

Mr. Rigney: We will hold this, then, for the time being until we can check the Appendices and renew the offer at a later time.

May this exhibit be marked the next in numerical order, Plaintiffs' Exhibit No. 160.

(Said document was marked for identification as Plaintiffs' Exhibit No. 160.)

Mr. Rigney: We now offer Plaintiffs' Exhibit No. 160 for identification, being a letter of May 28, 1943, from Howard I. Young, director, Mineral Resources Coordinating Division, to Mr. Donald M. Nelson, War Production Board.

Mr. Barnes: Your Honor, I object to this on the ground that the enclosures referred to do not accompany the exhibit. One of them I am willing to concede for purposes of the offer is the document which plaintiff tendered as its Exhibit No. 13. The other, however, is described in the open-

ing paragraph as a copy of amended Order L-208, which I take it was a draft because there had been no amendment to L-208 issued as of about this date. It does not accompany the document which plaintiff is offering as Exhibit No. 160.

[fol. 1067] Mr. Rigney: In going over these the other evening, Your Honor, and deciding to offer this, we assumed that Exhibit No. 13 would be in evidence by the time we offered this.

The Commissioner: That still doesn't make it complete.

Mr. Rigney: No. It needs the other which was the proposed amendment. So in view of Your Honor's ruling on similar objections, I will have to hold this for the time being and may renew the offer later.

The Commissioner: All right.

Mr. Rigney: May this be marked Plaintiffs' Exhibit No. 161 for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 161.)

Mr. Rigney: Plaintiff offers in evidence Exhibit No. 161 for identification, being a letter of June 4, 1943, from Mr. Donald M. Nelson to Mr. Paul V. McNutt, chairman of the War Manpower Commission.

Mr. Barnes: May I ask the purpose of this offer?

Mr. Rigney: It is a part of what the situation was in 1943, at a time when consideration was being given by the War Production Board to rescinding or modifying Order L-208. It constitutes a part of that picture.

Mr. Barnes: Your Honor, this is the first evidence that any such consideration was being given in the War Production Board, to the best of my recollection. I don't recall its [fol. 1068] being within the allegations of the petitions in any of the six cases which are here involved. I fail to see how it comes within the scope of the court's opinion. I therefore object on the ground that it is irrelevant and immaterial.

The Commissioner: It may be received.

(Said letter dated June 4, 1943, from Donald Nelson to Paal V. McNutt, marked "Plaintiffs' Exhibit No. 161," admitted in evidence and made a part of this record.)

Mr. Rigney: Plaintiff now offers in evidence Exhibit No. 43 for identification, being a memorandum of June 7, 1943, from M. Creditor to Mr. Donald M. Nelson.

Mr. Barnes: I object on the grounds previously stated with respect to the preceding exhibit, Your Honor.

The Commissioner: It may be received.

(Said memorandum of June 7, 1943, from M. Creditor to Donald Nelson, marked "Plaintiffs' Exhibit No. 43," admitted in evidence and made a part of this record.)

[fol. 1069] Mr. Rigney: Plaintiff now offers in evidence Exhibit No. 40 for identification, being a memorandum of June 8, 1943, from Donald D. Davis, Operations Vice-Chairman, to Mr. Donald M. Nelson, Chairman of the War Production Board.

Mr. Barnes: I object on the grounds of incompleteness, your Honor. The opening paragraph refers to the fact that a file containing reports and recommendations accompanies the memorandum. It does not accompany the copy which was offered by the plaintiff.

Mr. Rigney: I do not think that is a correct observation. It says, "I am returning herewith your file containing reports and recommendations respecting the above order." That is in a different category than these other documents that we have had which carry with them an enclosure or an appendix, or something of that sort. He is sending back a file, he is not transmitting an enclosure to this letter in the sense that we have had that problem before. I do not think there is anything in the body of the letter which is incomplete, or where the meaning is in doubt by reason of the fact that this file is mentioned.

The Commissioner: No, but at the same time, it would seem to me that the contents of the material returned may have a bearing upon the subject matter of this letter. I think the objection is good.

Mr. Rigney: I would that perhaps the Government could [fol. 1070] come forward with that. Mr. Barnes would have easier access to that than we would, your Honor. This file which is referred to, I should imagine, would not be filed in the same place that this document is anyway. And if it would throw further light on it, Mr. Barnes could offer

that. But I would like to ask your Honor to reconsider and receive this.

The Commissioner: Well, I think counsel knows that I have been extremely liberal in letting evidence in. I just feel that the court wants to have everything where it is apparent that it could throw light on the problem. But at the same time, if only part of the story is offered over objection, I do not think I can allow it to be received.

Mr. Rigney: May this be given the next numerical number in the new exhibits?

(Said document was marked for identification Plaintiffs' Exhibit No. 162.)

Mr. Rigney: Plaintiff offers in evidence now, your Honor, Exhibit No. 162 for identification, being a letter of June 13, 1943 from Robert P. Patterson, Under-secretary of War, to Mr. H. O. King, Director of the Copper Division of the War Production Board.

Mr. Barnes: Your Honor, in view of the last remark you made, I would like to read a portion of a sentence from the court's opinion in the Idaho Maryland Mine Corporation case which is the basis upon which I have been asserting my [fol. 1071] objection to these documents subsequent to October 8, 1942. What the court said there was:

> "The question raised by the facts alleged in the amended petition and which we have authority to consider and decide is whether or not on the facts so alleged the order in question went beyond what was required by the exigency of the situation existing in October, 1942."

I do not see how what the situation may have been in June of 1943 when Secretary Patterson wrote that letter to the head of the Copper Division can have any bearing on the issue delimited by the court as the issue for consideration here. And I object to the receipt of that document on this basis.

The Commissioner: It may be received.

(Said memo, dated June 13, 1943, from Secretary Patterson to Mr. H. O. King, marked "Plaintiffs' Exhibit

No. 162," admitted in evidence and made a part of this record.)

Mr. Rigney: May this be marked Plaintiffs' Exhibit No. 163 for identification?

(The document referred to was marked for identification Plaintiffs' Exhibit No. 163.)

The Commissioner: I might agree with counsel at a later time, but I do not know now, and it would certainly be improper for me to exclude evidence and be found by the court to be in error and require another trial, and require these people from great distances to return for another trial.

[fol. 1672] I do not want to imply by that that I have any feeling one way or the other.

Mr. Rigney: I do not deem it proper for me to ask your Honor to hear me on it in view of your Honor's ruling.

Plaintiff offers now Exhibit No. 163 for identification, your Honor, being a memorandum of June 14, 1943 from Gustav Peck to Mr. Donald M. Nelson.

Mr. Barnes: I seem to be full of objections, your Honor. I now have a new one to this document and to the preceding documents, which is along these lines: the record will show that on June 15, 1943 the entire question of the gold order was again presented to the full War Production Board, as appears from the minutes of that meeting, and was decided by it. Various recommendations by staff members prior to that time on bases which were not adopted by the War Production Board at that meeting can have no relevance or significance unless it is shown that those conditions were communicated to the Board at the time of that meeting and were before it. I object to the receipt of this document on that basis.

The Commissioner: It will be received.

(Memorandum dated June 14, 1943 from Mr. Peck to Mr. Donald Nelson, marked "Plaintiffs' Exhibit No. 163", admitted in evidence and made a part of this record.)

Mr. Rigney: Plaintiff offers Exhibit No. 48 for identification in evidence, being a memorandum of September 7,

[fol. 1073] 1943 from Gilbert J. Brown to Hugh C. Porter on the letterhead of the War Production Board.

Mr. Barnes: May I ask the purpose of this offer?

Mr. Rigney: This offer is made in conformity with certain allegations in one or more of the petitions here with reference to the exportation of mining machinery abroad.

Mr. Barnes: If it is being offered to prove those allegations of the petitions I have no objection to it, your Honor.

Mr. Rigney: I would not want to be confined to that statement as to any use that it might serve generally in support of our cause insofar as a later brief is concerned or findings. But I state that as among the reasons that it is offered.

Mr. Barnes: I fail to see that it has any possible relevance or materiality to the issues here involved except for that limited purpose, your Honor, and if it is being offered for any other purpose I object to its receipt.

The Commissioner: I seem to be a little confused. Did I understand the purpose as stated by counsel that it was to prove the allegations of the petition?

Mr. Barnes: With respect to certain foreign transfers of mining machinery to foreign countries.

Mr. Rigney: There are certain allegations in one or more of the petitions of the plaintiffs here with respect to the [fol. 1074] exportation of mining machinery to foreign countries during the period of the shut down here, and this is particularly pertinent on that point, your Honor, and is offered primarily for that purpose.

The Commissioner: It may be received.

(Memo dated 9-7-43 from Mr. Gilbert Brown to Mr. Hugh Porter, marked "Plaintiffs' Exhibit No. 48", admitted in evidence and made a part of this record.)

Mr. Rigney: Plaintiff now offers in evidence Exhibit No. 51 for identification, being a memorandum of October 30, 1943 from Mr. A. S. Knoizen, Director of the Mining Division, to three gentlemen within the War Production Board, Mr. Batcheller, Mr. Hall and Mr. Young.

Mr. Barnes: I object to this, your Honor, on the ground that it is too remote from October 8, 1942 and does not have any relevance or materiality. The record shows that the War Production Board on June 15, 1943 had reached

a decision with respect to the continuance of the order and that none of the addressees of this memorandum were members of the War Production Board.

The Commissioner: It may be received.

(Said memo dated 10-30-43 from Mr. Knoizen to Messrs. Batcheller, Hall and Young, marked "Plaintiffs' Exhibit No. 51", admitted in evidence and made a part of this record.)

[fols. 1075-1083] Mr. Rigney: May this be marked as the next exhibit in order, please.

(Said document was marked for identification as Plaintiffs' Exhibit No. 164.)

Mr. Rigney: Plaintiff now offers in evidence Exhibit No. 164 for identification, your Honor, bearing the date of May 4, 1945, headed "Order Clearance Committee Meeting 902."

Mr. Barnes: May it please the court, this is a document that has the clear appearance of being an excerpt from the minutes. It does not give any indication of the opening of the meeting, any indication of the persons present and any indication of a signature on the minutes. I object to it on the ground of incompleteness.

Mr. Rigney: I do not see anything that indicates it is incomplete.

The Commissioner: It may be received.

[fol. 1084] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

Transcript of testimony — February 4, 1953

TESTIMONY FOR PLAINTIFFS (Resumed)

The hearing was resumed, at the time above indicated, pursuant to the recess previously taken.

Present: (The same appearances as previously noted.)

The Commissioner: You may proceed.

Mr. Herrington: At this time, Mr. Commissioner, Idaho Maryland will call Mr. Allan.

CHARLES L. ALLAN, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct Examination.

By Mr. Herrington:

Q. What is your name?

A. Charles L. Allan.

[fol. 1085] Q. You are employed by Idaho Maryland Mines Corporation, one of the plaintiffs in this case?

A. Yes, I am.

Q. Who is the president of the corporation?

A. Mr. Albert Crase.

Q. How old is Mr. Crase?

A. He was 73 in November of last year.

Q. How long have you been connected with the corporation?

A. Since August of 1935.

Q. What is your present title?

A. Secretary Treasurer and Comptroller.

Q. Do you exercise any supervisory duties?

A. I have the over-all responsibility of conducting the corporation's affairs.

Q. What departments are there in the management of the company?

A. The Underground, Surface, the Mill, Geologic, and Engineering Departments.

Q. Do these departments make regular reports?

A. They make regular reports at varying periods.

Q. How often?

A. The Underground makes daily reports, and a monthly summary of their operations. The Surface Department will make reports weekly or bi-weekly. A daily report from the [fol. 1086] Mill. The Engineering Department is constantly making maps for our reference. And the Geologist, of course, is keeping a constant record of his findings and recommendations.

Q. What is the function of the Underground Superintendent?

A. The Underground Superintendent has direct charge of all the underground operations, the mining and maintenance. He has the responsibility for producing the ore.

Q. What is the function of the Surface Superintendent?

A. The principal activity of the Surface Department is servicing and supplying the Underground. The Service Superintendent is responsible for that work.

Q. What is the function of the Geologist?

A. The Geologist examines the mine, analyzes the diamond drill cores, makes recommendations based on his technical knowledge as to what mining should be done underground.

Q. Do you consult with the president of the corporation in connection with these reports that you mentioned?

A. Yes, I am constantly in consultation with the president.

Q. Do you attend meetings of the Board of Directors?

A. I do.

Q. Do you take part in the discussions?

A. I take active part in all the discussions.

[fol. 1087] Q. How long have you been connected with the Idaho Maryland Mines Corporation?

A. About 17½ years; since 1935.

Q. In what various capacities?

A. I was first a cost accountant; and then a senior accountant; personnel manager; chief accountant; and I became Secretary-Treasurer in 1949. In October, 1950, until March of 1951, I was General Manager.

Q. During the time you were General Manager of the mine, what were your duties?

A. I was in full charge of all operations, production, milling, and all the corporate activities.

Q. Mr. Allan, where is the Idaho Maryland Mine located?

A. The Idaho Maryland Mine is about a mile east of the Grass Valley city limits.

Q. In what county?

A. In Nevada County, California.

Q. What is the principal industry of Nevada County, California.

A. Gold mining.

Q. How long has that been true?

A. Since 1848.

Q. Since gold was discovered in California?

A. Since gold was discovered in California.

Q. Is the mine located in a definitely well-known mining [fol. 1088] district?

A. The Grass Valley Mining District of California is well known.

Q. What other city is adjacent to Grass Valley?

A. Nevada City, the county seat of Nevada County.

Q. What is the principal occupation of the inhabitants of these communities?

A. Gold mining.

Q. Has that been true for many years?

A. It has been true since the towns were founded.

Q. Have the inhabitants gone through the occupation of gold mining for many generations?

A. Yes, they have. The majority of the miners in Grass Valley were originally Cornish tin miners who were brought to this country for the purpose of operating shaft mines.

Mr. Herrington: Will you mark this as an exhibit?

(Said document was marked for identification as Plaintiffs' Exhibit No. 165.)

By Mr. Herrington:

Q. I show you Plaintiffs' Exhibit for identification No. 165, and ask you if this is a map of the Idaho Maryland Mines holdings in Grass Valley?

A. Yes, this is a map of the Idaho Maryland Mine Corporation's holdings in Grass Valley.

[fol. 1089] Mr. Herrington: I will introduce that as Plaintiffs' Exhibit next in order.

Mr. Barnes: May I ask the purpose of the offer?

Mr. Herrington: Just to indicate the description of the mine; for no other purpose. We can have it marked only for identification, if you choose.

Mr. Barnes: For that limited purpose, I have no objection. The point I had in mind at the opening of these hearings, when I stipulated, for the limited purpose of the liability hearings, with respect to ownership, was that we would not get into detailed evidence of this type which might, if it is

admitted generally, have an effect on subsequent damage hearings if we have to get into that point. I don't think from that standpoint, for example, that this witness is competent to identify this, probably. If it is being offered only for descriptive purposes, I would have no objection to its being received for that limited purpose.

OFFERS IN EVIDENCE

Mr. Herrington: The map is offered only for descriptive purposes, Your Honor.

The Commissioner: It may be received on that basis, then.

(Said map of Idaho Maryland Mines Corporation holdings in Grass Valley, Cal., marked as "Plaintiffs' Exhibit, No. 165," admitted in evidence and made a part of this record.)

[fol. 1090] By Mr. Herrington:

Q. Mr. Allan, will you describe generally the nature of the Idaho Maryland Mine at Grass Valley?

A. The Idaho Maryland Mine has an incline shaft 2850 feet in length, which extends to the 2,000 foot level vertically. Levels have been turned off this shaft at approximately every 100 feet.

Q. Have you marked on the map the location of the Idaho shaft?

A. Yes, it is marked. The Idaho shaft is here (indicating). It is where this small circle appears. That is the Idaho shaft.

Q. Is the Idaho Mine older, in point of use, than any of the other portions of the property?

A. Yes, it is much older.

Q. Is there another shaft called the Brunswick shaft?

A. Yes.

Q. Where is that located?

A. That is located a mile and a half southeast of the Idaho shaft.

Q. Have you located the New Brunswick shaft on the map?

A. The New Brunswick shaft is here (indicating).

Q. I believe you said the New Brunswick Mine is more recent in date of operation than the Idaho?

A. That is right.

[fol. 1091] Q. Are the two units operated as one at the present time?

A. At the present time they are operated as one unit.

Q. Are there other openings into the mine in addition to the Idaho shaft and the Brunswick shaft?

A. There is a circular shaft called the Idaho No. 2 shaft, located east of the Idaho shaft and extending down to the 1000-foot level of the Idaho Mine.

Q. What other shafts are there?

A. The Old Brunswick shaft. It is located south and east of the Idaho No. 2 shaft, and it extends to the 1100-foot level of the Old Brunswick Mine, but it is really a part of the New Brunswick workings.

Q. I believe you described generally the character of the Idaho shaft. Will you now describe the Brunswick shaft, the New Brunswick shaft?

A. The New Brunswick shaft is a vertical, three-compartment shaft, 3400 feet deep. The lowest level on that shaft is 3280, which is about 120 feet from the bottom of the shaft.

Q. When was that shaft erected?

A. The Brunswick shaft dates from the early 20's.

By Mr. Barnes:

Q. Mr. Allan, since you have Old Brunswick and New Brunswick, would you indicate which you are referring to [fols. 1092-1096] when you refer to the Brunswick shaft?

A. The New Brunswick shaft dates from the early 1920's.

By Mr. Herrington:

Q. Is the Old Brunswick shaft being used for operating purposes at the present time?

A. Not at the present time. It is used as a second exit.

Q. You mean as an escapeway?

A. It has, however, a steel headframe, and a hoist house.

Q. Is it capable of being used for operating purposes?

A. It could be used, and up to probably a year ago it was used occasionally for hoisting ore.

Q. What is the character of the frame equipment at the New Brunswick Mine?

A. There is a modern steel headframe, with concrete bins built into the headframe; a very large hoist capable of hoisting ore from a 5,000 foot depth; and the mill and the shops, the change house and storehouse, are all new buildings in the vicinity of the shaft.

[fol. 1097] By Mr. Herrington:

Q. Mr. Allen, you were describing the New Brunswick shaft. Can you tell us when it was constructed?

A. The New Brunswick shaft was started in the early 1920's. The New Brunswick new headframe was completed in 1941.

Q. What is the character of it? Of what materials is it constructed?

A. It is a steel headframe, a very modern headframe, with very modern hoisting equipment, one of the most efficient hoisting layouts in the United States.

Q. What other surface equipment did the Idaho Maryland Mine have by October, 1942?

A. They had mills, shops, automotive equipment, all the necessary equipment to carry on mining and servicing of the underground.

Q. Did you have a machine shop?

A. We had machine shops, electric shops, welding shops, blacksmith shop, carpenter shop, and a small sawmill.

Q. Will you describe generally the nature and extent of the underground workings of the Idaho Maryland Mine?

A. The Idaho Maryland Mine on the incline shaft reaches the 2,000-foot level. It has been developed to the 2700-foot level by winzes on the west side from the 2,000-foot level to the 2300; and on the east side, from the 2300 to the 2700. [fol. 1098] There are levels, of course, between the 2000 and the surface at possibly every 100 feet. On these levels are drifts, cross-cuts, raises, winzes, stopes. There are possibly 55 miles of underground workings in the two mines.

Q. Has the company had any policy with respect to keeping up its equipment?

A. The company has always tried to maintain its equipment in the most efficient working order. It has purchased new equipment when needed. We had a lot of new equipment and very good equipment in October 1942.

Q. What is the general nature of the gold-bearing ore in the Idaho Maryland Mine?

A. It is quartz. The Idaho Mine is slightly different from the current Brunswick Mine. The geologist could explain that. Both mines are quartz mines.

Q. Is that commonly referred to as free gold?

A. There is free gold in the quartz.

Q. What is the color of quartz?

A. Usually white, not always.

Q. Where a gold vein is discovered, can you see gold in the quartz?

A. Yes, you can see free gold particularly. Anyone who is familiar with gold can recognize it in any color, but the free gold is quite noticeable in our quartz.

Q. What has been the company's policy with respect to [fols. 1099-1105] exploration for the purpose of developing proven ores?

A. We have never had a serious program of developing ores, having large blocked-out ore reserves.

Q. Is the company operated continuously without having blocked out proven ores?

A. Yes, it has always operated in that manner.

Q. The Grass Valley Mining District is a well-known mineralized area, is it not?

A. Yes, it is very well known.

Q. Can you tell us anything about the depths of the mines in the Grass Valley area?

A. The Empire Star and North Star Mines of the Numont Company in Grass Valley are almost twice or over twice as deep as our mines. In the Empire Star, they have a 9600-foot level on their incline shaft, which is over 10,000 feet long.

Q. What is the deepest working at the present time in the Idaho Maryland Mine?

A. In the Idaho Maryland Mine, 2700-level is the deepest working.

Q. And Brunswick?

A. Brunswick, 3280 level.

[fol. 1106] By Mr. Herrington:

Q. Did Idaho Maryland Mines Corporation actually operate prior to October 8, 1942, for a number of years prior to that date?

A. Yes, it had been operating since 1926.

Q. Has it been operating subsequent to June 30, 1945, continuously up to the present date?

A. Yes, it has.

Mr. Herrington: I will withdraw these exhibits.

By Mr. Herrington:

Q. On or about October 8, 1942, did Idaho Maryland Mines Corporation have on hand a supply of material?

A. Yes, we had an inventory of material.

The Commissioner: Are you physically withdrawing those that you had marked?

Mr. Herrington: Yes, I am. In view of the objection there is no point of introducing them.

Mr. Barnes: I thought they were received in evidence subject to the right of verification.

Mr. Herrington: They were received in evidence subject to verification? I thought you objected to them.

The Commissioner: I don't understand the objection.

Mr. Herrington: I don't understand the objection.

The Commissioner: In view of that statement you are going to leave them in evidence?

[fol. 4107] Mr. Herrington: We will leave them in evidence. I don't understand the objection, either, Your Honor, but I am not going to argue with it.

Mr. Barnes: I haven't had an opportunity to look at these myself at all. I don't know whether the oral testimony of the witness is going to be in conformity with those documents or not. We have the documents in subject to the right of verification. Why do we have to have oral testimony? The fact that we have questions on something covered by documents immediately makes me suspicious.

Mr. Herrington: I can explain it, Mr. Barnes. All I want to do is to show for the purpose of the record that in the years preceeding October, 1942, Idaho Maryland had operated at a very substantial profit.

Mr. Barnes: If the documents prove it, and if the documents are verified, counsel has that in the record.

Mr. Herrington: For the purpose of the record, I might at least identify the documents and ask Mr. Allan to tell us what they are.

By Mr. Herrington:

Q. Mr. Allan, I show you Plaintiffs' Exhibits Nos. 166 to 171, inclusive, and ask you if you will identify the exhibits.

A. These documents are reports of examination by the auditing firm of McLaren, Goode & Company, of our books [fol. 1108] and accounts as of December 31 of the years 1937 to 1942, inclusive.

Q. Do you know of your own knowledge whether the books of Idaho Maryland Mines Corporation are identical with the audit reports?

A. The books are identical with the audit reports.

Mr. Herrington: Will you mark this?

(Said document was marked for identification as Plaintiffs' Exhibit No. 172.)

By Mr. Herrington:

Q. Mr. Allan, I think you stated that Idaho Maryland Mines Corporation had on hand on October 8, 1942, a supply of mining materials, and I show you the inventory which has been marked as Plaintiffs' Exhibit No. 172 for identification and ask you whether or not to your knowledge that is the inventory of materials and supplies which were on hand on the date shown by the inventory.

A. Yes, this is a physical inventory, an actual physical count of materials and supplies on hand at the date of inventory, October 31, 1942.

Q. Does the inventory show that a large amount of critical materials at that time were held by Idaho Maryland Mines Corporation and available for use by it?

Mr. Barnes: I object to the form of the question as being leading, Your Honor.

[fol. 1109] The Commissioner: Sustained.

By Mr. Herrington:

Q. With respect to the inventory can you tell us in general what it consisted of?

A. Supplies and materials necessary for operating the mine, particularly large items of pipe and rail, steel, drill steel, building machine repair parts, tires, tubes, repair parts for the milling machinery, valves, pipe fittings, and miscellaneous supplies.

Q. How about mercury?

A. It shows an inventory of mercury. There is no index to this, and I cannot find it readily. There is mercury on this

inventory of 42,089.89 ounces, which is approximately thirty-seven flasks of 76 pounds each.

Q. I don't think you told us the general process of extracting ore. Would you mind describing that briefly for the Idaho Maryland mine?

A. When ore is extracted from the heading or working, principally from stopes, it is dropped from the shafts into cars by rail being hauled by small locomotives. At the shafts it is dumped into chutes or ore pockets, then drawn into skips in the shaft, hoisted to the surface and dumped from the skips into ore bins. From the ore bins it is fed to a sorting belt, where waste and foreign matter, such as pieces of copper wire or wood, sometimes hammer handles or even [fol. 1110] hammers, parts of shovels which get into the rock. Then it is crushed to an inch and a half or less and fed into ball mills for pulverizing.

From the ball mill it goes over tables through flotation cells in the amalgamation process. About two thirds of our gold is recovered in the amalgamation process. The residue is in the form of sulphide concentrates that are treated at a cyanidation plant. The amalgam and the cyanide concentrates are finally melted in a refinery at our own plant into the form of bullion bars and delivered to the United States Mint.

The Commissioner: Do you have stamps?

The Witness: We have no stamp mill. In 1942 we did have a stamp mill operating, a twelve stamp mill, which has since been torn down.

By Mr. Herrington:

Q. Did the company have at all times its own cyanidation plant, amalgamation plant?

A. It has always had a cyanidation plant and a smelting plant.

Q. You stated that approximately two thirds of the gold was recovered in the amalgamation process. Is any gold recovered prior to the amalgamation process?

A. Some of the free gold, five to ten per cent, depending of course on the amount of free gold in the ore, in the material, is recovered from the table, the first operation, [fol. 1111] the jig.

Q. Is that due to the peculiar nature of the ores in the Idaho Maryland mine?

A. Yes, it is due to the fact that we have quite a bit of free gold in our ore.

Q. Is it necessary in the operation of the mine to operate the cyanidation plant? Is that an essential part of the operation?

A. It is not absolutely essential. Concentrates can be smelted. In fact, at the present time we are smelting our concentrates, sending them to the American Smelting & Refining Company smelter at Selby, California.

Q. Are you operating a cyanidation plant at all?

A. No. It has been closed for perhaps six weeks.

Q. What is the reason for that change in operation, Mr. Allan?

A. We are mining shrinkage stopes in what is known to the miner as black slate, a form of quartz. We ran into carbon difficulties, making cyanidation rather difficult, so we thought we would try to get greater recovery by sending the concentrates to the Selby smelter.

Q. The Selby smelters were operating during the war period, to your knowledge, from 1941 to 1945?

A. Yes, it operated all during the war.

Q. Now tell us what the situation was with respect to [fol. 1112] the availability of timber in 1942.

A. We were purchasing timber from small saw mills in Nevada County. There are a large number of small saw mills. They supplied our timber and have done that for years.

Q. Does the company operate its own saw mill?

A. At that time we had a small saw mill used only for framing our timbers or preparing rough lumber when lumber was needed around the mine. At the present time there are two commercial saw mills in operation.

Q. Let's go back to October, 1942. The saw mill that you had in use then was used solely for the purpose of cutting lumber into appropriate lengths for the mine, if I understand your testimony correctly.

A. That is correct.

Q. Does the company have any timber of its own on its properties?

A. There is timber on practically all of the property, except right around the mine shafts and the buildings.

Q. What is the character of that timber? Is it capable of being used in the mine?

A. It can be used as mine timbers.

Q. To what extent does the Idaho Maryland mine require timbering?

A. The Idaho Maryland mine requires considerable timbering. The Brunswick mine, practically no timber com- [fol. 1113] pared to the Idaho Maryland mine.

Q. What is the character of the timbering? Can you describe it for us?

A. It is in the square set stopes we are using posts and caps in the drifts.

Q. What is the difference between square set and posts and caps?

A. Square set is four posts are laid 8 by 8, 10 by 10 timber, with a square frame connecting the posts at the top. Posts and caps are just two posts set up on either side of the drift with a cross piece connecting the two against the roof. That is the hanging wall.

Q. Where did the company obtain its power in 1942?

A. Pacific Gas & Electric Company.

Q. Approximately what was the monthly requirement of power for the operation of the mine?

A. In October, 1942, we were using a million and a half to two million kilowatts a month.

Q. Did you continue to use power throughout the period of the shutdown?

A. Yes, we used power throughout the period of the shut down.

Q. Approximately what was the average cost per month?

A. Nine—

Mr. Barnes: I object to this as being immaterial to any [fol. 1114] issue involved here. It goes to the question of damages.

Mr. Herrington: I will withdraw the question.

Mr. Herrington:

Q. How much power was used per month during the period of the shutdown?

A. From a million to a million and a half kilowatts.

Q. What was that power used for?

A. Principally for pumping. Some hoisting had to be done with men underground, lighting and operating the shops.

Q. At any time during the period of the shutdown were you curtailed in power?

A. No, we were not.

Q. Was there any allocation of power?

A. No, no allocation.

Q. Was power always available to you during that period of shutdown?

A. Yes, it was.

Q. Mr. Allan, what was the situation October 8, 1942, with respect to manpower available for the operation of the mine?

A. We had a little over two hundred men, 213 to 215 men on the payroll. Two hundred thirteen, I believe, is the correct figure.

(Document was marked for identification as Plaintiffs' Exhibit No. 173.)

[fol. 1115] By Mr. Herrington:

Q. I show you Plaintiffs' Exhibit No. 173 for identification and ask you if this is a list of the employees of Idaho Maryland Mines Corporation as of October 8, 1942.

Mr. Herrington: In this connection I may state to Your Honor that this list was furnished to the government and I believe it has been checked by the government as being accurate except that the heading is erroneous. We have a heading here as of October 1-15, which is not correct. There are a half dozen names here who appear on this list as being employed October 8, 1942, whereas the list shows that the men had been released either a day or two or some weeks prior to that time. As to those I am going to ask the witness to make the necessary corrections.

Mr. Barnes: Is that the same list? You seem to have some lines drawn through here.

Mr. Herrington: Those are the ones we have corrected, and I will ask the witness to do that.

By Mr. Herrington:

Q. I show you Plaintiffs' Exhibit No. 473 for identification which will now be introduced in evidence and ask you if that is a correct list of the men who were employed at the Idaho Maryland Mines Corporation on October 8, 1942.

A. Yes, it is a correct list of the men who were employed by the Idaho Maryland Mines Corporation on [fol. 1116] October 8, 1942.

Q. Have you made some corrections on that list in ink at my request?

A. Yes, I have made some corrections.

Q. Will you explain what those corrections are?

A. These corrections are men whose names—

Q. Start at the top first.

A. These corrections are men—

Q. No, the heading, please. Start at the top and tell us each correction that you have made on the list.

A. I deleted the words "as of October 1-15, 1942" so that the heading now reads Idaho Maryland Mines Corporation Employees.

Q. What other corrections?

A. Then I deleted the names of those men who, according to the dates shown here in the column Employment Record were not actively employed as of October 8, 1942.

Mr. Barnes: Will you read those names?

The Witness: On page one the first name is Bustillos, Joseph. My next deletion is the name, I believe, of Dale Butler; it is the next name following Bustillos. The next name is Joseph Chisholm.

On page two, Charles Goudge, William Henry Harvey, Letcher K. Jesse, John Alexander Johnson, John Lee, and Swan Nelson.

[fol. 1117] There are no deletions on page three.

On page four, one deletion, William Henry Carey.

On page five, one deletion, Elmer Lloyd Patton.

On page six, Conrad Stroh, Walter H. Weege, and Patricia O. Wilson.

On page seven, Elmer Oscar Williams, Sefe Abas, Charles Baftista, Dennis Edward Colvin, Arthur Frick Erickson, Glen Furman, and Francis Grenfell.

On page eight, John Hoskin, Cecil Jones, Clifford Morgan, and Royal Widener.

On page nine, Philip Angove, Irving Carnegie, Howard Dennis, Thomas Hall, William Meals, and Garville Sparks.

Mr. Barnes: Mr. Allan, will you look back at the first name on page one?

The Witness: Joseph Bustillos?

Mr. Barnes: Selo Ali. Didn't he leave the company's employ on October 1, 1942, and not return until February 11, 1943?

The Witness: Yes, according to this record, he did.

Mr. Barnes: Shouldn't he similarly be eliminated?

The Witness: Yes, he should also be eliminated.

Mr. Herrington: In that case I suggest you make the corrections now so the list will be correct.

Mr. Barnes: Turning to page seven, the name of Paul Dovell appears. You didn't cross his name out, did you?

[fol. 1118] The Witness: What is the name?

Mr. Barnes: Dovell, the seventh name from the bottom on page seven.

The Witness: He should be deleted.

Mr. Barnes: Those are the only questions.

Your Honor, I might state this list has been checked against the employment records. We are prepared to agree that this is a correct copy of those records.

The Commissioner: Very well.

Mr. Herrington: I am not sure that I introduced the inventory in evidence. I will offer the inventory, Plaintiffs' Exhibit 172, in evidence.

Mr. Barnes: Your Honor, with respect to the inventory I would like to ask the witness a few questions with respect to it. I don't know whether you would like to have me do it or go into the cross examination. It makes no difference as far as I am concerned.

Mr. Herrington: Whatever Your Honor wishes.

The Commissioner: I will do that. I will defer ruling on it until later.

Mr. Herrington: Then I will introduce in evidence the Plaintiffs' statement of employees, Plaintiffs' Exhibit No. 173 for identification. It is now offered in evidence.

The Commissioner: I take it there is no objection.

Mr. Barnes: Just one minute to be sure. No, there is [fol. 1119] no objection to its receipt, Your Honor.

The Commissioner: It may be admitted.

(Said document, being a list of Idaho Maryland Mines Corporation employees, marked "Plaintiffs' Exhibit No. 173," admitted in evidence and made a part of this record.)

By Mr. Herrington:

Q. Mr. Allan, will you tell us generally what the company's experience has been with respect to the availability of employees in the early part of 1942 or, we will say, commencing from Pearl Harbor Day, December 7, 1941?

A. In December of 1941 we had over eight hundred employees. In January of 1942 we still had eight hundred. By July of that year employment had dropped to three hundred, slightly over three hundred. Then the separations leveled off somewhat until October 8, 1942, when we had 240 employees.

Q. Was the mine in operation on October 8, 1942, with that number of employees?

A. Yes, it was operating.

Q. How many men are shown on your list as being workers underground on October 8, 1942?

A. One hundred sixteen.

Q. How many of the employees were workers above ground or clerical workers?

A. Clerical workers are not included in this list. There [fol. 1120] were ninety-four above ground on this list.

Q. Do you know the average age of the employees of the corporation as of October 8, 1942?

A. For the division it is figured at 47.7 years of age.

Mr. Barnes: Those are the employees that are shown on Plaintiffs' Exhibit No. 173, is that right, sir?

The Witness: That is right.

By Mr. Herrington:

Q. How many men are shown on your list as having been employed underground who were over the age of fifty years?

Q. Forty-three men underground over the age of fifty.

Q. What percentage of the total number of men underground were fifty years or more of age?

A. That would be about 40 per cent.

Q. When limitation Order L-208 was issued on October 8, 1942, what steps did you take to close the mine?

A. We immediately notified the employees that the mine was being closed, and we discontinued any development work that was going on. There was very little of it at that time, and we went ahead with the idea of getting out all the rock we possibly could before October 15, which was the last day we were allowed to have any production.

Q. Did the mine close down on October 15, as far as production was concerned, completely?

A. Yes. There was no production after October 15.

[fol. 1121] Q. Mr. Allan, I show you Plaintiffs' Exhibits in evidence Nos. 104, 105, 106, 107, 108, 109, 110, and 111, which for purposes of convenience I am going to refer to collectively as the first appeal of Idaho Maryland Mines Corporation. Do you recall that following the limitation Order L-208 that Idaho Maryland Mines Corporation filed an appeal with the War Production Board asking relief under that order?

A. Yes, I recall that appeal.

Q. Will you tell us what the primary purpose of the appeal was at that time and what the situation was with respect to the mines?

A. The primary purpose of this appeal was to be allowed to continue the drift to make a second exit between the Idaho Maryland mine and the Brunswick mine. This second exit was required by the California state law for any shaft or excavation 300 feet deep or more. We had not finished that connection at the time of the shutdown. We asked to complete it.

Q. The appeal was granted, I believe?

A. The appeal was granted.

Q. Did you complete the second exit?

A. We completed the second exit between the Idaho 2700 level and the New Brunswick 3280 level by a raise from the latter level to the 2700 level.

Q. Following the completion of the second exit, to what [fol. 1122] extent did you endeavor to maintain the mine?

Mr. Barnes: Your Honor, I object to this. It seems to me this goes to the question of damages rather than to the question of liability, which is the issue here presented.

By Mr. Herrington:

Q. How many men were employed by the company for maintenance only following limitation Order L-208?

Mr. Barnes: Your Honor, I make the same objection.

Mr. Herrington: I think it is pertinent, Your Honor, in view of the allegations, that we had to maintain the mine, to show at least what the facts were in so far as what was done in regard to that maintenance.

Mr. Barnes: My feeling, Your Honor, is that there may be allegations in the petition, but they are allegations relating to damages rather than allegations relating to liability.

The Commissioner: How does it bear on liability?

Mr. Herrington: It bears on liability, to this extent, Your Honor, that it is alleged in the petition that Order L-208 permitted the employment of a sufficient number of men to maintain the mines in working order and condition. Our allegations are that it would have taken all of the available men to maintain the mines, and that is what we intend to show by this line of questioning. So even had the order been intended to release men for work from the gold mines to [fol. 1123] copper mines, it could not have operated in that way in so far as Idaho Maryland is concerned because all the men who were there were necessary for maintenance only.

The Commissioner: Overruled.

By Mr. Herrington:

Q. Following limitation Order L-208 and following the work that was done pursuant to the first appeal, what steps were taken to maintain the mine in good order and condition?

A. With the number of men remaining we were able only to maintain the pumping stations, the more important drifts where drainage was involved or where ventillation was necessary.

Q. How many men did you employ during the period of the shutdown for maintenance only?

A. I would say between forty and fifty men.

Q. How many men would have been required in order to maintain the mine in good order and condition throughout all of this period?

Mr. Barnes: I object, Your Honor. No qualification of the witness has been shown to express an opinion on that subject.

Mr. Herrington: He was general manager of the mine and operated it.

The Commissioner: Overruled.

The Witness: It would take 150 or 200 men to maintain all [fol. 1124] the workings of the mine.

The Commissioner: Suppose we recess for five minutes at this point.

(Thereupon, at 11:15 a.m., a five-minute recess was taken in the hearing.)

By Mr. Herrington:

Q. I think when we finished, Mr. Allan, the last question had to do with the number of men who were employed underground in the operation or in the maintenance of the mine at that time following Order L-208 and following the completion of the second exit to the mine which was permitted under the first appeal.

A. We reduced our force to between forty and fifty men underground at that time.

Q. Were you able to maintain the mine during that period of the shutdown?

A. We maintained only the pump stations and the part of the drifts where drainage and ventilation were involved, and we maintained the shafts.

Q. I now call your attention to Plaintiffs' Exhibits in evidence Nos. 112 to 119, inclusive, which for convenience I am going to refer to as the second appeal of Idaho Maryland Mines Corporation, which was filed on or about December 13, 1943, and finally acted upon by the War Production Board on March 31, 1944.

[fol. 1125] Do you recall the circumstances under which this second appeal was filed? Also included, for the purpose of the record, in the so-called second appeal were Exhibits Nos. 30 and 31 which were introduced at the pre-trial, and that is the reason that they do not run in consecutive order with the other numbers.

A. I recall the appeal. It was made over the signature of Mr. Crase, the general manager at that time.

Q. Have you had occasion yourself to go underground and see the actual conditions in the mine following the shutdown?

A. I was underground a number of times, at least once a month, all during the shutdown.

Q. In the files of the War Production Board there are certain photographs referred to which were introduced for identification as Plaintiffs' Exhibits Nos. 124-A through 124-S. Will your look at those photographs and tell me, if you know, what they represent?

A. They are photographs of locations in the mine where it was possible to take photographs of the damage which had been done during the shutdown period since October 8, 1942.

Q. Are those photographs fair representations of the conditions that they purport to portray?

A. Yes, they are typical of conditions throughout the mine. In fact, there were much worse conditions than this [fol. 1126] in some places not available for photographing. I saw those myself.

Mr. Barnes: Are there any of those photographs that are duplicates?

The Witness: Yes. This is a duplication (indicating).

Mr. Barnes: By "this" he is referring to 124-D and 124-E.

The Witness: Nos. 124-A and 124-B are duplications; 124-F and 124-G are duplications; 124-H and 124-J are duplications; 124-M and 124-N are duplications.

Mr. Herrington: I offer the photographs in evidence as Plaintiffs' Exhibits Nos. 124-A to 124-S inclusive.

Mr. Barnes: No objection, in view of the testimony of the witness.

The Commissioner: Is there any objection at all?

Mr. Barnes: If they are being offered other than to illustrate the testimony of the witness, Your Honor, I don't think a proper foundation has been laid and I object on that basis. In other words, we don't know when they were taken, by whom they were taken or the locations where they were taken.

Mr. Herrington: We offer it to illustrate the testimony of the witness and the fact that they were filed with the War Production Board, that is all.

The Commissioner: There is no dispute about where they [fol. 1127] came from, is there?

Mr. Barnes: No, sir. They were taken from the files of the War Production Board.

The Commissioner: They will be received on that basis.

(Said photographs of interior of Idaho Maryland Mine, marked "Plaintiffs' Exhibits Nos. 124-A to 124-S," admitted in evidence and made a part of this record.)

By Mr. Herrington:

Q. What action was taken by the War Production Board upon your appeal?

A. We were allowed to resume operations on a limited basis, producing 7800 tons of ore a month and hiring not over two hundred men over forty years of age. The restrictions on the hiring of these men were that they were not to be drawn from war industries or any like activity?

The Commissioner: When was this?

The Witness: March 3, 1944, we were allowed to resume operations.

By Mr. Herrington:

Q. Then you endeavored to obtain men meeting those qualifications?

A. Yes, we did.

Q. How long did it take you to build up your force to approximately two hundred men?

A. We were not up to two hundred men before the end of [fol. 1128] the year.

Q. The end of 1944?

A. The end of 1944.

Q. How long did it take to get up to a production of 7800 tons a month?

A. In 1942 we never reached that 7800 tons. We came close to it, but we didn't get to it.

Q. 1944?

A. I meant 1944. We never reached 7800 tons.

Q. That was with the force which was available at that time?

A. With the available force, yes. It took a long time to prepare for that production, to open up the necessary

country underground to get that available ore. In fact, we were unable to put the men on as fast as we expected because of difficulty in making room for the men underground due to the destruction which had occurred.

The Commissioner: Did you say the destruction?
The Witness: That is right, destruction.

By Mr. Herrington:

Q. Just for the purpose of the record, I call your attention to Plaintiffs' Exhibits Nos. 120 to 123 in evidence, which for purposes of convenience I will call the third appeal and ask you if you recall the circumstances under which this appeal was filed, commencing on or about Novem-
[fol. 1129] ber 24, 1944, until sometime in December of 1944 or later. Do you recall the circumstances under which the third appeal was filed?

A. I recall this appeal. This appeal was to continue hiring men after we had reached our goal of two hundred which was granted in the appeal of March 10, 1944.

Q. The second appeal?

A. The second appeal.

Q. The third appeal was denied, was it not?

A. It was.

Q. Mr. Allan, go back for a minute to October 8, 1942, you say the mine was closed on October 15, 1942, seven days after the order went into effect?

A. All production stopped on October 15, 1942.

Q. Were you contacted by any agency of the United States Government at that time with respect to the employment of displaced miners?

A. No, we were not contacted by any government agency.

Q. Was there any notice posted on the property by the United States Employment Agency or any other agency of the United States?

A. No, there was not.

Q. Did the United States Employment Service or any other agency of the United States Government open an office in or about the mine premises?

A. Not on mine property or anywhere near it.

[fol. 1130] Q. Do you know of your own knowledge of any efforts that were made by the United States of America or

any of its agents to place any of the employees of Idaho Maryland Mines Corporation in copper mines or elsewhere?

A. I have no knowledge of their having made any effort to place men in copper mines in the Grass Valley District.

Q. Did you yourself take any action to endeavor to get jobs for any of the displaced men?

A. I referred a number of them to the Hall Scott Motor Company in Berkeley, California. These were surface employees.

Q. Have you formed an opinion as to whether or not Idaho Maryland Mines Corporation could have operated during the shutdown period from October 8, 1942, to June 30, 1945, had it not been for limitation Order L-208?

A. Yes, I have formed a definite opinion.

Q. What is your opinion?

A. That we could have continued to operate throughout that period.

Q. Tell me whether or not in your opinion it would have been necessary to make any changes in the regular method of operation.

A. The additional changes had already been made that were necessary. Due to the loss of men we had curtailed our operations and were resorting to shrinkage stoping.

[fol. 1131] Q. When did you commence shrinkage stoping in the Idaho Maryland mines?

A. That must have been early in 1942, when we lost several hundred men the first of the year.

Q. Is that method of operation continued under present circumstances?

A. Yes, we are continuing shrinkage stoping. In fact, we have only one square set slope operating at the present time.

Q. How about development work?

A. In 1942?

Q. Or during the period 1942 to 1945.

A. There had been very little development work, no development work for the purpose of blocking out ore; the necessary development in connection with preparing for stoping operations that were necessary.

Q. You mentioned sometime ago that the mining communities of Grass Valley and Nevada City had been populated to quite an extent by Cornish tin miners who came from England in the early days.

A. That is right.

Q. Do you know the term "tribute money" or "tribute pitch"?

A. Tribute mining or tribute pitch, as the Cornish men call it, is a system of leasing parts of the underground [fol. 1132] workings to a group of miners; the company furnishing the tools and supplies and the miners doing the work of extracting ore, the company handling their ore, and the proceeds from this production are split usually on a 50-50 basis. That practice had been used in the Grass Valley District for years.

Q. Is it a system which is still being used in the Grass Valley Mining District?

A. It is being used at the moment in the Numont properties there, the Empire Star and North Star mines. We discontinued it in June of 1952. We had been leasing or using the tribute method of mining in parts of our mine from October, 1948 to June of 1952.

Q. It was a well-known method of mining operation in the Grass Valley Mining District, was it not?

Mr. Barnes: I object to any further testimony along this line which appears to relate to a period subsequent to the resumption of operations in the mines, in 1948. It has no bearing whatsoever to anything which relates to the period from October, 1942, to June, 1945.

The Commissioner: That was not the testimony of the witness.

Mr. Barnes: He said they had been doing it in their mine from some date in 1948 to June, 1952.

The Commissioner: Is that your testimony?

[fol. 1133] The Witness: That is correct.

Mr. Herrington: He tesified it is an old mining method in the Grass Valley District. It is a method that we ourselves have used in recent years. It is a method that goes back many, many years in other mines.

The Commissioner: Overruled.

Mr. Barnes: I fail to see any relevance or materiality whatsoever, Your Honor. There is no evidence that any plaintiff here used that method at or about the time, no evidence that anything pertaining to it was brought to the attention of the War Production Board.

The Commissioner: The plaintiff is offering the evidence to show that it is something that could have been used.

Mr. Herrington: That is correct, Your Honor.

By Mr. Herrington:

Q. Was the tribute pitch method of mining in current use in Grass Valley prior to October 8, 1942?

A. Yes.

Q. And also subsequent to June 30, 1945?

A. Yes.

Q. In your opinion, was it a method which could have been used during the shutdown period had it not been for Order L-208?

A. It could have been used. There was no reason why it could not.

[fol. 1134] The Commissioner: In the use of such a method does it apply only to portions of the operation?

The Witness: It is usually employed where the company has gone as far as it can economically operate an underground working. The company operates within the restrictions of the Industrial Accident Commission and the methods of operating by large companies. In these places the tribute miners are able to go in and, you might say, scratch around for the better grades of ore.

It is a sort of clean-up operation. They can make money that way for themselves where the company could not afford to pay men on an hourly basis to go in and make such a selective production of ore. Also, it overcomes the manpower shortage when wages are not an inducement to miners to work at company pay. They make considerably more on the average in the long run than the day's pay miner will make.

The Commissioner: I gathered from your testimony that some operations were conducted by the company separate and apart from the operations under this method.

The Witness: Yes, the operations of the company and the tribute miners are going on in the same mine at the same time.

By Mr. Herrington:

Q. Just for purposes of illustration, while the company was operating on the tribute mining basis, approximately how much gold ore was recovered by the tribute miners and [fol. 1135] how much by the company?

A. That varied from year to year. The first tribute mining, the first year in 1949, the leases produced more ore than the company. In 1948 about an equal amount of ore was produced by the company and by the leases. Then we began to run out of places where we could allow leases to work without interfering with the company's operations and the lease production gradually dropped off.

Q. I asked you about the equipment and the machine shop and the blacksmith shop of the Idaho Maryland Mines Corporation. What were those shops available for?

A. They were for the maintenance and repair of mining and milling machinery.

Q. Were they capable of mass production?

A. No, they couldn't have produced anything in mass production. There was a lathe in each shop, a drill press, power hacksaw, one or two other machines.

Q. During the period of actual shutdown were the properties of Idaho Maryland Mines Corporation devoted to any other use?

A. No, they were not.

Q. In your opinion are they capable of being used for any use other than the production of gold?

A. No. They are gold mines, nothing else.

Q. Has Idaho Maryland Mines Corporation to your [fol. 1136] knowledge transferred or assigned the claim which is the subject of this present action?

A. No.

Q. Has any compensation been paid to Idaho Maryland Mines Corporation by the United States with respect to the subject matter of the petition in this case?

A. No.

Q. To your knowledge has any action been taken by the Congress of the United States or any agency or department with respect to the claim which is the subject matter of the petition in this case?

A. Not to my knowledge.

Mr. Herrington: You may take the witness.

Mr. Barnett: May I ask a question, Your Honor?

The Commissioner: Yes.

By Mr. Barnett:

Q. Mr. Allan, do you know how far Sutter's Creek is from the location of the Idaho Maryland mine, approximately?

A. I would say ninety or one hundred miles. I have been there, but I don't remember the miles.

Q. You speak of tribute mining. Is that known by any other name?

A. Leasing is the name.

Q. Has the word "contract" mining been used?

A. Contract mining in our experience is another type [fol. 1137] of mining.

Q. Could you describe just what that is?

A. In contract mining the miner is on the company payroll and he is paid so much a foot for advance in headings, in drifts, cross cuts, raises or whatever he happens to be working.

Q. Was that type of mining in general use, if you know, in and about the Mother Lode country as well as where your mine is located?

Mr. Barnes: I object to a statement of the understanding of the witness.

By Mr. Barnett:

Q. If you know.

Mr. Barnes: I object until the source of the witness's knowledge is shown.

The Commissioner: The objection is sustained.

By Mr. Barnett:

Q. Do you know whether or not there was a custom among the ore mines, that is, in and about Grass Valley, of lending or borrowing materials from one another?

A. Yes.

Mr. Barnes: I object to the form of the question as being leading.

The Commissioner: Overruled.

Mr. Barnes: I further object to the question in so far as [fol. 1138] it relates to the Mother Lode area until the source of the witness's knowledge has been known.

By Mr. Barnett:

Q. Central Eureka mine, then.

A. Yes, we exchange material. Anything that one mine needs and the other one can spare at the moment, we exchange.

Q. Was that custom in general use on October 8, 1942?

A. Yes, it had been in general use for a long time at the Idaho Maryland mine.

Mr. Barnett: Thank you. That is all.

Mr. Herrington: I might ask just another question.

By Mr. Herrington:

Q. Mr. Allan, there are numerous gold mines in California, are there not?

A. Yes, there are many hundreds of them, large and small.

Q. Is there a recognized secondhand market for making machinery in California?

A. Yes. There is secondhand machinery scattered all over California in the vicinity of mines, I would say from one end of California to the other.

Q. Do you know whether or not on or about October 8, 1942, there was a market in secondhand machinery?

A. Yes, there was a large amount of secondhand machinery on hand at that time.

[fol. 1139] The Commissioner: That wasn't the question. The question was, Was there a market?

The Witness: There was a large amount of secondhand machinery in the secondhand market at that time.

By Mr. Herrington:

Q. My question was whether there was a market. My next question is whether there was any considerable quantity of second hand machinery available.

A. There was a considerable quantity of secondhand machinery available. That was due, I believe, to the small

mines not having manpower enough to operate. By small mines I mean those which have a half dozen men. Their machinery would become available on the secondhand market.

Q. Do you know whether or not the secondhand mining machinery was ever rationed during World War II?

A. Not to my knowledge.

Q. Was it freely obtainable on the open market?

A. Yes, it was.

[fol. 1140] Cross-Examination.

By Mr. Barnes:

Q. Mr. Allan, what was the date of your first employment by Idalio Maryland?

A. August 1935.

Q. In what capacity were you employed?

A. I began as a cost accountant.

Q. What had been your prior training and experience?

A. I had been with the Colorado Fuel & Iron Company in their coal mines for 14 years.

Q. In what capacity?

A. I was Chief Mine Clerk of the Fuel Division. I had also qualified for the superintendency.

Q. Had you ever acted as superintendent?

A. I had acted as superintendent on a number of occasions when the superintendent was away.

Q. Had you had any professional training in any field whatsoever?

A. Not in mining. I graduated from Denver University in 1921.

Q. What had been your major there?

A. Liberal Arts.

Q. What were your successor positions with Idaho Maryland?

A. Cost accountant. I became senior accountant in 1937. [fol. 1141] In 1942, the duties of Personnel Officer were added. In 1944 ——

Q. At what point in 1942?

A. Early in 1942. I don't remember exactly the date. The Personnel Manager that we had went to another industry, and I succeeded him.

In 1944, August 1, 1944, I became Chief Accountant. In December, 1949, I was made Secretary-Treasurer. As I stated, from October, 1950, to 1951, I was General Manager and a member of the Board of Directors. That was in addition to my Secretary-Treasurer duties.

At the end of March, 1951, my title was lengthened to "Comptroller"; Comptroller in addition to Secretary-Treasurer.

Q. During the period from October 8, 1942, to June 30, 1945, what was your title?

A. Until August 1, 1944, I was senior accountant. I had no title. I was senior accountant in the office, and I was Personnel Officer. I had that title.

Q. To whom did you report in that capacity?

A. As Personnel Officer, I would report to the Manager. There was a Chief Accountant present at all times, but the full responsibility of the accounting department rested on me. Of course, I had to report to the Chief Accountant as a matter of form.

Q. Who was the Chief Accountant?

[fol. 1142] A. Justin McCarthy.

Q. Who was General Manager?

A. Albert Crase.

Q. Was there a Mr. William MacNider connected with the company in that period of time?

A. William MacNider appeared to my knowledge early in 1944. His connection with the company is not clear to me. I would say he was not connected with the company in any official capacity.

Q. When did you secure knowledge of the issuance of Limitation Order L-208?

A. It was received in San Francisco on October 8, 1942. That was our official notification, by telegram to Mr. Mannington, who was then Secretary of the corporation.

Q. Do you have that telegram here?

A. I don't have it.

Q. Do you know who sent it?

A. It was sent by the War Production Board. I don't remember the signature.

Q. When did you last see that telegram?

A. Probably two months ago.

Q. Where?

A. In the files. I believe the counsel has the files.

Mr. Herrington: We haven't got it, Mr. Allan. We asked you for it.

[fol. 1143] The Witness: I have a vivid memory of it, but I don't have it. It is probably still in the files, then.

By Mr. Barnes:

Q. How did you personally secure knowledge of the issuance of L-208, do you recall?

A. It was telephoned to the Grass Valley office.

Q. Was that telephone call received by you or by someone else?

A. It was not received by me. It was received by Mr. Crase.

Q. When did you personally first hear of L-208?

A. I first heard personally about L-208 unofficially on the radio, and I went to the office and was informed that notification had come in from San Francisco.

Q. Was that on the 8th or the 9th, do you recall?

A. It was on the 8th, the night of the 8th.

Q. The night of the 8th, you say?

A. I might have heard of the order over the radio on the night of the 7th, but it was on the 8th that I heard of the telegraphic order.

Q. Did you ever hear of a project undertaken by Idaho Maryland Mines Corporation to secure magnesium metal from serpentine?

A. Yes.

Q. When was that?

[fol. 1144] A. The project started, as I recall, in 1937 or 1938. The project was pretty well along before I knew just what was going on. When the charges began to come in on it, I had to being to find out what it was. It was a patented magnesium process.

Q. Do you recall whether or not in 1943 permission was given by the War Production Board to establish a pilot plant for the operation of that process?

A. I recall that a pilot plant was established. I don't recall permission having been necessary or having been secured.

Mr. Barnes: Will you mark that Defendant's Exhibit 21 for identification?

(Said document was marked for identification as Defendant's Exhibit No. 21.)

By Mr. Barnes:

Q. I will show you this document which has been marked Defendant's Exhibit 21 for identification, which is a copy of a letter from Mr. C. K. Leith, Chief of the Metals and Minerals Branch of the Office of Production Research and Development, to Mr. William MacNider of Idaho Maryland Mines Corporation, and ask you whether that ever came to your attention before?

A. No, I have not seen this letter before.

Mr. Barnes: Mr. Herrington, are you willing to have this [fol. 1145] received in evidence, or shall I serve notice to produce the original?

Mr. Herrington: I have no objection. It is not the best evidence.

Mr. Barnes: I can serve notice to produce the original.

The Commissioner: Is it offered?

Mr. Barnes: It is offered.

The Commissioner: Admitted.

(Said copy of letter dated 3-1-44, from C. K. Leith to William MacNider of Idaho Maryland, marked "Defendant's Exhibit No. 21," admitted in evidence and made a part of this record.)

By Mr. Barnes:

Q. Turning to the inventory, Mr. Allan, Plaintiffs' Exhibit 172, what part did you play in the preparation of that inventory?

A. I had no part in the actual preparation of the inventory.

Q. Did it come to your attention at that time?

A. It came to me after it was completed.

Q. For what purpose was it delivered to you?

A. For the purpose of adding up the pages and making a total of the inventory, and balancing that out with the company books and the company stock records.

Q. Under whose supervision was the inventory prepared? [fol. 1146] A. It would have been taken at that time under the supervision of the Chief Accountant, Mr. McCarthy.

Q. Do you know anything about the manner of its preparation other than as disclosed in the document itself?

A. I know how inventories are taken and were taken at that time.

Q. Your answer would be based upon only on your general knowledge of the manner of the taking of inventories, and not any particular knowledge of the taking of this inventory?

A. Not this specific inventory.

Q. Do you have any personal knowledge as to why this inventory was taken at this particular time?

A. Our inventory is always taken in October and November, and the month in which it is completed is used in dating the inventory. This was completed on October 18, 1942. Therefore, it was dated October 31, 1942.

Q. That was the next question I was going to come to. On the first page of the inventory it indicates the count was started on September 15 and completed October 18, 1942. Yet the inventory is dated as of October 31, 1942. Is it possible that between the date of October 18 when the count was completed, and October 31, there had been either additions to or withdrawals from inventory?

A. It would be possible, but those additions to and withdrawals from are on record, and were not included in the [fol. 1147] physical count of the inventory as appears here.

Q. When is an adjustment made for those additions or withdrawals if the count is completed on October 18?

A. They are made as they occur. If the material is received after inventory, but before the date of October 31, after the 18th, it would not be placed in this inventory. It would be placed in a stock record subsequent to October 31. If material is taken out of the inventory, a record is kept of that. The same thing occurs to the end of the year.

Q. If we look, for example, at page 2 of the inventory, I think it will serve to illustrate the question I have in mind. What is the information that appears in the extreme left-hand column?

A. That is a code number used in connection with International Business Machine operations.

Q. Did you keep your stock records on IBM cards?

A. We did. We had a stock record book in addition to that, but we used the cards, and the cards were used in the charging out of supplies.

Q. I notice, for example, the third item of that page, there is a number appearing in the extreme left-hand column, and then no entry beside it under the heading "description." What does that indicate?

A. That would be a code number set up for some article that would come in that place. The number had not been [fol. 1148] assigned. There was nothing received to which that number had been assigned. In coding for the IBM machines, there have to be spaces left for articles that might come in after the original code is set up.

Q. Looking at the first item on that same page, it refers to a 10 amp, 125 volt snap switch, and I notice that in quantity there is no entry at all. What does that indicate?

A. These inventory sheets are typed up before this information in pencil is put on, and all items that appear on the stock records as having been in stock at any time during the year are on here. Those items which are not on the inventory when a physical count is made would not have any entries opposite them on these pages.

Q. If we look down to the first item on that same page, under Switches (Miscellaneous); I see there are two numbers entered there under "Quantity," 24 and 4; and then beside that someone has put the figure 28. Does that mean that that inventory was located in two different places?

A. Yes. Inventory was taken in the Brunswick warehouse and the Idaho warehouse. The Idaho warehouse was the principal warehouse for most of the supplies. The Brunswick warehouse had some of the articles that were also in the Idaho Maryland warehouse. The total of this is 28, with 4 apparently in the Brunswick warehouse and 24 in the Idaho [fol. 1149] warehouse.

Q. Is it possible to tell which is which when two figures appear here?

A. No. To my knowledge, the lower figure would be the Idaho Maryland warehouse where the inventory was first taken, and the first information. The Brunswick warehouse information would follow, and that figure would be set in above. There might be instances of a duplication in report-

ing items, In that case they would also put in the figure without making any erasure. They would take in an additional figure. In the majority of cases, it indicates two locations for the supplies.

Q. Turning over to page 30 and looking at the first item on that page, for illustration, I see that the information which was typed on there was changed by somebody in the process of making the inventory. What is the nature of that change, first?

A. The typed information states Marcy Mill.

Q. What does that mean, do you know?

A. That is part of the ball mill. These liners, Code 5-201, apparently were found to be part of the tube mill, which is part of the cyanidation plant. They changed that to the tube mill.

Q. Then what is the entry under "quantity" that appears opposite that item?

[fol. 1150] A. One set, 20 pieces. That would be the explanation of item 20.

Q. What about the one immediately below that, the shell liners?

A. The liners show 5 sets, 84 pieces.

Q. Then what has been put in there?

A. Entered there in pounds, 88,200 pounds, shell liners.

Q. Do you know whether shell liners are customarily inventoried on the basis of weight?

A. They are inventoried usually on the basis of weight. They are received and handled as sets. We are billed by the foundry that provides those on the basis of weight.

Q. Looking on down that same page, your stock No. 5-253, cresylic acid, I see it says 101 barrels. Then somebody has put in the quantity column the figure of 5353. What does that indicate?

A. 5353 would indicate pounds.

Q. Would that indicate pounds or gallons; in all likelihood?

A. There is pounds above it. I would understand that to be pounds, but it should be gallons.

Q. A barrel is approximately 53 gallons, under normal circumstances, isn't it?

A. About 50 gallons.

Q. What was that used for, do you know?

[fol. 1151] A. That was used in the mill, in the process of treating ore.

Q. In what part of the process? Are you familiar with that?

A. That would be used on the table at that time, I believe, the pick tables.

Q. For what purpose?

A. For separating gold from quartz.

Q. Directing your attention to page 99 now, against a number of the items on that page, somebody has put in a question mark. What does that question mark indicate to you?

A. It doesn't mean anything to me. Apparently there was no change made. It might have been, probably was, and I will say it was an item that they wanted to recheck.

Q. Do you know who put those question marks in?

A. No. They are not my question marks. I have one or two question marks on this inventory, but these are not mine. They could have been by one of the clerks who were working on the inventory at the time.

Q. Then looking at page 103, under the general heading "belt lacing"; there was an entry made apparently as a result of the physical inventory. Someone crossed it out and then wrote "5 boxes," with a question mark beside it. Do you know what that means?

A. Belt lacing comes in boxes, I know that. I don't know [fol. 1152] just what quantity is in a box.

Q. Although the quantity has been physically stricken out, the extension and the price have not been stricken out, is that correct?

A. I don't think that light line through the bottom figure is intended to be a strike-out.

Q. There is one heavier line that goes through the figure 119½ which apparently represented the total, and through the figure of 67, did it not?

A. Yes.

Q. Then a lighter line through the 52½, which is underneath that.

A. The 52½ and the 67 total 119. For some reason it was determined that there were only 52½, so they scratched out the total of item 67.

Q. What process was used, if you know, in checking this inventory?

A. Considerable checking was done, as you noted on the first sheet, and of course the auditors spot-checked it. They made a very thorough check, in fact, of these items. You notice red checkmarks all the way through. Those are items that the auditors have checked and found correct.

Q. Looking at page 93 just as an illustration here, and following these columns across, we have first the column headed "quantity," and then beside that a column headed [fol. 1153] with a checkmark. What is the purpose of that column?

A. This column?

Q. Yes.

A. It indicates that one of the processes of this inventory has been completed; one of these processes over here.

Q. Listed on the first page?

A. Yes.

Q. What process would that be?

A. It would probably be this process, "prices posted to" —no, it wouldn't be that. Those checkmarks look like mine. It might have been due to some difficulty in balancing, and therefore we had to recheck the inventory. That happened almost every year.

Q. I notice you have turned here for illustration to page 53. Checkmarks have been made in that same column opposite items where no inventory appears, is that correct?

A. Yes. I don't know why that is.

Q. But not with respect to all of those items.

A. No.

The Commissioner: We will recess until 2:00 o'clock.

(Thereupon, at 12:30 o'clock p.m., a recess was taken in the hearing until 2:00 o'clock p.m.)

[fol. 1154] AFTERNOON SESSION

(The hearing was resumed, at the time above-mentioned, pursuant to the recess previously taken.)

Mr. Herrington: I am going to ask permission at this time to withdraw Mr. Allan for just a moment in order that Congressman Clair Engle may testify. The Congressman has some important engagements this afternoon.

Is that agreeable to you?
Mr. Barnes: That is satisfactory.
Mr. Herrington: Congressman Engle:

HONORABLE CLAIR ENGLE, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Herrington:

Q. Will you state your full name, please, for the record?
A. My full name is Clair Engle.
Q. You are a Representative in the Congress of the United States?
A. Yes, sir, from the Second District of California.
Q. Will you describe generally the Second District of California?
A. The Second District of California runs from the [fol. 1155] Oregon line to Death Valley along the Sierra Nevada Mountains, covering 19 mountain counties in California, an area of approximately 65,000 square miles, or approximately one-third of the total area of the State. Geographically, the District covers all of the Sierra Nevada Mountains from the Oregon line to the Death Valley-Mount Whitney area.
To visualize the District, it is approximately 100 miles in width and 600 miles in length on the eastern border of California contiguous to Nevada, from the Oregon line to about 25 miles north of the southern intersection of the California-Nevada line at Boulder Canyon.
Q. Has the mining industry in California been an important industry within your District?
A. It is one of the most important and has been in the past one of the most important industries in my District. As a matter of fact, Mr. Herrington, the gold produced from the District which I represent, together with the gold produced in adjacent Nevada, practically built San Francisco, and initiated the commercial dominance of San Francisco as a

great port in the West following the Gold Rush of 1848-49.

Gold was discovered at Coloma in my District by Marshall at Sutter's Mill in 1848, and that, of course, started the vast migration of people which commenced the industrial development and population of California.

Q. Do you know of your own knowledge that California [fol. 1156] has always been a great gold-producing State?

Mr. Barnes: I object to the form of the question as leading.

The Commissioner: Overruled.

The Witness: California has been the gold-producing State of the Union.

By Mr. Herrington:

Q. I show you the Minerals Yearbook for 1941 of the United States Bureau of Mines, and ask you to read into the record from page 10 the mineral products of the United States and the principal producing States in 1940 with respect only to gold, which appears on the last line.

A. Reading from page 10 of the Minerals Yearbook for 1941, the chart entitled "Mineral products of the United States and principal producing States in 1940," under "Gold," in order of quantity the order is as follows: California, first; Alaska, Second; South Dakota, third; and Nevada, fourth.

Q. With respect to the production in California, will you read into the record from page 225 of the Minerals Yearbook for 1941 the 25 leading gold-producing mines in the State.

A. Reading from the point indicated by Mr. Herrington, the leading mines, gold-producing mines in California in 1941, in order of their rank: 1st—Idaho Maryland-Brunswick. 2nd—Natomas. 3rd—Empire Star—Mr. Herrington, [fol. 1157] do you want me to give the locations of those mines? They are given here. Just for clarity of the record, Idaho Maryland-Brunswick are at Grass Valley.

Q. The names and the locations.

A. Natomas is at Folsom. Empire Star at Grass Valley-Nevada City. Yuba Unit—its location is given as the Yuba River. Lava Cap, Grass Valley-Nevada City. Butte Unit—Oroville. Central Eureka—the district is the Mother Lode.

Its location is at Sutter's Creek. That is not in this item here.

No. 8 is Capital Dredges, at Folsom; No. 9 is Golden Queen at Mojave; No. 10 is Carson Hill, at Mother Lode; 11, Argonaut, Mother Lode; 12 is Alabama, Ophir; 13 is Cactus Queen at Mojave; 14 is Sliger at Mother Lode; 15 is Sheepranch, at East Belt in Calaveras County; 16 is Snelling at Snelling; 17, Original Sixteen to One, at Alleghany; No. 18 is Iron Mountain at Flat Creek (Iron Mountain); No. 19 is Walker at Genesee, Plumas County; 20 is Ohio Point (Virgilia) in the Rich Bar District of Plumas County; 21 is Keystone in the Mother Lode; 22 is Surcease at Yankee Hill, Butte County; 23 is Merced Dredge at Snelling, Merced County; 24 is Putnam Property, at Camanche in San Joaquin County; and 25 is Siskiyou Unit, at Callahan in Siskiyou County.

All of those mines, with the exception of three or four, are in my District.

[fol. 1158] Q. Congressman Eagle, will you look at the table which appears at page 227 of the Minerals Yearbook of 1941, showing the mine production by counties, and tell me which was the leading county producing gold in California in 1941?

A. The leading county, according to this table, was Nevada County.

Q. What was the total production in dollar value of gold?

A. $9,872,275. That, of course, is the county in which the Idaho Maryland is located.

Q. Does this table show the total number of mines operating in California at that time?

Mr. Barnes: I take it the question relates to gold mines.

Mr. Herrington: Gold mines, that is correct.

The Witness: Yes. The table shows the total gold mine production broken down in terms of lode and placer mines.

By Mr. Herrington:

Q. What are the figures shown on the table as the total number of gold mines operating in California at that time?

A. One thousand thirty gold-producing lode mines.

By Mr. Barnett:

Q. Will you read what it says about Amador County, the Mother Lode, the richest lode in the State of California? Mr. Pittman says to read for Central Eureka, too.

[fol. 1159] A. Amador is third on the list, $3,499,300 in annual production.

By Mr. Barnes:

Q. Is that in your District, too?

A. Yes, sir.

By Mr. Herrington:

Q. Congressman Engle, are you familiar with War Production Board Limitation Order L-208?

A. Yes, sir.

Q. When did you become Congressman from the Second California District?

A. On September 1, 1943, at a special election, succeeding my predecessor, Mr. Harry L. Englebright, who died the preceding May.

Q. What, if any, action did you take with respect to Order L-208 after you were elected to Congress?

A. I introduced a bill to abolish it, and I importuned every Federal agency that had anything to do with it to repeal it. I did that continuously for two and a half years.

Mr. Herrington: Will you mark this?

(Said document was marked for identification as Plaintiffs' Exhibit No. 174.)

By Mr. Herrington:

Q. I show you Plaintiffs' Exhibit 174 for identification, and ask you if this is the bill or resolution which you intro[fol. 1160]duced in Congress to repeal Limitation Order L-208?

A. That is the bill.

Q. That copy is taken from your files, is it, Congressman?

A. That is correct.

Mr. Herrington: I ask that Plaintiffs' Exhibit 174 be introduced in evidence.

Mr. Barnes: May I see it, please?

Mr. Herrington: Excuse me.

(Document examined by Mr. Barnes.)

Mr. Barnes: This slip of paper that is clipped on here gives, I take it, the Resolution Number that was assigned to this in the 78th Congress, 1st Session, is that correct?

The Witness: That is true. I thought my file contained a copy of the printed bill as it came from the House, but I do not seem to have it. However, it would be available.

Mr. Barnes: I have no objection.

The Commissioner: Admitted.

(Said typewritten copy of H. R. 3682, To rescind Limitation Order L-208, introduced by Congressman Engle, marked as "Plaintiffs' Exhibit No. 174," admitted in evidence and made a part of this record.)

By Mr. Herrington:

Q. What was the Congressional action upon the resolution?

[fol. 1161] A. The bill was not passed.

Q. Did you take any other action in Congress, conduct any hearings, with respect to Limitation Order L-208?

A. Yes.

The Commissioner: Just a moment.

By The Commissioner:

Q. Before you go past the action with respect to this bill, you say the bill wasn't passed, Congressman. Was it reported out of committee?

A. No, no action was taken on the bill. That would be a more correct and precise answer.

By Mr. Barnes:

Q. To what committee was it referred, do you recall?

A. I would have to check that. The bill itself would show, not this copy, but the copy that came from the House would show. It seems to me, though, it went to Banking and Currency. I would have to check that. I can supply it for the record.

Mr. Barnes: That can be easily checked.

By Mr. Herrington:

Q. During the period from 1943 on, after you became Congressman from your District in California, did you have any consultation with members of the War Production Board with respect to Limitation Order L-208?

A. Yes, I did, many times.

[fol. 1162] Q. In general, do you recall what the representations to the War Production Board were that you made with respect to Limitation Order L-208?

Mr. Barnes: Your Honor, I object unless the person to whom the representations were made and the dates are specified.

By Mr. Herrington:

Q. Do you have any independent recollection now of the specific dates, or the specific people that you talked to?

A. Yes. Senator Millikin and I had a conference with Secretary Krug—I call him Secretary Krug; at that time he was head of WPB, which was prior to the time he became Secretary of the Interior—and Paul V. McNutt, who then was head of the War Manpower Commission, and a representative of Judge Vinson's office, Judge Vinson then being Economic Stabilizer. I can't recall definitely who that was, but I think it was Robert Nathan, who was the economic adviser to Judge Vinson.

That conference took place in what I think they call the Federal Security Building just below Capitol Hill, in May of 1945. Senator Millikin and I went to this conference with the purpose of discussing with Mr. Krug, head of the WPB, Mr. McNutt, head of War Manpower, and the representative from Judge Vinson's office, the repeal of Order L-208.

Q. Do you recall what you said with respect to Order L-208 and its effect upon the community which you represent?

[fol. 1163] Mr. Barnes: Your Honor, I object on the ground it is irrelevant and immaterial, being too remote from October 8, 1942, the date here in question.

The Commissioner: Overruled.

Mr. Barnes: May it be understood that my objection continues to this entire line of examination?

The Commissioner: Yes.

The Witness: The presentation made to Mr. Krug and Mr. McNutt and the representative from Mr. Vinson's office was that Order L-208 was a mistake to begin with, and was doing incalculable harm to the gold mining industry, in fact ruining it, with no compensating benefits to the war effort. That, in substance, was the nature of our presentation.

By Mr. Herrington:

Q. Do you recall when Order L-208 was actually revoked?

A. July 1, 1945, I believe.

Q. What, if anything, did you have to do with respect to its revocation?

A. I was in on the conferences which brought about termination of WPB Order L-208 following this discussion that I referred to in which Senator Millikin and I plead with Paul McNutt and Captain Krug and the representative from Mr. Vinson's office to take that order out. They promised us some action on it, and the case got balled up in Judge Vinson's office. I followed it up with conferences with Judge [fol. 1164] Vinson, and I also discussed it personally, prior to the actual issuance of the revocation order, with Robert Nathan, who was the economic adviser to Judge Vinson as Economic Stabilizer. Finally, the actual revocation of the order rested on clearance with Paul V. McNutt as Manpower Commissioner. I have the date, I think, in this memorandum. I can refresh my recollection as to the date.

We got the case finally cleared with Paul V. McNutt, and he called me on a Saturday morning and told me that he was going to wash his hands of the whole business, and in plain English, tell Judge Vinson's office that he had no objection whatsoever, on the basis of manpower considerations, to the revocation of this order. That was the Saturday preceding June 22, 1945.

Q. Congressman, did you conduct some hearings in the House of Representatives on legislation which was designed to reimburse mine owners for losses incurred by reason of Limitation Order L-208?

A. Yes, sir. I introduced a bill, and the hearings were held before a subcommittee of the Committee on War Claims, of which I was chairman.

Q. Is the report of your committee printed in any official document of the Congress of the United States?

A. It is printed in the Report on S. 45 of the United States Senate, that being Senator McCarran's bill for the [fol. 1165] same purpose.

Mr. Herrington: Will you mark this, please?

(Said document was marked for identification as Plaintiffs' Exhibit No. 175.)

By Mr. Herrington:

Q. I show you Plaintiffs' Exhibit 175 for identification, being Report to Accompany Senate Bill 45 of the 81st Congress, and ask you whether or not the report of your committee is correctly set forth appearing on pages 2 and following?

A. Yes, the report appears there.

Mr. Herrington: It is rather a long report, but for the purpose of the record I would like the Congressman to read just a few lines of the conclusions reached by the committee.

Mr. Barnes: Your Honor, I have no objection to his reading the document. I do object to reading from a document which is not in evidence.

Mr. Herrington: I will offer the document in evidence at this time, then, as a published report of a committee.

The Commissioner: Is that similar to the one which was marked for identification at pre-trial?

Mr. Herrington: I don't think this has been marked.

Mr. Barnes: No. The thing which was marked at pre-trial were hearings.

[fol. 1166] The Commissioner: Do you have any objection to the offer?

Mr. Barnes: No objection.

The Commissioner: It may be received.

(Said document, Report No. 79, to accompany S. 45, 81st Congress, 1st Session, marked "Plaintiffs' Exhibit No. 175," admitted in evidence and made a part of this record.)

Mr. Herrington: May we read into the record just three or four lines of the committee's conclusions?

The Commissioner: All right. I don't think we ought to read extended portions, but if you just want to point up a little bit of it, that will be all right.

Mr. Herrington: Just the four points of the committee's conclusions, please.

The Witness: The committee report states, reading from page 2 of Report No. 76, Calendar No. 65, Senate Document, 81st Congress, 1st Session:

"In the opinion of your committee the evidence presented, both oral and documentary, overwhelmingly supports the following contentions.

"1. WPB Order L-208 was unique in that it was the only Government order closing a productive industry.

"2. Issuance of the order was an administrative error, based upon a statistical misconception, and may, further- [fols. 1167-1171] more, have been illegal.

"3. The net results of the order in accomplishing its avowed primary purpose of channeling manpower to 'essential' mines were negligible.

"4. The economic loss to the gold-mining industry has been great and in some cases the damage may be irreparable."

By Mr. Herrington:

Q. Congressman Engle, I show you a pamphlet introduced as Plaintiffs' Exhibit No. 2 for identification. It consists of hearings before the Committee on War Claims on House of Representatives Bill 4393, and I ask you whether or not you conducted the hearings?

A. I conducted the hearings in the sense that I presented the case to the subcommittee. The subcommittee was chairmanned by Congressman Ellis Patterson of California, who was a member of the House Committee on War Claims at that time.

Mr. Herrington: At this time, Your Honor, we will offer Plaintiffs' Exhibit No. 2 for identification, in evidence.

[fol. 1172] By Mr. Herrington:

Q. Congressman Engle, are you familiar personally with the conditions that existed in the California gold mines and communities in your District following Order L-208?

Mr. Barnes: Your Honor, I object to this on the ground that it goes to the question of damages rather than to the question of liability.

The Commissioner: Overruled.

The Witness: Yes, sir.

By Mr. Herrington:

Q. Will you state what the conditions were, to your knowledge?

Mr. Barnes: Your Honor, I further object on the ground that there has been no showing of knowledge of these being brought to the attention of the War Production Board to influence any decision to revoke the order at any date subsequent to October 8, 1942.

The Commissioner: Overruled.

The Witness: I have traveled the District which I represent constantly since 1943 when I first ran for office. The effect of the gold closing order, L-208, was disastrous upon many of the communities in that District, and adversely affected the economy of the whole area. Grass Valley, where the Idaho Maryland Mine is located, went into a period of [fol. 1173] economic stagnation from which it has never recovered even to this time.

The same thing is true with reference to other parts of the District, the Central Eureka at Sutter Creek and the Argonaut Mine at Jackson, and others, all of them great producers up to the time of the closing. The Idaho Maryland Mine produced enough revenue in 1940 or '41 to pay $220,000 in Federal taxes. That was reduced to absolute zero in 1943.

Grass Valley is the only community in California that lost population during the last Census. It is the only place in my District today where there is a real economic problem at the present time, all stemming from the fact that these gold mines were closed and have never recovered. The population in the high school at Grass Valley is actually less than it was ten years ago.

Mr. Barnes: Your Honor, I move to strike the answer on the ground it represents a conclusion on the part of the witness rather than the fact. He has used the terms "disastrous" and "economic stagnation."

The Commissioner: To the extent that it contains conclusions, I will keep that in mind at the proper time.

By Mr. Herrington:

Q. Congressman Engle, did you bring those conditions to the attention of the War Production Board in 1943 and following?

[fol. 1174] A. Just as vigorously as I could; and as a matter of fact, I prepared a letter and sent it down to Julius A. Krug, then head of the WPB, signed by not only myself but 30 other Members of the House of Representatives. The letter clearly and explicitly defined——

Mr. Barnes: I object to oral testimony as to the contents of a written document.

The Commissioner: Sustained.

By Mr. Herrington:

Q. Do you have a copy of the letter which you filed with the War Production Board, Congressman Engle?

A. I made a copy available to you, Mr. Herrington, out of my files.

(Said document was marked for identification as "Plaintiffs' Exhibit No. 176.")

The Witness: It is a two-page document, Mr. Herrington. The list of the signators is on the second page.

By Mr. Herrington:

Q. I show you Plaintiffs' Exhibit 176 for identification, and ask you if this is the letter you referred to, addressed to Mr. Krug?

A. This is the letter, Mr. Herrington, that was sent by me personally to Mr. J. A. Krug, then Chairman of the War Production Board, on May 9, 1945, the date it bears.

Mr. Herrington: I offer Plaintiffs' Exhibit 176 in [fol. 1175] evidence.

Mr. Barnes: May I see it, please?

(Document handed to Mr. Barnes.)

(Here followed discussion off the record.)

Mr. Barnes: I object on the grounds that it relates to a period of time subsequent to October 8, 1942, and therefore is irrelevant and immaterial.

The Commissioner: It will be received.

(Said copy of letter dated 5-9-45, to J. A. Krug, Chairman, WPB, from Congressman Engle and other Congressmen, marked as "Plaintiffs' Exhibit No. 176," admitted in evidence and made a part of this record.)

Mr. Herrington: That is all, Congressman.

You may cross-examine.

The Commissioner: Any further questions?

Mr. Barnett: No questions as far as Central Eureka is concerned. I believe the witness has covered it in his testimony.

Mr. Barnes: No questions.

Mr. Herrington: Thank you, Congressman.

(Witness excused.)

[fol. 1176] Mr. Herrington: Mr. Allan, will you resume the stand?

Charles L. Allan, resumed the witness stand and was examined and testified as follows:

Cross-examination (Resumed).

Mr. Barnes: Your Honor, with respect to Plaintiffs' Exhibit No. 172 on which you were asked to reserve ruling, the inventory, I think the record now shows that it is a document prepared in the regular course of Plaintiff's business and it would be admissible as such. I think my cross examination to date or any subsequent cross examination would go to the weight of it, and I therefore have no objection to its receipt.

The Commissioner: All right, it may be received.

(1942 Physical Inventory of Idaho Maryland Mines Corporation, marked "Plaintiffs' Exhibit No. 172," admitted in evidence and made a part of this record.)

By Mr. Barnes:

Q. Mr. Allan, what maintenance was required in the Idaho Maryland mine after October 8, 1942?

A. It was necessary to maintain the station levels and the pump stations.

Q. What do you mean by "station levels," to begin with?

A. At each level where there is an excavation off the shaft for men and materials to be removed from the escapes [fol. 1177] and skips, the level itself goes beyond the station.

Q. What has to be done to maintain the station level?

A. In the Idaho mine it has to be timbered, the shaft is constantly in the need of timber, and the stations are in the same kind of rock as the shaft.

Q. Why does it have to be retimbered?

A. To keep it from caving in.

Q. What happens to the timbers you have up there initially?

A. They gradually dry and rot and break.

Q. How long does it take a timber—you say these are 8 by 8's or 10 by 10's?

A. They might be even larger in a station level.

Q. How long does it take them to rot?

A. No definite time for that. Some timbers will last much longer than others. It depends upon the conditions of the timber underground, the conditions of air and humidity in the station.

Q. Does timber rot in a year, two years, five years? For a layman can you give us some idea of what we are talking about?

A. It might rot in any of those periods, in a year, or it might last five years.

Q. Aside from the station levels, what maintenance is required?

[fol. 1178] A. On those levels where we had drifts through which ditches for drainage had been made we would have to keep those open so the water would continue to flow down the drifts.

Q. What is required as far as keeping those drifts open?

A. Timbering would be required.

Q. What type of timbers are those? The same type?

A. The same type.

Q. Does the same situation with respect to retimbering exist there, that it can be anywhere from one to five years that timbering might be required?

A. Yes.

Q. How many feet or miles of such drifts were you required to maintain? Do you recall that?

A. From five to ten miles.

Q. Out of how many miles in the mine?

A. Approximately fifty-five.

Q. What else had to be maintained, other than the two items you have discussed so far?

The Commissioner: With respect to this timbering that you speak of, what was the extent of the timbering?

The Witness: That would depend again on the rock conditions. The timbers might be spaced closely together, they might be right together, or they may not have to be put in for eight or ten or maybe even a further distance apart.

[fol. 1179] By Mr. Barnes:

Q. Do I understand that in some places you had the timbers solidly set one right against the other?

A. That is right.

Q. And in other places the timbers might be as much as ten feet apart?

A. That is right, and in some places even farther. In some places the timber might be further apart than that.

Q. What is the criterion that determines that fact?

A. The action of the rock. If the rock needs timber to be supported, it is indicated by the movement of the rock and timbers are set in accordingly.

Q. Aside from these two elements that you have referred to, what else in the mine required maintenance?

A. The ditches would have to be kept open. The ground swell and the movement of the earth would block the flow of water and close the ditches.

Q. If you were in an area that didn't require extensive

timbering, would you have much ground swell or other movement of the earth?

A. Probably not.

Q. If you had timbering, wouldn't the timbering tend to protect the ditches?

A. It would.

Q. What else had to be maintained?

[fol. 1180] A. The pumps would have to be maintained.

Q. Where were the pumps located physically?

A. They were located on pumping stations near the shaft.

Q. At how many levels, do you recall?

A. At that time I believe in the Idaho mine, five levels.

Q. What were those? Do you recall that?

A. One on the 2,000 level, one on the 1660 level, one on the 1400 level, and one on the 900 level. There might have been one other in there.

Q. What was required so far as the maintenance of those pumps was concerned? What had to be done?

A. They had to be lubricated, of course, and occasionally some repair made.

Q. How frequently were repairs required, do you know?

A. Not very frequently. There is not much wear on the pumps.

Q. Were those electrically driven pumps?

A. Electrically driven pumps.

Q. What else had to be done in the way of maintenance?

A. Outside of keeping these drifts and raises necessary for drainage and ventilation open and the maintenance of the pumps, I can't think of anything else right now that was necessary. There probably is something, but I can't think of it.

[fol. 1181] Q. You had to do all this same maintenance work while the mine was operating, didn't you?

A. Yes.

Q. How many employees did you say you had on October 8, 1942?

A. Two hundred twelve or two hundred thirteen, one hundred sixteen of them underground doing underground work.

Q. You said that you referred some of the men at the plant to Hall Scott Motors. Do you know of your own knowledge how many of them went there?

A. I know of two of them who went there. I referred five or six after the shutdown.

Q. One of those two had actually left your employ on October 1, hadn't he?

A. I don't know that.

Q. I was referring to Plaintiffs' Exhibit No. 173. There are only two men listed there beside whom there is any reference to Hall Scott Motors, and one of them left your employ on October 1.

A. These might not have been the men that I referred to. I am not sure who they were, but I remember referring men to Hall Scott after the shutdown. These men were apparently referred before the shutdown.

Q. To your knowledge had the Idaho Maryland lines ever employed the tribute mining system prior to October 8, 1942?

[fol. 1182] A. Not to my knowledge.

Q. Do you know whether or not consideration had ever been given prior to that date to employing the tribute mining system?

A. I do not know that. It is possible that prior to the company's operation of the Idaho Maryland mine tribute mining was used, because that was a very common practice in that district.

Q. Mr. Allan, looking at Plaintiffs' Exhibit No. 173, it appears that eighty-five of the men listed there left the employ of your company between October 9 and the end of October, but during November and December terminations were twenty-one and nineteen respectively. Then they went along at a very small level until June of 1943 when you had forty-five terminations. Did something particular happen in June of 1943 to cause that?

A. We had completed the second exit at that time.

Q. That was the one that you had been granted an appeal on, is that right?

A. That is right.

Mr. Barnes: That is all.

Mr. Herrington: I have no questions. That is all.

Mr. Barnett: No questions.

(Witness excused.)

Mr. Herrington: Will you mark this document as Plain-
[fol. 1183] tiffs' Exhibit No. 177 for identification.

(Said document was marked for identification as Plaintiffs' Exhibit No. 177.)

Mr. Herrington: Your Honor, I would like to introduce in evidence at this time as Plaintiffs' Exhibit No. 177 Senate Subcommittee Preliminary Report pursuant to Senate Resolution 66. Only a portion of it refers to the gold mine closing order, and I have through the courtesy of Mr. Connor photostatic copies of that portion which relates to the gold mining order. Have you any objection to introducing the entire document, Mr. Barnes?

Mr. Barnes (examining document): I have no objection to the receipt of this as a congressional report, Your Honor.

Mr. Herrington: It is offered for that purpose.

The Commissioner: It may be received.

(Preliminary Report of the Subcommittee on Mining and Minerals Industry, pursuant to S. Res. 66, 78th Congress, 2nd Session, marked "Plaintiffs' Exhibit No. 177," admitted in evidence and made a part of this record.)

Mr. Herrington: I also have a photostat of a report from the 82nd Congress, Second Session, Report No. 1605, which is a report to accompany Senate Bill 3195. I am sure that this is a correct photostat of the original print. If there is any objection to it on the ground that it is not a copy from the United States Government Printing Office, we will have [fols. 1184-1185] to obtain one.

Mr. Barnes (examining document): Subject to verification, I have no objection to Document 178.

The Commissioner: It may be received.

Mr. Herrington: That will be Plaintiffs' Exhibit No. 178 and it will be subject to verification.

[fol. 1186] Mr. Herrington: While I think of it, there is one other point, Your Honor. There are certain resolutions that were adopted by the State of Colorado, and the Territory of Alaska, and the State of Nevada which should be introduced in evidence. I do not have the official reports here. I believe the court takes judicial notice of the official reports of those states, does it not?

The Commissioner: I don't think they do. Here again, if

you have a copy, we have a provision whereby copies are just as good as originals, and subject to verification.

Mr. Herrington: We have copies of some of the resolutions: The laws of Nevada of 1943, the laws of Alaska of 1943, and a second resolution of Nevada of 1943. The Nevada resolutions are Nos. 28 and 21 respectively and the Alaska resolution is House Joint Memorial No. 3. I will offer all three in evidence subject to verification and have them marked the next Plaintiffs' exhibit number in order.

(Said documents were marked for identification as Plaintiffs' Exhibits Nos. 179, 180, 181 and 182, respectively.)

The Commissioner: Off the record.

(Discussion off the record.)

Mr. Herrington: Have you looked at all these, Mr. Barnes?

[fol. 1187] Mr. Barnes: Yes, I object to these resolutions, Your Honor, adopted by various state legislatures, on representations not shown on the record as to what facts before them. It is not shown that they had any binding effect whatsoever, and I don't see how they can possibly have any relevance or materiality here.

The Commissioner: They will be received.

Mr. Herrington: They will be Plaintiffs' Exhibits Nos. 179, 180, 181 and 182, all subject to verification.

(Assembly Joint Resolution No. 28, Laws of Nevada, 1943, marked "Plaintiffs' Exhibit No. 179," admitted in evidence and made a part of this record.)

(House Joint Memorial No. 3, Laws of Alaska, 1943, marked "Plaintiffs' Exhibit No. 180," admitted in evidence and made a part of this record.)

(Senate Joint Resolution No. 21, Laws of Nevada, 1943, marked "Plaintiffs' Exhibit No. 181," admitted in evidence and made a part of this record.)

(Senate Joint Resolution No. 18, Colorado, marked "Plaintiffs' Exhibit No. 182," admitted in evidence and made a part of this record.)

Mr. Barnes: I might also point out, Your Honor, although I think it goes to the question of weight, that there is no evi-

dence that copies of any of these were transmitted to the War Production Board or to any official of the War Pro-
[fols. 1188-1190] duction Board.

The Commissioner: What is the time, generally?

Mr. Barnes: 1943, generally.

Mr. Herrington: There is no date on the Colorado one. I will have to get that for you.

Mr. Barnes: Mr. Herrington, would you have any objection to the receipt of these two documents?

Mr. Herrington (examining documents): No objection.

Mr. Barnes: Your Honor, these two documents consist of a telegram from the War Production Board to Idaho Maryland dated July 19, 1943, and a telegraphic reply dated July 21, 1943, and I am offering them.

The Commissioner: They may be received.

[fol. 1191] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Connor: One other question we had yesterday was, I think, Exhibit No. 13 for identification which was incomplete in that it did not have the three appendices attached to it. We meant to offer it yesterday with the appendices but I took it back to the hotel with me. I would like now to offer Exhibit No. 13 for identification with the three appendices to it. We can either handle that by withdrawing the original and substituting this or just attaching photostats of the three appendices to it.

Mr. Barnes: Wouldn't it be easiest, because of the confusion we might have on the document, to leave the original Exhibit No. 13 and make this No. 13-A and have them both there, with the understanding in the record that it is a complete copy?

The Commissioner: I think that might be well.

Mr. Barnes: I have no objection on that basis, both 13
[fol. 1192] and 13-A on that basis.

The Commissioner: They may be received.

(Report on Gold Mine Order L-208, Its Effect and Accomplishment, marked "Plaintiffs' Exhibit No. 13," was admitted in evidence and made a part of this record.)

(Report on Gold Mine Order L-208, Its Effect and Accomplishment, with attached Appendices 1, 2, and 3, was marked

for identification as "Plaintiffs' Exhibit No. 13-A," and was admitted in evidence and made a part of this record.)

Mr. Herrington: We have one problem in connection with our inventory and that is the copy in evidence is the only copy available. We had one photostat made for Mr. Barnes and I was wondering if it would be possible to substitute the photostatic copy which was furnished to Mr. Barnes and that we may withdraw the original.

The Commissioner: Yes.

Mr. Barnes: That is satisfactory.

Mr. Herrington: I will withdraw the original and substitute the copy.

The Commissioner: Anything else from Idaho Maryland or Homestake?

Mr. Connor: Not at this time.

The Commissioner: We will recess for a few minutes before we take up Central Eureka.

(Thereupon, a short recess was taken in the hearing.)

[fol. 1193] STIPULATION BETWEEN CENTRAL EUREKA MINING COMPANY AND THE UNITED STATES

Mr. Barnett: If Your Honor please, in behalf of Central Eureka Mining Company, we would like to put into the record at this time the following stipulation between this plaintiff and the defendant, the United States of America:

1. Central Eureka Mining Company was incorporated on October 29, 1894 in the State of California, and ever since that date has been and now is a corporation duly organized and existing under the laws of the State of California, with its principal places of business located at Sutter Creek, Amador County, California, and San Francisco, California. That on October 8, 1942, the date of the issuance of Order L-208, the Central Eureka Mining Company had shareholders, and the shares of stock of said company were listed with and traded upon the San Francisco Stock Exchange. That on said date the said company had 600,000 shares of capital stock authorized to be issued.

2. Central Eureka Mining Company is now, and at all times mentioned herein and in its petition, as amended, on file herein, has been the owner in fee and in possession of the real and personal property known and described as

the Central Eureka Gold Mine, consisting of approximately 641 acres of gold-bearing land, all located at Sutter Creek, Amador County, California, and mining plant and equipment located on said land.

3. On October 8, 1942, the date of the issuance of Order [fol. 1194] L-208, the Central Eureka Mining Company employed a total of 117 men, of whom 73 men were classified as underground workers. The average age of the total number of employees was 41.74 years and 74.36% of said employees were married and had an average of 2.64 dependents. That the aforesaid employees had resided in the community wherein the mine is located for an average of 4.26 years, and 31 of said employees own their own homes in said community.

4. Immediately following the issuance of Order L-208, the 117 men employed by Central Eureka Mining Company were displaced as follows:

(a) 64 men were retained to maintain the mine until January of 1943, at which time the National War Labor Board ordered that henceforth the company would not be authorized to employ more than 42 men in the maintenance of its mine.

(b) 5 men volunteered or were drafted to the military service.

Then we skip (c).

5. The wages or salaries paid to employees of Central Eureka Mining Company during the period October, 1942, through December, 1942, totaled $46,158.60. In the year 1943, the total salaries amounted to $116,019.49. In the year 1944, salaries and wages paid were $84,467.12. In the year 1945, salaries and wages paid were $82,284.81. Salaries and wages paid to employees during the period October 8, 1942 [fol. 1195] to and including December 31, 1945, were $328,930.02.

6. All materials used in the operation of gold mines, including all materials deemed critical for the war effort, were subject to allocation and restriction by virtue of preference rating order P-56. The Central Eureka Mining Company was issued serial numbers 56-213 and 31-281 by the War Production Board, pursuant to said mine's application for serial numbers, and in accordance with the rules

and regulations promulgated by Preference Rating Order No. P-56.

Then we skip down to No. 8.

Prior to October 8, 1942 Central Eureka Mining Company was engaged in a successful operation and development of its gold mining property at a profit. That in the five-year period immediately preceding the issuance of Order L-208, the company herein paid in excess of $355,414.04 in Federal and State taxes. That during the same period of time, as above mentioned, the company herein paid to its shareholders dividends in the amount of $1,182,000.

Mr. Barnes: Mr. Barnett, in connection with that statement in respect to taxes, in view of the fact that we put in the exact amount of taxes, the phrase "in excess of" should now be eliminated.

Mr. Barnett: That is right, the taxes paid were $355,414.04.

Mr. Barnes: That is right.

[fol. 1196] Mr. Barnett: 9. The Central Eureka Mining Company's mine is located within the city limits of Sutter Creek, California, and the population of said city on October 8, 1942 was approximately 1,500.

Mr. Barnes: Your Honor, that stipulation is satisfactory to the defendant with one qualification. With respect to the paragraph which Mr. Barnett read, which is No. 2, relating to ownership of the property, that is subject to the same qualification I stated at the opening of these hearings, and we are making that stipulation only for the purposes of the proof with respect to liability, and that in the event it becomes necessary to take testimony with respect to damages, the question of ownership and whether the lands are gold bearing, and so forth, will have to be a matter of independent proof. Otherwise, all of the statements read have been verified against the books and records of the company, or against independent documentation furnished by counsel for the plaintiff, and the stipulation is satisfactory to us.

Mr. Barnett: I want to assure counsel, if he comes out there, we will show him gold.

The Commissioner: Is the stipulation acceptable with the qualification put upon it by the defendant?

Mr. Barnett: I did not quite get it.

The Commissioner: The reporter will read it back.

Mr. Pittman: Your Honor, I do not see, in the absence of [fol. 1197] any explanation from defendant's counsel, why it should be acceptable for the question of the liability issue and not acceptable on the question of damages.

The Commissioner: We are not trying the question of damages here anyway. It seems to me that if the Court should find that the Government is to be held liable to the plaintiffs at the close of this case, then all matters with respect to damages will have to be established, and it would seem that those, including ownership, would be a part of the damage question.

Mr. Barnes: I was afraid, your Honor——

The Commissioner: You wanted to be sure.

Mr. Barnes: I wanted to be sure of that, yes sir.

Mr. Barnett: There are many questions that Mr. Pittman and I thought were not necessarily appropriate at this hearing, and for that reason our proof has been somewhat limited to what we think are the main issues on the question of liability. And, of course, we adopt the evidence produced by Homestake and by Idaho Maryland as far as its affects that direct issue.

Now, we have lists here, your Honor, of 100-some-odd employees and what they do, and so forth, but I cannot see at this moment that it is particularly relevant. If counsel for the Government wants them in we will put them in, but I just feel that as long as we have this stipulation showing the number at the time and subsequent, I think that is the ger- [fol. 1198] maine part.

The Commissioner: I would like a statement from you with respect to the qualification put on the stipulation by the Government.

Mr. Barnett: I really think that counsel is correct, and we too may have other evidence to put in that would affect the question of damages. I think that goes to the quantum rather than what we are talking about here.

The Commissioner: All right.

Mr. Pittman: If it please your Honor, are we to take from that that if liability is established, all other matters in evidence here, without such a reservation that is herein made, will be accepted in the other trial, or will we have a trial de novo?

The Commissioner: If liability is established it would seem to me there is only one other question, and that is: how much. But with the qualification placed upon the stipulation with respect to ownership, as I understand it, the Government takes the position that you are still going to have to show that you own the lands which you say you do as a part of your proof of damages.

Mr. Barnett: Your Honor, I gather that the burden of showing that we do not own it may be pursued by the Government.

Mr. Pittman: They reserve the right.

Mr. Barnett: They reserve the right to do that. I cannot [fol. 1199] see any objection to that.

Mr. Barnes: That was not the statement that I made.

The Commissioner: I did not think it was. In other words, you have submitted certain information concerning the ownership to the Government. He has made such a check as convinces him that he can make the representation which he did. For the purpose of liability he will accept it, but if liability is established you are going to have to prove with more particularity the question of ownership.

Mr. Barnett: I do not see any serious objection to that, your Honor. We are satisfied with it. And I think that counsel will be too, after he digs into the deeds, if he wishes to.

Mr. Connor: I might state for the record now that we feel on the question of damages, the proof that we will have to show as to title is the proof that we would have to show in an ordinary ejectment suit, and then the burden would shift to the Government to show that we are not rightfully in possession.

The Commissioner: We will get to that at the proper time.

Mr. Barnes: I hope we never come to it, your Honor.

Mr. Barnett: Your Honor, as far as we are concerned, our live witnesses will be here tomorrow, as I informed you.

The Commissioner: I thought if you had any documents that you did not need the witnesses for we could use this [fol. 1200] time for that.

Mr. Barnett: I do not have any other than these photographs here that we might dispose of.

Vol. II

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 29

THE UNITED STATES, PETITIONER,

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED OCTOBER 24, 1956

CERTIORARI GRANTED JANUARY 14, 1957

(Pages 863 to 1611)

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75—Memorandum from H. O. King to A. I. Henderson, dated July 3, 1942	2393	1439
76—Document entitled "Committee Program for Increasing Production in the Copper Mining Industry," dated July 8, 1942	2394	1440
77—Minutes of Interdepartmental Committee on Non-Ferrous Metals, dated August 18, 1942	2398	1445
79—Minutes of the War Production Board meeting of September 1, 1942	2402	1448
82—Minutes of Interdepartmental Committee on Non-Ferrous Metals meeting, September 15, 1942	2406	1455
83—Memorandum from J. M. Scribner to Dr. M. H. Stow, dated September 17, 1942	2412	1459
87—Memorandum from W. L. Batt to A. I. Henderson, dated September 25, 1942	2413	1460
88—Minutes of Interbranch meeting of Branches concerned with Mineral Production, September 28, 1942	2414	1461
89—Minutes of Interbranch meeting of Branches concerned with Mineral Production, dated October 2, 1942	2416	1464
92—Minutes of War Production Board meeting, October 6, 1942	2418	1466
94—Minutes of Interbranch meeting of October 9, 1942	2423	1478
95—Minutes of Interbranch meeting of October 16, 1942	2427	1484
96—Minutes of Interbranch meeting of October 19, 1942	2429	1488
98—Minutes of Interbranch meeting of October October 26, 1942	2431	1491
99—Memorandum from John J. Corson to Donald M. Nelson, dated November 5, 1942 with a statement, "Summary of USES Reports, etc.	2434	1495
100—Minutes of Inter-Division meeting of November 23, 1942	2438	1498

	Original	Print
Record from the United States Court of Claims—Continued		
Plaintiff's Exhibits—Continued		
101—Memorandum from Wilbur Nelson to H. W. Dodge, dated November 24, 1942	2440	1501
125—Memorandum from Edward T. Dickinson, Jr. to William L. Batt, dated April 22, 1943 (Excerpts from)	2442	1503
126—Letter from Senator McCarran, et al. to The President, dated October 10, 1942	2448	1507
127—Letter from Brehon Somervell to Chan Gurney, dated October 11, 1942	2452	1510
128—Letter from G. C. Marshall to Chan Gurney, dated October 12, 1942	2453	1511
129—Minutes of Interdepartmental Committee on Non-Ferrous Metals, dated August 25, 1942	2454	1512
132—Telegram from Robert P. Patterson to Edward H. Clark, dated October 10, 1942	2459	1516
133—Notice to Employees of Homestake, signed by Guy N. Bjorge, dated October 15, 1942	2461	1517
162—Letter from Robert P. Patterson to H. O. King, dated June 13, 1943	2462	1518
164—Minutes of Order Clearance Committee Meeting, dated May 4, 1945	2464	1520
175—Report to accompany Senate Bill 45 of the 81st Congress—Senate Report No. 79, Calendar No. 65, entitled, "Relief of the Owners and Operators of Certain Gold Mines, etc.	2467	1524
177—Senate Subcommittee Preliminary report of the Subcommittee on Mining and Minerals Industry (Excerpts)	2473	1535
178—Senate Report No. 1605, Calendar No. 1536, entitled "Gold Miners." (To accompany S. 3195)	2489	1559
336—Memorandum from Bernard C. Gavit to Mr. Reginald G. Conley, dated July 9, 1942	2496	1572
Defendant's Exhibits:		
2—Form used on issuance of Order L-208	2497	1574
3—Amendment No. 1 to Order L-208	2499	1574
33—Memorandum from Richard A. Lester to General Frank J. McSherry, dated July 7, 1942 with 2 attachments	2502	1575
34—Memorandum from Richard A. Lester to General Frank J. McSherry, dated July 4, 1942, Critical Shortage of Labor in Non-ferrous Metal Mining, etc.	2507	1579
35—Memorandum from Richard A. Lester to Brigadier General Frank J. McSherry, dated August 25, 1942, "Workers in the Homestake Mining Company."	2509	1582

Record from the United States Court of Claims—Continued	Original	Print
Defendant's Exhibits—Continued		
36—War Manpower Commission Directive XIII, Employment of Workers Previously Employed, etc.	2511	1584
42—Letter from H. A. Walker to Homestake Mining Company, dated January 13, 1942 with attached schedule	2514	1586
43—Memorandum from R. J. Lund to A. I. Henderson, dated September 9, 1942, "Gold Mining Order."	2517	1589
46—Memorandum from J. M. Scribner to Donald M. Nelson, dated September 11, 1942, "Gold Order," and attachment	2522	1594
48—Summary of Proposed Gold Curtailment Order with Agreed date of September, 1942	2526	1598
49—Memorandum from Edward H. Rott to Edward T. Dickinson, Jr., dated April 24, 1943	2527	1599
50—W.P.B. Document 228, Gold Mining Order L-208, Executive Secretary's Note, dated June 15, 1943	2530	1601
51—Minutes of War Production Board meeting of June 15, 1943 (Excerpt)	2533a	1605
52—Memorandum from Harvey A. Anderson to Dr. Marcellus H. Stow, dated September 16, 1942	2535	1608
53—Table 1—Comparative Statistics for Metal Mining in the United States, By Type of Metal Ore, 1939	2536	1609
54—Table 2—Value of Mining Machinery and Equipment Produced in 1939	2537	1610
55—Table 3—Fuels Consumed and Electric Energy consumed by Major Nonferrous Metal—Ore Industries in the United States, 1939	2538	1610
56—Table 4—Number of Gold Mines in the United States and Alaska, By Class of Ore, 1941-1943	2539	1611
57—Table 6—Gold Production, United States and Alaska, 1939-1943	2540	1611

OFFERS IN EVIDENCE

We will offer in evidence as Plaintiffs' next exhibit in order, No. 183, a photograph of the mill; another photograph showing a picture of the shaft and shops, as Plaintiffs' next in order, No. 184; a photograph showing the old Eureka shaft and head frame as Plaintiffs' Exhibit 185; a photograph showing the 2300 sub-station, which I think your Honor might recognize, as Plaintiffs' Exhibit 186; a photograph of the ventilation fan on the 3000-foot level as Plaintiffs' Exhibit 187; a photograph of the north skip-way from the 300-foot level as Plaintiffs' Exhibit 188; a photograph of the 3000-foot level of the north drift is Plaintiffs' Exhibit 189; a photograph of the Old Eureka Shaft as Plaintiffs' Exhibit 190; a photograph of the pump station on the 2300-foot level as Plaintiffs' Exhibit 191; the sheave wheel on the head frame as Plaintiffs' Exhibit 192; and a photograph of the 500-foot level pump station as Plaintiffs' Exhibit 193.

That is as far as we can go now, your Honor.

Mr. Barnes: I have no objections to those as generally representative of the mine. There is no indication as to the date of the picture between 1942 and 1952, but as generally representative of the mine I have no objection to the receipt.

Mr. Barnett: We will connect that up, but they are offered [fol. 1201] for that purpose, to show the general representation.

The Commissioner: They may be received on that basis.

[fol. 1202] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

Transcript of testimony—February 5, 1953

TESTIMONY FOR PLAINTIFFS (Resumed)

The hearing was resumed, at the time above indicated, pursuant to the recess previously taken.

Present: (The same appearances as previously noted.)

The Commissioner: You may proceed.

Mr. Pittman: May it please Your Honor, I would like to call as our first witness, Mr. Slater.

THOMAS CALVERT SLATER, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct Examination.

By Mr. Pittman:

Q. Mr. Slater, will you give your full name to the [fol. 1203] reporter?

A. Thomas Calvert Slater.

Q. Where are you presently employed?

A. Calaveras Cement Company

Q. In what capacity?

A. Geologist.

Q. Were you ever employed by the Central Eureka Mining Company.

A. Yes.

Q. At what time?

A. From the middle of 1939 to about the middle of 1948.

Q. In what capacity, Mr. Slater, were you employed by the Central Eureka?

A. As geologist and Underground Superintendent, and finally, General Superintendent.

By Mr. Barnes:

Q. Were those simultaneous or successive?

A. I beg your pardon?

Q. Did you hold those jobs simultaneously or successively?

A. Successively.

Mr. Pittman: Will you mark this for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 194.)

[fol. 1204]. By the Commissioner:

Q. What was the final date you mentioned?

A. It was about the middle of 1948 when I left the company.

By Mr. Pittman:

Q. Mr. Slater, are you familiar with the Annual Report of the Central Eureka Mining Company for the year 1940?

A. Yes.

Q. Did you prepare the inventory as shown in that report?

A. I had some responsibility in that, yes.

Q. I would like to show you the Annual Report of Central Eureka Mining Company, marked for identification, and ask you to look at that and see if you prepared the inventory as shown in that report?

A. Yes.

Mr. Pittman: I would like, Your Honor, to introduce this in evidence.

Mr. Barnes: I would like to ask the witness a question about it, if I could.

By Mr. Barnes:

Q. Where is the inventory shown in this document which has been marked Plaintiffs' Exhibit 194 for identification?

A. Where is what?

Q. Where is the inventory, the one that you said you [fol. 1205] prepared?

A. Stores and Supplies on Hand.

Q. In other words, you are referring to the balance sheet under the heading "Assets," the item "Stores and Supplies on Hand," which gives a total dollar amount, is that correct?

A. That is right, yes.

Q. What responsibility, if any, did you have for preparing the inventory for the year 1940?

A. In a general way: The storeroom actually did the counting, and I was assistant to the General Superintendent at that time and was there when it was going on, and exercised some foreign judgment in seeing that they were getting the figures and helping get them, and so forth. It wasn't actually my sole responsibility.

Q. I take it that the item you have referred to in the balance sheet which is in Plaintiffs' Exhibit 194 for identification, was taken from a list of the stores on hand, is that correct?

A. That is right, yes.

Mr. Barnes: I object, Your Honor, on the ground that it is not the best evidence.

Mr. Pittman: Your Honor, may I ask another question of the witness?

By Mr. Pittman:

Q. Do you know whether or not the list which this was [fol. 1206] taken from was certified by certified public accountants?

A. They checked our figures, yes.

Mr. Pittman: I submit, Your Honor, this is an Annual Report subject to certification. It has been certified, and the Assistant Superintendent has testified that he has personal knowledge of it.

The Commissioner: It is not the best evidence. It is not the inventory that was prepared. It is figures taken from it.

By Mr. Pittman:

Q. Mr. Slater, do you have personal knowledge as to the inventory of Central Eureka Mining Company for the year 1940?

A. Generally speaking, yes.

Q. What is it?

A. What is that?

Q. What was it in dollar value?

Mr. Barnes: Your Honor, I object, in the first place, on the ground that the dollar value of the inventory is not relevant or material here, since I assume this is being laid as a foundation for testimony similar to that given in other cases as to whether or not the inventory would have lasted the company over a period of years, which means an unbalanced inventory, 90 per cent in one item, would give a large dollar total but doesn't help at all; plus the fact that the [fol. 1207] recorded inventory of the company is the best evidence as to what it had, made by a physical count.

The Commissioner: Answering your last objection first, unless the absence of the original inventory which was taken can be shown, I must sustain that objection.

As to the first objection by the Government, the question did not limit itself to the dollar figure. Since the objection

is sustained on the second ground, I merely point that out to counsel.

Mr. Pittman: I would like to have this marked for identification purposes.

(Said document was marked for identification as Plaintiffs' Exhibit No. 195.)

By Mr. Pittman:

Q. Mr. Slater, I am showing you a list of materials supposed to be in inventory, compiled and on hand at the Central Eureka Mining Company as of the date shown. Do you know who prepared that inventory?

A. Yes.

Q. Would you state it?

A. The accountant for the mine prepared this, and it was taken from records of the mine that were prepared by the storeroom man, and so forth, the actual records of the mine, an actual count of the pieces. That is how they were arrived at.

[fol. 1208] Mr. Pittman: I would like to endeavor to introduce that exhibit in evidence, Your Honor.

Mr. Barnes: I would like to show you the document, Your Honor, as a preface to my objection. The document is in the form of a letter dated February 1, 1953, to the President of Central Eureka, and signed by a Mr. Whitmore at the Sutter Creek plant. That perhaps makes my objection even clearer than the witness' testimony, but in any event I think from the witness' answer it is clear that this is not the best evidence but is a secondary tabulation prepared from other sources. I object on the ground of the best evidence rule.

Mr. Pittman: May it please Your Honor—pardon me, do you wish to make your ruling?

The Commissioner: Unless you have something to add.

Mr. Pittman: I would like the record to show that counsel for the Government has been in conference with us back as far as early December on a stipulation, and we submitted an inventory to him which was checked, I must say, rather superficially. Our best records, which we are trying to introduce a substitute for here, were at the mine at a different location than we advised the counsel, and when he was out there he was unable to check our inventory. I would

like to stipulate with counsel for the Government at this time that we can introduce our inventories, as we have [fol. 1209] endeavored to do prior, subject to verification.

Mr. Barnes: May it please the Court, this is the situation we are faced with in this case: Mr. Pittman is entirely correct in saying they submitted to me in the early part of December a draft stipulation which included certain material with respect to inventory. That was referred to the FBI agents for verification at the site of the mine. As I told Mr. Pittman, the report that I received back from the FBI agent stated that Mr. Whitmore, who is the writer of that letter, and Mr. Robertson, who is an associate of Mr. Barnett, were present at the mine with the agent. They advised him that they were unable to locate any of the original material from which the figures submitted to me had been prepared. They thought that Mr. Barnett might have that material here with him.

Mr. Barnett has subsequently produced and shown to me one document (exhibiting the document) which is here, a retained copy of a form allegedly filed with the War Production Board. (Document handed to Mr. Pittman). That is the only document that has been shown to me at any time in connection with this. We have had certain discussions about it.

My own calculations, based on that form, indicate that whoever prepared the data from which the draft stipulation was prepared which was submitted to me, made certain mathematical mistakes, and I pointed them out to counsel [fol. 1210] for the plaintiff. But the situation is that there were not present at the mine any records that could be pointed to by the officials in charge of the mine from which the allegations of the draft stipulation could be verified. There has not been any cursory check as Mr. Pittman indicated at all. There was nothing to verify.

Mr. Barnett: Just one thing in reference to what counsel said, Your Honor. We received a report. Among the documents inspected out there, there was one missing; and that is the one to which Mr. Barnes referred that I had here. But my office assures me that they did check out there. What they checked, I don't know, but the only document I had was the one I gave Mr. Barnes when he called it to

our attention that that particular document was missing among the other papers.

I might say that the unfortunate part is that the offices of the company have just been changed, and the agent of the Government did not go down to the new office. He probably could have found much there if he had.

Mr. Barnes: May I state in that connection, Your Honor, that the agent of the Government went to the office that had been stated by plaintiff when it submitted the documents as the location where the material could be checked. He went in company with an associate of Mr. Barnett, and was never told at that time, according to the report that I received, that there was any other source of documents that could be checked.

[fol. 1211] The Commissioner: I am prepared to rule now on the offer as made, and the objection is sustained.

If the original inventory is in existence, that should be produced, if you are trying to get evidence with respect to the inventory in the record. In the absence of the original, if the absence is satisfactorily explained, then secondary evidence may be received as to what the inventory consisted of.

By Mr. Pittman:

Q. Mr. Slater, will you explain why the original inventory cards, index system, purchase orders, or however you arrived at your inventory, are not produced in court this morning?

A. I would say the evidence is bulky, for one point; and, as he mentioned, a change in the offices of the company has upset them somewhat. I would feel that that information is there at the company. It may be that they just were not able to locate it at the time.

Q. Do you have an inventory book? By that I mean one volume that lists the inventory of the company.

Mr. Barnes: Your Honor, I object to the form of the question, because the witness has not been employed by the company for some four or five years. We are interested in what the company did.

Mr. Pittman: For the year 1942, then.

[fol. 1212] The Commissioner: In what form was the in-

ventory? I will ask the question: In what form was the inventory recorded?

The Witness: They went through, as I remember, and made a count of the various items in each bin, and tabulated it on yellow sheets with a number. The prices were looked up and they were extended. They were grouped into various groups of material, and totals were arrived at.

By the Commissioner:

Q. Where are those?

A. Those sheets are some of them (indicating).

Mr. Pittman: For identification purposes, may I mark Physical Inventory, March 1942?

(Said document was marked for identification as Plaintiffs' Exhibit No. 196.)

By Mr. Pittman:

Q. Mr. Slater, I hand you Exhibit 196 for identification, Physical Inventory, March 1942, and I will ask you by whom that was prepared?

A. I would say Mr. Oliver, looking at the writing and all; and the prices and the totals are by Miss Provis, who was the accountant for the company. Those are the sheets they actually had with them when they were counting the material.

Q. Can you testify whether or not that reflects the true inventory of Central Eureka as of March 1942?

[fol. 1213] A. To the best of my knowledge and to the best of the knowledge of the people who took the inventory, yes, the actual people who were doing the counting. They were making an honest effort to do a job.

Q. Is that the only record that Central Eureka has indicating the inventory of Central Eureka for 1942?

A. There may be additional recaps when these are totaled and combined. There are probably other records, yes.

Q. What sheet would that be taken from?

A. They would be taken from this (indicating).

Q. From this here?

A. From this material, yes. This was going through the bins, counting the bolts and various pieces of equipment.

Q. And it was prepared during the actual counting of the inventory?

A. That is right, yes.

Q. This does not include what was actually in the mine?

A. Not at all, no. This is in the warehouse, the stores that hadn't been used.

OFFERS IN EVIDENCE

Mr. Pittman: I would like to introduce this in evidence, Your Honor.

(Document handed to Mr. Barnes.)

Mr. Barnes: Could I ask a question or two?

The Commissioner: Yes.

[fol. 1214] By Mr. Barnes:

Q. How often was inventory taken by Central Eureka, do you know?

A. As I remember, once a year.

Q. Was that taken at any particular season of the year?

A. Along towards the end of the year, as I remember it.

Q. These pages which have been handed me, Plaintiffs' Exhibit 196, are headed March 1, 1942. Do you know why an inventory was taken as of that date?

A. I can't just recall offhand, but there was probably some reason at the time. I don't just remember that.

Q. Do you recall whether or not an inventory was taken later on in 1942?

A. At the end of the 1942—I am not sure. It has been quite a few years. I don't remember the details. I know that was the practice of the company, to keep a good inventory of their equipment.

By Mr. Pittman:

Q. Do you have figures on the amount of dollar value, showing what the inventory was at the end of 1942?

A. Yes.

Q. Taken from a certified public accountant's statement?

A. Yes.

Q. What is that?

Mr. Barnes: Again I object to that, on the ground it is [fol. 1215] not the best evidence.

The Commissioner: Let us dispose of this offer first.

Mr. Barnes: Your Honor, it doesn't seem to me that this has been established as being a record made or maintained in the regular course of business. It seems to have been made for some special purpose which the witness is not aware of. I object to it on that basis.

The Commissioner: It will be admitted.

(Said Physical Inventory, March 1942, of Central Eureka Mining Company, marked "Plaintiffs' Exhibit No. 196," admitted in evidence and made a part of this record.)

Mr. Barnes: May I ask the witness one additional question?

By Mr. Barnes:

Q. I notice inside this book but not physically stapled into it is a page which is headed, "Inventory of Mill Supplies, in Pounds," and bears the date May 11, 1942. Do you know what that relates to?

A. Just talking to them, I understand that sheet——

Mr. Barnes: I object to a statement of the understanding of the witness.

The Commissioner: Sustained. You can testify if you know.

[fol. 1216] By Mr. Pittman:

Q. Do you know, Mr. Slater?

The Commissioner: Of your own knowledge.

By Mr. Barnes:

Q. Not what somebody told you, but do you know of your own knowledge?

A. That the actual totals—no, I didn't prepare the totals. I wasn't there when they prepared the totals for them.

The point I was going to make, as I remember the inventory was made on hand January 1, 1942, and then it was made on months afterwards; and there was a period later on, July, August, and September, where they were figured

on the basis of the previous months. That is just the best of my knowledge. I can't go back and remember all——

Mr. Barnes: Your Honor, I am uncertain as to whether this document was included within your prior ruling, but I object to its receipt on the ground that there has been no satisfactory identification of it.

Mr. Barnett: That is part of the mill inventory, Mr. Barnes. One is the general inventory, and that is the mill inventory, which is part of the general inventory. It so states up in the corner.

Mr. Barnes: It bears a different date. It is not part of the document "Physical Inventory of March 1942." It is [fol. 1217] not physically attached to it.

Mr. Pittman: Is this the sheet to which you are directing your objection?

Mr. Barnes: That is right. The Commissioner has allowed that in over my objection.

Mr. Pittman: You are objecting to the Inventory of Mill Supplies, in Pounds—Quicksilver——

The Commissioner: It will be received also. Mark the "Pounds" sheet as 196-A.

(Said sheet, headed "Inventory of Mill Supplies, In Pounds—May 11, 1942," was marked as "Plaintiffs' Exhibit No. 196-A," and was admitted in evidence and made a part of this record.)

By Mr. Pittman:

Q. Mr. Slater, are you familiar with the inventory practices and policies of the Central Eureka Mining Company on the dates you were employed there, from 1939 to 1945, as to stocking inventory supplies?

A. Yes.

Q. Would you tell the Court what that practice was in maintaining inventories?

A. As I remember, at inventory time the storeroom was notified, and sufficient manpower was made available to him, and they just started in and started counting, and went through the inventory, the stores of the company. They [fol. 1218] counted them and made the records, and the records were then taken down to the office of the mine and they were priced, and totals were made.

Q. In so far as the quantities kept on hand in the years 1939, '40, '41, and '42, did your company have any plan or policy of maintaining inventory?

Mr. Barnes: I object, unless the source of the witness' knowledge is shown, Your Honor. He was first employed by the company as geologist. He has testified he was next Underground Superintendent. In neither case would he have had anything to do with the aboveground inventory, as far as the record indicates to date.

The Commissioner: I think the objection is sound.

By Mr. Pittman:

Q. Mr. Slater, is it a fact that as Underground Superintendent you must of necessity draw from those inventories?

A. That is right.

Mr. Barnes: I object to the question as being leading, Your Honor.

The Commissioner: Overruled.

By Mr. Pittman:

Q. Do you know what the inventory of Central Eureka was in the year 1939?

Mr. Barnes: I object, Your Honor, on the ground that the recorded inventory is the best evidence.

[fol. 1219] The Commissioner: Sustained.

Mr. Pittman: If the Assistant Superintendent knows, Your Honor, can't he testify to it?

The Commissioner: Not in view of the objection.

By Mr. Pittman:

Q. Are you familiar with the ore deposits of Central Eureka?

A. Yes.

Q. Do you know what the reserve deposit of the Central Eureka Mine was as of October 8, 1942?

A. Somewhere in the neighborhood of 100,000 tons, or more.

Q. Approximately how many tons was the normal mining capacity of Central Eureka?

A. Between 4,000 and 5,000 tons a month.

Q. In your opinion, what period of time would Central Eureka, under normal operation, be permitted to continue mining with the reserves as shown on your map?

Mr. Barnes: Your Honor, I object to the form of the question. The question uses the word "permitted." It doesn't seem to me as though that is something within the scope of the witness' knowledge in any way. In any event, we have the witness' statement that there were ore reserves of 100,000 tons, and that it milled 4,000 to 5,000 tons a month. It is simple to see that means they had a supply of [fol. 1220] 20 to 25 months of recorded reserves.

The Witness: That would——

The Commissioner: Maybe he can throw some light on it. Overruled.

By Mr. Pittman:

Q. Do you want the question read back?

A. I might say there that the figure I gave you was blocked-out ore, and then there is inferred ore and probable ore that increases those figures.

The Commissioner: What do you mean by "blocked-out"?

The Witness: That is on four sides, where it has been exposed on four sides.

By Mr. Pittman:

Q. Are you familiar with the practice of borrowing tools and inventory from other mining companies in the vicinity of Central Eureka at Sutter Creek?

A. Yes. We cooperated and exchanged back and forth. We tried to help one another. That has been the practice in the Mother Lode country. It still is today.

Q. Are you familiar with the Argonaut Mine?

A. Yes.

Q. How far is that from Central Eureka?

A. About four miles.

Q. Do you know whether or not it was closed down during the year 1942?

[fol. 1221] A. Yes, I remember that it was closed down.

Q. Do you know whether or not it had any inventory?

A. Yes, they did.

Q. Did you see it personally?

A. I was through the property and saw it, yes.

Q. Did you know that they were closed down long before L-208 was issued?

Mr. Barnes: I object to the form of the question, Your Honor.

The Commissioner: Sustained.

By Mr. Pittman:

Q. In the event it was necessary to continue mining operations, could Central Eureka have borrowed any materials and inventory from Argonaut Mines?

Mr. Barnes: Your Honor, I object unless the source of the witness' knowledge is shown. That requires the concurrence of two parties, the officials of the Argonaut Mine as well as the officials of Central Eureka.

Mr. Pittman: Your Honor, I submit that the record is already replete with the custom in both Idaho and Homestake, and by the present witness, that it was customary among the mining industry there to borrow and lend among them their inventory. Our witness has testified that he is familiar with the mine, that he has checked the inventory, and I am asking if, to his knowledge, any of the Argonaut [fol. 1222] inventory could have been made available, or was it promised to be made available to Central Eureka. He says he has knowledge of it. I just want the record to show if we could get it.

The Commissioner: I think your question is bad in form. I think you can get the evidence that you desire, but you have to ask the question in such a way that you get it properly. I will sustain the objection.

By Mr. Pittman:

Q. Did we buy anything from the Argonaut Mine?

A. Yes.

Q. Were we ever refused any materials from the Argonaut Mine that we requested?

A. No, not to my knowledge.

Mr. Pittman: I would like to offer this for identification.

(Said document was marked for identification as Plaintiffs' Exhibit No. 197.)

By Mr. Pittman:

Q. I hand you the Annual Report of Central Eureka Mining Company for the year 1941, and I would like to ask you by whom that was prepared, if you know?

A. The auditor, the certified public accountant for the company. The details were prepared by the accountant at the mine, and the various other individuals at the mine whose work is described here: the President of the company, [fol. 1223] the accountant, the engineers and geologists, and the General Superintendent of the company, whose names are all on here.

Q. Does that show the supplies on hand?

A. It shows the total dollar value of supplies on hand.

Mr. Pittman: Your Honor, I would like to offer this in evidence.

Mr. Barnes: I object on the same basis, Your Honor, as not being the best evidence.

The Commissioner: Sustained.

Mr. Pittman: May I have the record reflect, Your Honor, that I note my exception.

The Commissioner: Yes.

Mr. Pittman: Your Honor, may I make an offer of proof of the facts as shown in this statement?

The Commissioner: Of course, that will go along with the record, though not in evidence, so if your offer was merely as to what is contained in the paper, that in itself is an offer.

Mr. Pittman: I would like to show from this witness, if I could, whether of his own knowledge he knew that the supplies of what we claimed were in inventory were on hand.

The Commissioner: If you want to make any further offer of proof, go ahead. I have only excluded this document. You haven't offered anything beyond the document yet.

[fol. 1224] Mr. Pittman: I asked him about the supplies being on hand, and there was an objection to his statement on it. I would like to get that offer of proof in evidence.

The Commissioner: Go ahead.

Mr. Pittman: I believe, Your Honor, that the objection

was sustained, wasn't it? I want to make an offer of proof as to the supplies on hand at the end of the year 1941.

By Mr. Pittman:

Q. Do you know what the supplies on hand were at the end of 1941?

A. I know to the best of my knowledge and the understanding of the people who did the work, and all, that that figure is correct, yes.

Q. Mr. Slater, have you an opinion as to whether or not, with the inventory on hand and the ore deposits that we had, Central Eureka could have continued in operation after the issuance of Order L-208?

A. Yes. They were built up for the purposes in the event of war or trouble.

Q. You mean the inventory was built up?

A. Yes, early, before we went to war.

Q. You say they could continue. How long could they have continued, in your opinion, to operate?

A. My estimate is two or three years.

Mr. Pittman: That is all.

[fol. 1225] Cross-examination.

By Mr. Barnes:

Q. Mr. Slater, at what point in 1939 was it that you went with Central Eureka?

A. About the middle of the year. I would say it was in June.

Q. And you went with the title of geologist, is that correct?

A. That is right.

Q. Who was your immediate superior?

A. Mr. Norman.

Q. What was his position?

A. He was Assistant Superintendent.

Q. How long did you remain as geologist?

A. Until 1942.

Q. What time in 1942, do you recall?

A. July or August.

Q. What did your position become then?

A. I took over the underground in addition to my work as geologist.

Q. Who did you succeed as Underground Superintendent?

A. Mr. Clinton Knox.

Q. Who did you report to in that capacity?

A. Mr. Norman.

Q. How long did you continue as Underground Superintendent?

[fol. 1226] A. I think it was in January 1944.

Q. What was your title then?

A. After that time, I was General Superintendent.

Q. Was the Central Eureka Mine engaged in any mining operation at that time?

A. No.

Q. Did your title continue as General Superintendent until 1948?

A. Yes.

Q. On this question of ore reserves, did you prepare any kind of written report or other document showing your estimate of those reserves?

A. Yes.

Q. Do you have a copy of that here?

A. No, I don't, other than that copy. (Document handed to witness.) This is a copy of that statement that I had.

Q. This is an ore estimate, October 1942, is that correct?

A. That is right.

Q. Table 1 covers what type of ore? You referred to "proven ore," I think, as one class; and was "indicated" the other?

A. Yes. I have listed them here as "proven ore" and as "measured ore." In other words, that is another term for the same ores.

[fol. 1227] Q. On the first page which you have in front of you, you have two totals, one of 22,600 tons of measured ore and one of 26,900 tons of measured ore, is that correct?

A. That is correct.

Q. What about the second page? Is that still measured ore?

A. No. The next one is indicated ore.

Q. What is the total shown there for indicated ore?

A. 61,100 tons.

Q. And is the 12,200 also part of the indicated ore?

A. Yes.

Q. So that makes a total of 73,300 of indicated ore?

A. That is right, yes.

Q. What do you mean by "indicated ore"?

A. I mean—that is a definition used by the USGS.

Q. By USGS, you mean United States Geological Survey?

A. That is right. I remember I used those headings following their pattern, their procedure.

Q. Generally, what does it refer to as distinct from measured ore?

A. It isn't as well exposed. Where measured ore is on four sides, indicated ore would be on two sides. Inferred ore would be maybe on one side with diamond drilling, rather than laterals or drifts in the ore.

Q. Is inferred ore the material referred to at the bottom [fol. 1228] of the second page of this document?

A. That is right, yes.

Q. How much inferred ore do you show?

A. I don't show that in terms of tons. I show it in tons per vertical foot, of 252 tons.

Q. Then you are basing that on the difference between the 3800 level and the proposed 4000 level, aren't you?

A. That is right, yes.

Q. So you get a total of 44,100 tons of inferred ore, is that right?

A. That is right, yes.

Q. What about the third page of that document? What does that cover?

A. This is the ore mined in the Eureka Mine in the years 1948, 1949, '50, '51, '52, and '53.

Q. From what source did you get that information?

A. That is from the monthly and yearly compilation of tonnages from various stopes. Those records are all kept, and this is merely taken as a summary of those records.

OFFERS IN EVIDENCE

Mr. Barnes: Your Honor, I would like to offer this in evidence as Defendant's Exhibit 27.

Mr. Pittman: Do you want to attach this to it (indicating sheet).

Mr. Barnes: Counsel ha e handed me a facing sheet dated

February 1, 1953, being an Engineer's Report signed by [fol. 1229] T. Fong, Mining Engineer. I am perfectly willing to have that accompany the document, since counsel said the two came together, but all that I am offering and wish to be bound by is the estimate, three pages, identified by the witness, which is described as being Table I, consisting of three pages, and attached to this document.

Mr. Pittman: Does the letter tell what is being transmitted?

Mr. Barnes: I didn't even read it, Mr. Pittman.

Mr. Pittman: That is the only reason I offer it to be attached. That is the only reason I ask that it be attached and placed in evidence.

The Commissioner: We will mark them. It has not received a number?

Mr. Barnes: Neither of them has received a number.

The Commissioner: The table will be marked 27; and mark the facing sheet the next Plaintiffs' number.

(Said documents were marked for identification as Defendant's Exhibit No. 27 and Plaintiffs' Exhibit No. 198.)

The Commissioner: You say you have no objection. So both of them are admitted.

(Said table headed Ore Estimate, October 1942, Central Eureka Mining Company, marked as "Defendant's Exhibit No. 27," admitted in evidence and made a part of this record.)

[fol. 1230] (Said letter dated February 1, 1953, Estimate of Ore Reserves, October 1942, Engineer's Report of T. Fong, Mining Engineer, marked as "Plaintiffs' Exhibit No. 198," admitted in evidence and made a part of this record.)

[fol. 1231] By Mr. Barnes:

Q. Mr. Slater, who were the officers of the Central Eureka Mining Company in October, 1942, to your knowledge?

A. Mr. Spiers was the general superintendent. Mr. Prior, C. C. Prior, was the president of the company. (Referring to document) To my knowledge, Mr. Stadfeld was secretary of the company. There is a list of the officers and directors.

Q. Was the president physically located at Sutter Creek or was his office there?

A. His office was at San Francisco.

Q. Mr. Slater, do you recall that in November, 1942, following the issuance of limitation Order L-208 the Central Eureka Mining Company leased certain mining equipment to Mr. Kellogg Krebs and Mr. Richard Krebs? Do you know for what purpose they leased that equipment?

A. They used it for mining, milling tungsten ore, as I remember it.

Q. Their tungsten mine was in Tulare County, is that right?

A. That is right.

Q. That is in California?

A. Yes.

Q. Do you recall how much improvement was leased to them?

A. I believe it was flotation machines and feeder, reagent feeders.

[fol. 1232] Q. What about agitators?

A. Agitators, yes.

Q. Classifier?

A. Classifier, yes.

Q. Sand pumps?

A. Yes.

Q. Filter, duplex pan filter?

A. I think so. Yes, I remember them bringing the compressor for that.

Q. Did you ever have any knowledge of a copper mining operation that Central Eureka undertook in Battle Mountain, Nevada?

A. Yes.

Q. When was that?

A. 1943 as I remember?

Mr. Barnes: Your Honor, I have here the application by Central Eureka for a serial number under Preference Rating Order P-56 for the copper mine at Battle Mountain, Nevada, dated November 23, 1952, and I would like to offer that in evidence as Defendant's Exhibit No. 28.

Pittman: No objection.

The Commissioner: It is admitted.

(Application for serial number under P-56, dated November 23, 1942, of Central Eureka Mining Company was marked for identification as "Defendant's Exhibit No. 28," and was admitted in evidence and made a part of this record.)

[fol. 1233] By Mr. Barnes:

Q. Do you know, Mr. Slater, whether or not any mining equipment was transferred to the Battle Mountain operation?

A. Yes.

Q. Do you know whether any personnel was transferred from Sutter Creek to the Battle Mountain operation?

A. Just myself.

Q. Were you the only one?

A. Yes.

Mr. Barnes: That is all.

Redirect examination.

By Mr. Pittman:

Q. Mr. Slater, would you have leased this material that you just stated to this other mine had not Order L-208 been issued?

A. Yes.

Q. I say would you have leased the material had Order L-208 not been issued.

A. Oh, no, no.

Q. Was this eppper mine which defendent's counsel just spoke about an experimental mine?

A. Explorations, yes, exploring copper deposits.

Q. Do you know how long that exploration took place?

A. As I remember, it was just a matter of a few months. I think it ended, I would say, around the 4th of July, if my [fol. 1234] memory is right. We were all finished and on our way back to Sutter Creek. Both Mr. Norman and I took care of that deposit, that property, and we alternated back and forth. Toward the end I spent a good deal of time there, most of the time, at Battle Mountain.

Q. Did it result in any material amount of recovery of copper?

A. What is that?

Q. Did your exploration for copper result in any material recovery of copper?

A. No. We did produce some ore that I think was later shipped. We did not exercise our option on the property, and referred it to the owners. The ore that we took out was shipped as I remember it.

Mr. Pittman: That is all.

Mr. Barnes: No further questions.

The Commissioner: The witness may be excused.

(Witness excused.)

Mr. Barnett: Mr. Smith, Your Honor.

There is certain evidence here about plates. We have them here, but I think it will just encumber the record, so we will not introduce it.

DONALD D. SMITH, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commis- [fol. 1235] sioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Barnett:

Q. Mr. Smith, where do you reside, please?

A. In Palo Alto, California.

Q. What is your present business or occupation?

A. I am the president of the Central Eureka Mining Company.

Q. Will you describe generally the property of Central Eureka Mining Company?

A. The Central Eureka Mining Company—you are talking now about physical——

Q. That is correct.

A. —is very much the same in principle as any of the Mother Lode mining companies. It consists of two shafts with various connecting drifts, cross cuts. It has two complete hoists, of course, two sets of compressors for air-conditioning the mine. It has a complete assay office, a complete mill from the time of the primary crush to the cyanida-

tion of the precipitate tanks. It has a very modern change house, a large supply room, complete woodworking facilities, blacksmith shop, electrical shops, and various things that go with that type of mine.

Q. You say it has a sawmill or lumber shop?

A. Yes.

[fol. 1236] Q. It has a machine shop?

A. Yes.

Q. Blacksmith shop?

A. Right.

Q. Would you say that it is more or less self-sustaining?

A. Yes. We have very little work done on the outside.

Q. Do you have any sources of lumber?

A. Yes.

Q. Of what does that consist?

A. At the moment when it is opportune, we buy our lumber cut and finished, depending on market conditions, from outside lumbering interests. When lumber becomes short and is difficult to get, we buy poles and trim them and create our own timbers.

Q. Do you have a source of timber on your property?

A. Not any more, no.

Q. Did you in 1942?

A. Yes.

Q. Had you been up in that country in 1942?

A. Oh, I have been going up in that country since I was a child. My grandparents were interested in gold mining, and being a Californian it is a sort of natural inclination to want to go to look. It has held a great fascination for me.

Q. More particularly the Mother Lode, is that right?

[fol. 1237] A. That is right.

Q. In reference to the shafts that you have described, am I correct in saying that they consist of two separate mines?

A. That is right. There is the Central mine and the Eureka mine which were consolidated some years back.

Q. Describe the Central shaft, please.

A. The Central shaft goes down to the 3200 foot level. To go deeper into the mine to our lowest workings, which today is 4250 feet, you cross over on a drift and go down into the 4100 foot level via a winze which in layman's terms is a shaft with no entry into the surface.

Q. Recently, I had the experience of going down in the

shaft. Which shaft do we go down, The Central or the Old Eureka?

A. You went down the Old Eureka.

Q. How deep is that?

A. The shaft—it is as deep as 3200 feet from the standpoint of effective usefulness. It goes deeper than that, but it is not in state of repair so that it can be used. This is the Old Eureka shaft.

Q. Referring to Plaintiffs' Exhibit No. 184, would you show to His Honor the shops and the location of the sawmill and the other parts?

A. The lumber working building, Your Honor, is behind [fol. 1238] this head frame (indicating). It doesn't show very well in this picture. This is the supply room and this is the double change room (indicating). This, of course, is the hoist building (indicating). This is an electrical shop (indicating). This is the blacksmith shop and this is a limited foundry capacity machine shop (indicating).

Mr. Barnes: May I point out that the record is going to establish absolutely nothing about that picture?

By Mr. Barnett:

Q. Mr. Smith, you are now identifying objects on Plaintiffs' Exhibit No. 184, is that correct?

A. Yes.

Q. Have you pointed the storeroom out?

A. This is the storeroom here, one of them (indicating).

Q. Was that the same situation as existed in October, 1942?

A. Yes.

Q. For what purpose is the Eureka shaft used at the present time?

A. The Eureka shaft is used for the transportation of men and materials into the mine and waste out of the mine.

Q. And the Central shaft, what is it used for?

A. It is used for the hoisting of ore, mainly.

Q. Will you describe the process by which that ore is extracted up to the time it reaches the mill?

[fol. 1239] A. It is extracted by drilling into the face, loading the holes with powder and blasting it. Then with automatic or mechanical mucking devices it is mucked into cars

and trammed to ore chutes. Ore reserve storage bins is what it amounts to. From there it is hoisted up to the Central shaft to the coarse ore bin where it gets its primary crush. It is then conveyed over to the mill on a conveyor belt into bins and from there by gravity flow it goes into the stamp mill and through the flow of the mill and comes out in two forms; either in the form of amalgam or as the end result of the cyanide plant as precipitates.

Q. Do you have a locomotive that assists in that procedure?

A. We have two locomotives that are used in the transportation of ore from the Old Eureka side of the mine to the Central side from the pumps of the hoisting.

The Commissioner: What is the distance?

The Witness: Would Your Honor permit me to ask Mr. Slater the exact distance? I really couldn't tell you. I can give you an estimate.

The Commissioner: All I had in mind, I just wondered how far apart the two shafts were.

The Witness: I would say about 4,000 feet.

By Mr, Barnett:

Q. These dump cars go that distance from one mine to the [fol. 1240] other?

A. That is correct, yes, sir.

Q. After it finally reaches the mill it goes through the process of stamping, and so forth, which has been described?

A. That is right.

Q. Has the Central Eureka Mining Company adopted a policy with reference to its equipment?

A. Would you ask that question again, Mr. Barnett?

Q. I have in mind the maintenance of its equipment. Do you know the condition of the equipment?

Mr. Barnes: Your Honor, I object to the form of the question as not relating to the period in question here.

Mr. Barnett: I withdraw that.

By Mr. Barnett:

Q. Directing your attention to October, 1942, you had occasion at or about that time to observe the equipment, is that correct?

A. That is correct.

Q. At that time you had no official identification with the mine, is that correct?

A. That is correct.

Q. Your official identification commenced when?

A. In May of 1948.

Q. In 1942 did you have the opportunity of observing [fol. 1241] the condition of the equipment?

A. Yes.

Q. That was at a time when you visited the mine?

A. That is correct.

Q. What did you observe?

A. I observed that the equipment was in very good shape. As a matter of fact, it always has been, apparently, the policy of the Central Eureka Company in prior days as well as current days to maintain the equipment in very excellent condition.

Q. You say that you became identified in 1948?

A. Correct.

Q. Did you have occasion to have any connection or identification with the inventory of the mine?

A. Nothing other than what I observed from passing through the mine. We, of course, were interested in the condition generally of that mine as well as the Mother Lode mines, and as we would travel through the country we generally would go through the supply room and the head of the hoist rooms and see the whole layout.

Q. Do you know whether or not in 1948 when you became identified with the mine there were any items in the inventory that had been there in October, 1942?

A. Yes. As a matter of fact, we were still working on plate steels and bolt stocks and things of that sort that were [fol. 1242] there at that time.

Q. Are you acquainted with the Idaho Maryland mine?

A. Yes.

Q. Are you familiar with any custom existing in the Grass Valley section as well as the Mother Lode section that permits the lending and borrowing of equipment?

A. Yes, I am. The gold mining business being a non-competitive business, we have no secrets. It has always been the custom in the gold mining fraternity from the days, I believe, of the prospector with a mule and a tin pan. Some-

body was always helping him, loading him with equipment and material, grub staking him and so forth. It seems to have grown up with the industry. If Idaho Maryland needs something that we have that we can let them have, we immediately do it, and they do the same for us, as the case of the other mines in the vicinity, the Kennedy and the Argonant.

Q. By hours, how far would you say the Kennedy and Argonant are from the Central Eureka?

A. About five or six minutes at the outside.

Q. How far is Idaho Maryland, the Grass Valley?

A. About three hours, two and a half or three hours.

Q. Is this Central Eureka mine an old mine?

A. Yes. It is one of the oldest in the area.

Q. Could you give His Honor some historical background of Central Eureka?

[fol. 1243] A. Very briefly, Central Eureka is kown as the Hetty Green mine. That was one of the starts of Hetty Green's fortune. She took $12,000,000 out, I believe, in 500 feet of mining. The mine started from that with respect to any substantial production. It has been in operation off and on ever since. As is the case with the Mother Lode mine, you do hit barren areas and if you hit it at the time when you are not adequately financed, you generally end up with new owners who do have adequate financing to get you to different ore.

Q. As to the difference between Mother Lode ores as compared with other gold bearing ore, that is to say, Homestake or Idaho Maryland, can you explain to His Honor what the difference, if any, may be?

A. Yes. Your ore deposits are more limited in the Mother Lode, but they are of greater value, much greater value. Your Homestake obviously is the largest mine, I guess, in the world. They do a tremendous volume. They mill per day what we would mill in a month, but their ore values, that is, per ton of ore, are considerably less than you will find, generally speaking, in the Mother Lode.

Q. In the Central Eureka mine it is quartz, is it, hard rock?

A. That is right.

Q. I show you what purports to be——

[fol. 1244] The Commissioner: You used that word "value." I suppose it means the amount of gold per ton.

The Witness: That is correct.

By Mr. Barnett:

Q. I show you what purports to be a booklet, "Operations at the Old Eureka Mine." It is a technical publication, No. 1136-A-1112, American Institute of Mining, written in 1939 by L. A. Norman, Jr., which describes technically the operations of the Old Eureka mine. Are they referring to the Central Eureka mine there?

A. Yes.

Q. That pamphlet describes generally the technical features of the mine, is that correct?

A. Our mining operations for the last, probably, twenty years have been in this area that is described in this particular brochure.

Mr. Barnett: Could we mark this for identification as Plaintiffs' next exhibit number in order, please?

(Said pamphlet was marked for identification as Plaintiffs' Exhibit No. 199.)

By Mr. Barnett:

Q. Will you look at Plaintiffs' Exhibit No. 199. It describes generally the technical features of the mine, does it not?

A. Yes, it is a very good account.

[fol. 1245] OFFERS IN EVIDENCE

Mr. Barnett: We will offer this as Plaintiffs' Exhibit No. 199.

Mr. Barnes: Your Honor, I object on the ground it is incompetent, the witness not being produced for examination. It purports to be a speech or paper prepared by the former assistant superintendent of the mine and he obviously has not been produced here for cross examination and this is hearsay.

Mr. Barnett: It is only a scientific paper showing scientific phases of the mine and is descriptive of the testimony given by this witness. It has no other purpose as proof of any facts other than a descriptive bearing as far as the testimony is concerned. It is offered for that limited purpose.

Mr. Barnes: Your Honor, if the witness testified to it, we don't need this document in. The document is being offered as independent proof of some fact contained in it not specified by counsel. I object to its being offered as independent proof of any facts.

Mr. Barnett: It is merely a description of his testimony in general. Besides, if you will read it, you will learn a lot.

Mr. Barnes: I did read it.

Mr. Barnett: It might go to the weight rather than to the admissibility.

The Commissioner: I will let it in.

[fol. 1246] (Booklet, "Operations at the Old Eureka Mine," by L. A. Norman, Jr., marked "Plaintiffs' Exhibit No. 199," was admitted in evidence and made a part of this record.)

Mr. Barnett: That is all, Your Honor.

The Commissioner: Suppose we take a five minute recess.

(Thereupon, a brief recess was taken.)

[fol. 1247] Cross-examination.

By Mr. Barnes:

Q. Mr. Smith, what had your background been before you went with Central Eureka?

A. Immediately prior to going with Central Eureka, I spent about three and a half years in the Navy.

Q. Have you had any professional training in geology or mining?

A. Nothing other than a lifelong interest. I certainly don't profess to be a geologist, but I have studied mining and mining problems for some years.

Q. Have you ever been an officer of any other mining company?

A. No, sir.

Q. Prior to going in the Navy, what had you been doing?

A. Prior to going into the Navy, I was in the glass container manufacturing business.

Mr. Barnes: That is all.

Mr. Barnett: No questions, Your Honor.

The Commissioner: The witness may step down.

(Witness excused.)

Mr. Barnes: Your Honor, I have here what is the only appeal file that has been found by counsel for either party, pertaining to Central Eureka. It is not an appeal in the [fol. 1248] sense that the other files are, but so that the record will be complete, I would like to offer these documents in evidence. They have been examined by counsel for the plaintiff.

The first is a letter from Central Eureka signed by Mr. L. A. Norman, to Dr. Marcellus H. Stow, Deputy Director of the Mining Division, dated December 9, 1943.

Mr. Barnett: No objection.

The Commissioner: Admitted.

(Said letter, dated 12-9-43, from L. A. Norman, Jr., to Dr. Marcellus H. Stow, WPB, was marked as "Defendant's Exhibit No. 29," and was admitted in evidence and made a part of this record.)

Mr. Barnes: The second, which I am offering as Defendant's Exhibit 30, is the reply to that letter, dated December 17, 1943, signed by Henry W. Erickson, Deputy Administrator of Limitation Order L-208.

Mr. Barnett: No objection.

The Commissioner: Admitted.

(Said copy of letter, dated 12-17-43, from Henry W. Erickson, Deputy Administrator, Limitation Order L-208, to Central Eureka, was marked as "Defendant's Exhibit No. 30," and was admitted in evidence and made a part of this record.)

Mr. Barnes: And third, which I offer as Defendant's Exhibit 31, is a further letter from Mr. Erickson, dated December 22, 1943.

[fol. 1249] Mr. Barnett: No objection.

The Commissioner: Admitted.

(Said letter, dated 12-22-43, from Mr. Erickson to Central Eureka, was marked as "Defendant's Exhibit No. 31," and was admitted in evidence and made a part of this record.)

Mr. Barnes: That is all defendant has with respect to Central Eureka.

Mr. Barnett: Your Honor, I would like to make an offer of proof that if the Witness Slater were to testify, he would testify substantially to this offer of proof which has been objected to. I would like to make the offer that the inventory——

The Commissioner: So that there is no misunderstanding about it, put Mr. Slater back on the stand and ask the question so that we will know just what this offer relates to.

Mr. Barnett: Mr. Slater, will you take the stand?

THOMAS CALVERT SLATER, resumed the witness stand and was examined and testified as follows:

Direct Examination.

By Mr. Barnett:

Q. Mr. Slater, you have made, at the request of Mr. Pittman and Mr. Smith and myself, a computation of inventory showing the gradual build-up from 1937 to 1942, is that [fol. 1250] correct?

A. That is right.

Q. You stated some time ago in your examination that in view of the imminence of war, Central Eureka were building up their inventory?

A. That is right.

Q. You have the dollar value of the inventory on this memorandum?

A. That is right.

Q. Was this prepared by you?

A. Yes.

Q. And prepared from the financial statements that you have referred to previously?

A. Yes.

Q. And any other documents?

A. These are basically from those statements, the annual reports of the company, and my knowledge of what transpired. The mine was informal. It wasn't a big organization. We would get together in the morning and talk over the operations, what we planned, and what our thoughts were at the time. I imagine others do the same thing. It

was at that time that we talked about building up our inventories——

Mr. Barnes: Just a moment. I object to this conversation, Your Honor.

[fol. 1251] By Mr. Barnett:

Q. In 1937, the dollar value which was put down here was how much?

Mr. Barnes: Your Honor, I object to this as not being the best evidence.

The Commissioner: Sustained.

Mr. Barnett: Now I will make the offer of proof, Your Honor, without asking repetitious questions.

The Commissioner: Yes. I wanted to be sure that the offer was related to a particular question.

Mr. Barnett: Yes, Your Honor.

We expect the witness to testify that in 1937, the inventory was $5,992.68; in 1938, $8,653.90; in 1939, $13,839.50; in 1940, $28,725.82; in 1941, $51,751.33; and in 1942, that is, December of 1942, $50,321.41.

The Commissioner: You said you expect him to testify. You mean he would have testified?

Mr. Barnett: He would have so testified; and we make that in the form of an offer of proof.

That is Central Eureka's case, as far as the liability issue is concerned, Your Honor.

Mr. Barnes: Just one additional point. Could I have that PD-275, that pencil copy which was retained?

Mr. Barnett: What was that?

Mr. Barnes: That War Production Board report.

[fol. 1252] Mr. Barnett: This? (Indicating.)

OFFERS IN EVIDENCE

Mr. Barnes: I would like to offer in evidence as Defendant's Exhibit 32, Central Eureka's retained copy of a Form PD-275, which shows the inventory on December 31, 1941, of various types of materials, the quantities received by the company during the first quarter of 1942, the amount used or put into production during that quarter, the inventory on March 31, 1942, at the end of the quarter, and an estimate

as to the quantity required to be put into production during the third quarter, the quarter ending September 30, 1942.

Mr. Barnett: We are going to object to that, Your Honor. First, a proper foundation hasn't been laid. Second, it is irrelevant, incompetent and immaterial. Third, it is not proper cross-examination. This is one of the documents from which we attempted, without success, to prove certain facts, and many questions were raised. We feel that it is not the best evidence. The inventory itself is.

Secondly, the so-called anticipated needs was used for a purpose different from what we are concerned with here.

Mr. Pittman: May it please Your Honor, I wanted to offer the same thing in evidence, and under the theory that it wasn't the best evidence——

The Commissioner: You didn't offer that.

Mr. Pittman: This is comparable to the inventory that we offered because you said, as I understood Your Honor's [fol. 1253] ruling, it wasn't the best evidence. This is not the original. This was taken from other facts and figures, and that is the best evidence.

The Commissioner: Obviously it is being offered for a different reason by the Government than it would have been offered by the plaintiff. In other words, that may possibly be an admission against the plaintiff.

Mr. Connor: It may very likely be also that the figures on here are incorrect. I should think the Government should produce the original of this as filed, as being the best evidence of what the document is.

The Commissioner: The plaintiff turned it over to Government counsel in my presence. I saw them.

Mr. Pittman: That is what brought about the dispute in the early stages, Your Honor. This computation was made from figures, and we didn't have the inventories available at the plant. Now we have come back in court today with a CPA's report of the inventories, a man who was personally available at the mine and can swear to the correctness of the inventory. We were unable to get that in evidence; and if we are unable to get that in evidence, I certainly think the source of this is not shown, and I don't think this should be put in evidence, although I will say it is practically the same as our other inventory.

The Commissioner: I have made my ruling. I don't see [fol. 1254] any basis for changing it.

(Said pencil copy of Form PD-275 filed by Central Eureka, dated 5-11-42, was marked as "Defendant's Exhibit No. 32," and was admitted in evidence and made a part of this record.)

Mr. Barnett: Let me ask you a question here. I think I anticipate the future argument of counsel on this exhibit, that is, counsel for the defendant.

By Mr. Barnett:

Q. There is a statement here about anticipated need, or something of that sort. Are you familiar with that? Just the general heading?

A. When was this document made?

Mr. Barnes: May 11, 1942, it was signed.

By Mr. Barnett:

Q. They have an inventory for 1941, and then an anticipated need for the next quarter. Do you know anything about the figures that appear on the exhibit?

A. Yes. I don't know definitely.

Q. I don't mean the figures themselves, but did you have any policy, when you anticipated what you would require for a future period, as to whether you exaggerated the amount or minimized the amount?

A. We were conservative as to our operation, yes. We figured an estimate that we had ample to take care of our needs.

[fol. 1255] Q. Would it be more or less than you would require?

A. You would figure your contingencies, yes. We always do it. That is an engineering practice, yes.

Q. You always tried to get what, more or less?

A. More.

Q. So in this so-called document, if you stated to these priority boards you anticipated using so much, you would always exaggerate, is that correct?

A. Yes.

Q. That is typical of engineering companies?
A. That is right. It is engineering practice.

Mr. Barnett: That is all.

Mr. Barnes: I would like to ask the witness one question with respect to that.

Cross-examination.

By Mr. Barnes:

Q. Looking at the document, Mr. Slater, and referring under the general heading "Carbon Steel" to the item which is called "Wire rope and strand," I notice that that indicates that during the first quarter of 1942, you used 4.3 tons of material——

Mr. Barnett: Just a moment, Your Honor. We object to that. That is only a statement of some type. It is not proof of the fact stated.

The Commissioner? Whose statement is it?

[fols. 1256-1305] Mr. Barnes: Just a minute. Let me ask the witness the question.

Mr. Barnett: It is not signed by this witness at all.

By Mr. Barnes:

Q. Do you recognize the signature that appears on there?
A. Yes.
Q. Whose signature is that?
A. Mr. L. A. Norman, Jr.
Q. What was Mr. Norman's position at the time?
A. General Superintendent.

[Title Omitted]

[fol. 1306] In the United States Court of Claims

Transcript of testimony—February 9, 1953

Testimony for Plaintiffs (Resumed)

The hearing was resumed, at the time above indicated, pursuant to the recess previously taken.

Present: (The same appearances as previously noted.)

Mr. Rigney: Your Honor, since last Wednesday I have had an opportunity to go over the record in some detail and consider a good number of the exhibits which have been put in, and have come to the conclusion that it is unnecessary for us to call Mr. Howard Young as the plaintiffs' witness. He didn't come to the WPB until 1943, so his testimony would necessarily be confined to the period after that, and I am satisfied in my own mind that it would be merely cumulative of evidence already in. For that reason, I have decided not to call him.

[fol. 1307] There are just one or two items concerning the exhibits that need to be straightened out.

May this be marked Plaintiffs' Exhibit 36B for identification.

(Said document was marked for identification as Plaintiffs' Exhibit No. 36B.)

OFFERS IN EVIDENCE

Mr. Rigney: I might say, Your Honor, that Exhibit 36B for identification is a memo of November 24, 1941, which is headed, "Department of State, Memorandum of Conversation."

Plaintiff now offers in evidence this exhibit, which in my judgment will then make admissible 36 for identification and 36A for identification. This item was an attachment referred to in those exhibits, and because this was not readily available for offer, the other exhibits were not received.

Mr. Barnes: Do you have 36?

Mr. Rigney: Yes. Exhibit 36 is the memo of December 2 from Mr. George to Mr. Nelson, and refers to Mr. Livermore's memo of November 27, 1941, which is 36A for identification. That in turn refers to this November 24 memo, which I have asked to be marked Exhibit 36B for identification. I think that that completes the documentation in connection with these exhibits.

Mr. Barnes: Subject to verification that this is the enclosure, Your Honor, I have no objection.

The Commissioner: Then 36, 36A and 36B may all be [fol. 1308] admitted in evidence. I took it that your offer was of all three.

Mr. Rigney: Yes, Your Honor, that is correct.

(Said memo of 12-2-41 from Mr. George to Mr. Nelson, memo of 11-27-41 from Mr. Livermore, and memo of 11-24-41 headed "Department of State, Memorandum of Conversation," marked as "Plaintiffs' Exhibit Nos. 36, 36A and 36B," respectively, admitted in evidence and made a part of this record.)

Mr. Rigney: Now, Your Honor, with the admission in evidence of this November 24 memo as Exhibit 36B, I should like to reoffer Exhibit 69 for identification, which was the letter of Donald M. Nelson to Mr. Milo Perkins dated December 3, 1941. That letter of Mr. Nelson's also referred to this November 24 memo which has been received as 36B, and for that reason it was not received at the time it was offered.

Mr. Barnes: My recollection isn't too clear on this. Has the first enclosure referred to in Exhibit 69 been marked?

Mr. Rigney: Yes. That is the memo from Lauchlin Currie of November 18, and I will get you the exhibit number.

Exhibit 68 is the exhibit number of the November 18 memo. It has the Joint Economic Committee's resolution attached.

Mr. Barnes: Subject to verification, no objection.

The Commissioner: Admitted.

(Said letter dated 12-3-41, from Donald Nelson to Milo Perkins, marked as "Plaintiffs' Exhibit No. 69," admitted in evidence and made a part of this record.)

[fol. 1309] Mr. Rigney: I think, Your Honor, that Exhibit 78 must be reoffered, Exhibit 78 for identification. That was the memorandum from President Roosevelt of August 31, 1942, to Paul V. McNutt, attaching a copy of a telegram from Senator B. K. Wheeler of Montana to the President, of August 30, 1942, and at the time this was offered, as I recall, objection was raised that there had been no showing up to that time that Mr. McNutt had had anything to do with this situation.

I think the record now, with testimony from several witnesses about Mr. McNutt's participation in certain conferences, and also the documentary evidence which has since been offered, lays sufficient foundation for the admission of that exhibit.

Mr. Barnes: Your Honor, with all due respect to counsel, there is no record to date which shows Mr. McNutt's personal participation in any of the conferences as to which there has been testimony. There is no testimony that ties this document up to show that notice of its contents was brought to any official of the War Production Board. The War Manpower Commission was an entirely separate and distinct organization.

Mr. Rigney: Your Honor will recall the testimony that Mr. McSherry, who was the No. 3 or No. 4 man in the War Manpower Commission, sat in on meetings prior to the issuance of L-208, participated in the discussions preceding [fol. 1310] the issuance of the order. There is correspondence now in evidence and documents in evidence in which Mr. McNutt's name appears prominently.

The Commissioner: Let me see the record where this was first offered.

Mr. Barnes: Page 406, I believe, Your Honor.

The Commissioner: It may be received.

(Said memo from President Roosevelt to Paul V. McNutt, dated 8-31-42, with attached copy of telegram to the President from Senator B. K. Wheeler dated 12-30-42, marked "Plaintiffs' Exhibit No. 78," admitted in evidence and made a part of this record.)

Mr. Rigney: Your Honor, I think that completes the offer of documents that we wanted to straighten out, and I believe that all the documents which we have offered which are properly admissible have been received. Plaintiff Homestake now rests.

The Commissioner: Very well.

Let's call on Idaho Maryland.

Mr. Orrick: Idaho Maryland rests.

The Commissioner: Central Eureka?

Mr. Barnett: Yes, Your Honor, with the inclusion of the testimony which just went in as part of our case. I think we rested the other day, subject to this testimony.

The Commissioner: This evidence would apply to any of [fol. 1311] the plaintiffs.

I see no one from Alaska-Pacific. Accordingly, proof is closed as to Alaska-Pacific.

In line with our discussion of Friday, proof is not closed as to Oro Fino or Bald Mountain, and further evidence will be expected from those two plaintiffs at the conclusion of the Government's presentation.

Mr. Barnes: Your Honor, is there any indication of or limitation on the scope and nature of the testimony that may be produced by those two companies?

In other words, the thought I have in mind is that we are going to be calling to the stand certain Government officials. If testimony is to be allowed to be introduced by them as to conversations with Government officials, we may be faced with the necessity of recalling at a subsequent time some or all of that group of officials, many of whom are going to have to come from distances to testify, and at considerable inconvenience. I therefore hesitate to proceed with the presentation of the Government's proof if we are going to be faced with a situation of that type at some subsequent date.

The Commissioner: I think the record will show quite clearly that any evidence to be adduced by those two plaintiffs would be limited to ownership on the one hand, and then possibly some evidence with respect to the actual closing of the mines concerned, and the receipt of the Limitation [fol. 1312] Orders by the mines.

Mr. Barnes: Plus testimony of the type that has been offered by some of the plaintiffs here, if they desire to do it, as to their inventory materials, and as to what happened to their employees.

The Commissioner: Yes.

Mr. Barnes: Which would, of course, not in any way affect the testimony I intend to offer now.

The Commissioner: I should not think it would, and we can proceed on that basis. After all, those two plaintiffs had just as much time to get ready for trial as the plaintiffs who are before the Court.

Testimony for Defendant

Mr. Barnes: Your Honor, before I proceed with my case, I would like to outline very briefly the type of testimony which the Government intends to produce here. I am doing that principally for this reason: Because of the fact that some of the witnesses are coming from out of the city and it

has been necessary to suit the schedule to their convenience to a certain extent, we are not going to be in a position to present our testimony in the most orderly fashion possible.

The Government's case in general is going to cover two points, and I might say two points that I believe are indicated by the opinion of the Court of Claims in the Idaho Maryland Mines Corporation case as being the issue in [fol. 1313] volved here. One is going to relate to the exigency of the situation existing in October, 1942, so far as it related to the manpower situation of the other nonferrous mines. Perhaps somewhat as a corollary to that, the second point will also deal with the exigency of the situation existing in October 1942 so far as it related to supplies of critical materials, demands on those critical materials, and potential savings that might be realized and were realized by virtue of the closing of the gold mines.

Those are the two principal points upon which the Government's case will rest. As I say, some witnesses will cover both points. We will not be able to develop either point fully at one time because of the fact that some witnesses will cover two points and because of the other fact, that to a certain extent we are not going to be able to take the witnesses in what we would have considered to be the optimum arrangement so far as their sequence of appearance on the witness stand is concerned.

We anticipate at the present time calling nine or ten witnesses, and I will indicate the order in which we expect to have them on the stand, their names, and what their official positions were.

The first one is Richard A. Lester, who was head—I think the title was changed two or three times. It was Priorities Section of the Labor Division or Labor Production Divi [fol. 1314] sion at one time, in the War Production Board.

The second witness will be I. N. P. Stokes, who was Assistant General Counsel for Orders and Regulations of the War Production Board.

The next two witnesses will be Mr. Ernst Hergenroether, who is presently head of the Ferro-Alloy Section of the NPA, who was during World War II connected with the Conservation Division of the War Production Board. Mr. Erwin Vogelsang, who during World War II was head of the Tin and Lead Division of the War Production Board.

The next witness will be Mr. John Lord O'Brian, General Counsel of the War Production Board.

We then intend to call Mr. Harvey A. Anderson, who was connected with the Conservation Division of the War Production Board. Again because of the fact that titles changed so rapidly, of several of the witnesses, as indicated, I hesitate to indicate his exact title.

Mr. Samuel Lipkowitz, who was in the Labor Division.

Mr. Robert R. Nathan, who was at that time Chairman of the Planning Committee of the War Production.

Mr. John Ohley, who was, I believe, connected with the Office of the Secretary or Under Secretary in the Department of the Army. I believe it was the War Department at that time.

We anticipate that that group of witnesses under normal cross-examination will carry us approximately through [fol. 1315] Thursday. Our schedule that we have made up indicates that.

There are two additional witnesses that we have been in contact with and whom we may desire to call. Frankly, we had originally, for other reasons, decided not to call Mr. Batt, whose name has been mentioned here several times. Your Honor indicated at one point during the presentation of plaintiffs' proof perhaps an interest in having Mr. Batt appear and testify. We immediately got in touch with Mr. Batt, and discovered that he is at the present time in Mexico, where he has been sent for reasons of health by his doctor, and he will not return to the East Coast of the United States until about April 1st. He will be available in Mexico City, and says that he would be glad to testify by deposition there between the 20th and 27th of this month, or on the West Coast during the month of March.

It is not the defendant's intention to request that the hearings be held open to take Mr. Batt's testimony either of those times. I am advising you of that fact because of the interest which you expressed, and we would be very glad to make Mr. Batt available as a witness at any or all of those times that might be satisfactory to you, if you feel that his testimony is material or necessary to the presentation of the case. You probably won't want to express an opinion on that until you have heard all of the Government's proof.

The Commissioner: That is true.

[fol. 1316] Mr. Barnes: The other witness—

The Commissioner: If we should go out to the West Coast, I understand Donald Nelson is out there and we might hear from him, too, if that should be indicated.

Mr. Barnes: In that connection, Your Honor, I don't know what the plaintiffs' reactions have been from Mr. Nelson. We have been in touch with him, and find that Mr. Nelson has very little recollection of specific details on this, even after refreshing or attempting to refresh his recollection by referring him to certain documents. I would be very glad, if that situation eventuates, to arrange to have Mr. Nelson appear for such testimony as he may be able to give and such light as he may be able to throw on the matter. Frankly, after our correspondence and discussions with Mr. Nelson, we felt that probably he would be able to add very little to the case, but it may be that under actual examination and cross-examination he might be able to throw greater light on some of the issues.

The other witness, though, that we desire to call is Brehon Somervell. I have been in touch with General Somervell just this morning. He is at the present time with the Koppers Company in Pittsburgh. General Somervell states that it will not be possible for him to come to Washington any time this week. He will be available in Pittsburgh for the taking of his deposition, and I was going to request that we take his testimony in Pittsburgh on Friday.

[fol. 1317] The Commissioner: I think we ought to have General Somervell's testimony.

Mr. Barnes: Yes, sir.

I might say also that General Somervell advised me that he is leaving on a Florida vacation on Saturday, so Friday becomes about the only day. He indicated that Friday was as inconvenient to him as any day this week would be so he would be available on Friday.

Mr. Lester, will you come around, please?

RICHARD ALLEN LESTER, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Barnes:

Q. Will you state your full name, please?

A. Richard Allen Lester.

Q. Where are you employed at the present time?

A. At the present time I am Chairman of the Department of Economics and Social Institutions at Princeton University.

Q. Would you indicate briefly for us your academic background?

A. After graduating from Yale University in 1929, I came to Princeton in 1929. I received an A.M. Degree from Princeton in 1930, spent a year thereafter in Germany as a [fol. 1318] German-American exchange fellow. I then subsequently came back to Princeton and received a Ph.D. Degree there in 1936.

I was instructor in Princeton in 1931 to 1932, and from '34 to '38. In 1938, I went to the University of Washington as Assistant Professor, in Seattle, Washington, and was there two years as Assistant Professor.

In 1940, I went to Duke University as Assistant Professor, subsequently became Associate Professor, and was nominally connected with Duke University until the fall of 1945.

In the fall of 1945, I came to Princeton University as Associate Professor, and in 1948 I became a full Professor and Chairman of the Department at Princeton University.

Q. Has your work been in any special phase of economics?

A. It has been largely in the industrial relations phase.

Q. Was there a period during the war when you were connected with any Government agency?

A. Yes. Either in late May or early June, I became connected with the Office of Production Management, the Labor Division.

Q. What year was that?

A. In 1941, I am sorry.

At that time Mr. J. Douglas Brown, who was then Professor of Economics at Princeton University, brought me there. He had just assumed the headship of this Priorities [fol. 1319] Branch of the Labor Division of the Office of Production Management.

Q. Dean Brown was then head of the Institute of Industrial Relations at Princeton, is that right.

A. Yes, Industrial Relations Section.

Q. He is now——

A. Dean of the faculty and head of the Industrial Relations Section.

Q. How long did you continue in that employment, Mr. Lester?

A. I continued in that employment officially, according to my records, until the end of August, when I was transferred——

Q. Was that 1942?

A. At the end of August, when I was transferred to the Manpower Commission as of September 1.

I went back to Duke University in the fall of 1942, so I apparently officially was on the record of the War Manpower Commission only until late September, plus whatever accumulated leave I had. But actually, during part of the period of July and August, I was serving with the War Manpower Commission, although nominally I was on the staff of the War Production Board.

Q. What positions did you hold in the Priorities Section of the Labor Division?

A. I was shortly after coming there made Associate Chief of the Branch. When J. Douglas Brown left in late January [fol. 1320] or early February, I was made Acting Chief of the Priorities Branch of the Labor Division, as it was then called. Subsequently the title was changed to something like the Industry Consultant Branch, although that may be the title that was in the Manpower Commission. I became Acting Chief of that until I was transferred to the Manpower Commission, the War Manpower Commission, where I was Chief of the Industry Consultant Service, I think it was called, of the War Manpower Commission.

Q. What were the functions of the Priorities Section of the Labor Division of the Office of Production Management in the War Production Board?

A. Our functions were of this sort: They were primarily to devise programs in each of the industry branches where we had a consultant on our staff. A member of our staff was in each of the industry branches of the War Production Board. The purpose was to work out programs for the utilization of labor in those industries.

Another function was in order to be in contact with the working groups in those industries to see how the limitation orders would apply to them and to work out arrangements where the application of limitation orders to those industries would be most effective in terms of the utilization of the services of the working forces in those industries.

We did some other things. We certified distressed areas.

Q. What do you mean by "distressed areas"?

[fol. 1321] A. Areas that were affected by priorities on employment. When a limitation order or conservation order was put out closing down or partially closing down operations because of taking away materials from that particular type of operation, unless they could raise substitute materials it involved layoff of workers. We certified a number of areas: First, those that were affected by the aluminum curtailment order at Manitowoc, Wisconsin; then those that were affected by the copper order, such as the Talon Zipper firm in Meadville, Pennsylvania; and in the end, we even certified a whole industry, the washing machine industry. We took the initial action in connection with it. Upon certification, these firms in those areas were given special treatment in terms of the placement of war orders, that is, war orders didn't have to go to the lowest bidders in those cases. They could be given to these concerns which were affected adversely by limitation orders.

Our purpose there was to conserve, in so far as possible, the organization of those firms, and to get them as soon as possible into war work.

Q. Other than the certification of these distress areas, what other activities were carried on by your Section or Division?

A. We participated in all orders that were issued under priorities, and one of our staff, first J. Douglas Brown and [fol. 1322] later I myself, were on the Clearance Committee through which all priority orders nominally passed. We worked out programs for the concentration of production

in various industries, beginning with the stove and bicycle industry, in order to release manpower and to get the larger firms in those industries into war work; in order to release manpower so that the large firms or those most able to do war work would get into war work, and those that were least able to would have whatever civilian operations were still remaining.

Q. Does your phrase "concentration of industry" refer to geographic concentration, or some other kind of concentration?

A. First, concentration of civilian production. The concentration of civilian production was designed in a relatively small number of firms. Suppose we were to cut back civilian production 50 per cent. Then we would want to get that 50 per cent in the companies least able to get into war work, and also in order to utilize fully the capacity of those companies that remained or plants that remained in civilian production.

Q. Did you have any experience with the application of a 50 per cent, or any other percentage, reduction across the board to all plants in an industry?

A. You mean did any order provide for that?

Q. Yes.

[fol. 1323] A. Yes, I believe the automobile orders did.

Q. What effect did that have on the conversion of those facilities and manpower to war work?

A. The companies were reluctant in industry after industry to take on war orders that would interfere with their civilian work, because they were afraid of being influenced in their normal market relationships. I remember particularly the typewriter industry. We had a great deal of difficulty in getting the typewriter industry to move very fully into war work until they were completely closed down. Much the same was true to some extent of the washing machine industry, even though they were certified as a distressed industry and got a gunmount contract under that. They tended continually to be in with appeals to piece out materials for little rubber, little this metal, little that metal, in order to continue on in production.

I recall that in the end we even had to arrange with the labor people in industry to bring pressure on the War Production Board to shut down completely the washing machine

industry when the branch had proposed to continue it on beyond April, 1942.

Q. Do you recall having your attention directed to the situation in the non-ferrous mining industry at some point?

A. Yes. Our attention was directed to the non-ferrous mining industry for two reasons.

[fol. 1324] Mr. Rigney: If Your Honor please, I object. I think he has answered the question, and counsel should put another question. Otherwise, it is difficult to interpose objections.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Do you recall how that came about? Do you recall how your attention came to be directed to the non-ferrous mining industry?

A. Yes. The non-ferrous mining industry came to be called to my attention in three connections: One, there was a shortage of copper particularly, although zinc also. In the early days when I first came with the War Production Board —that was in July——

Q. Of 1942?

A. '41.

I recall, although I don't have the exact date of the meeting, Mr. Church, who was then head of Copper and Zinc, Mr. John Church, called a meeting in which the question was raised as to how much copper and zinc we would send to the Chinese Nationalists. I recall that we did not send more than a half or a third what the Chinese Nationalists requested because it was claimed by Mr. Church that we were so short of copper, and to some extent zinc.

Then we were preparing shortly thereafter a limitation order on the use of copper which would shut down the use of [fol. 1325] copper for a large variety of civilian types of production—jewelry and various other less essential uses in civilian operations.

Also, we were participating at the same time in conferences with the Office of—then called Office of Civilian Supply, which was really the price end of it, with respect to arrangements to increase copper production. We were very strongly pushing for a two-price system of copper produc-

tion under which the production over a certain quota would be paid for at a higher rate in order to induce increased output in the way of opening up mines or in the way of utilizing lower grade ores than would be utilized normally, say, under a 12-cent copper price. So we were proposing a two-price system so that copper above quota would be paid for at a price more than 12 cents.

Q. Was that the program that eventually became known as the premium price plan?

A. I think it was.

Q. Do you have any recollection as to when that went into effect?

A. I have here before me a notice of a meeting on July 16—the meeting was not on July 16. The memo was on July 16. The meeting was on July 17, apparently, of 1941—no, June, rather. There is something wrong here. There is a misstatement of dates. The memo is dated July 16, and it gives the [fol. 1326] agenda for an OPACS meeting with copper producers on June 17, 1941. I am sorry, the memo itself is mistaken. Down here below it says the meeting will be held in Room D, Washington Hotel, 10 o'clock, July 17. So it really was July 17.

At that meeting apparently the two-price system was in contemplation to some extent, because I notice from my notes——

Q. Were you present at the meeting?

A. I was present at the meeting, and took about 7 or 8 pages of notes.

I notice that Mr. Stannard, of Kennecott Copper, said he thought the two-price system or a multiple price system would be unfair, and I recall personally that Kennecott was strongly opposed to the two-price system.

Q. Do you have any recollection now as to how long after that the premium price plan went into effect?

A. I am sorry, I do not, but I think that it went into effect shortly after the time of Pearl Harbor, but that is simply a guess. I couldn't recall.

Q. Do you have any knowledge as to whether or not it applied to non-ferrous metals other than copper?

A. I don't recall whether it did apply to other metals than copper or not. I rather think it did, but most of my recollection is with respect to copper.

Q. Incidentally, you referred to work on the preparation of an order which would cut down the use of copper. Did [fol. 1327] that eventually come to be known as M9C? Do you recall?

A. Yes, I think that is the number, M9C. Yes, I am sure it is.

Q. Did your interest with the non-ferrous mining activities remain constant, or were there other matters which came to your attention?

A. A great many other matters. We had representatives of our branch in each of the industry branches of the War Production Board, so we were dealing with automobiles, consumer durable goods of various kinds, bicycles, all kinds of items. In each of the industry branches in the War Production Board, presumably, we had someone representing the Labor Division.

Q. Incidentally, who was the Labor Division man in the Mining Branch, as you recall?

A. Allen Buchanan initially, and then we subsequently employed Bela Low, who was a mining engineer, and Samuel Lipkowitz. I think those were the three who were in the Non-Ferrous Mining Branch. We did have also at one time someone in the Aluminum Branch, from the beginning actually. If you include aluminum with non-ferrous metals, then we had someone else in the Aluminum Branch.

Q. Were those three individuals whom you mentioned simultaneously or consecutively employed?

A. Consecutively employed. Buchanan was with us, I presume, I would guess, six months before Lipkowitz and [fol. 1328] Low were brought with us. I am not certain, but I think Lipkowitz was with us a little before Low, but I may be wrong on that.

Q. Do you remember at some point at approximately the middle of 1942, having your attention again directed to the situation in the non-ferrous mining industry?

A. Yes. At this meeting of OPM-OPACS in 1941, I notice that I took notes on the number of places, the number of mines claiming to have shortages.

Mr. Rigney: If Your Honor please, I think it is not responsive to the question.

The Commissioner: Sustained.

Mr. Rigney: And I move to strike.

The Commissioner: Granted.

The Witness: Do you want to ask the question again?

By Mr. Barnes:

Q. I was asking whether something occurred at approximately the middle of 1942 to again direct your attention to the non-ferrous mining operation.

A. Yes, apparently from the record that I have here——

Mr. Rigney: If Your Honor please, I think the witness should either testify from his own recollection or, if he needs to have it refreshed, indicate that he is refreshing his recollection and then testify. I object to his reading from memoranda that he has before him.

The Commissioner: Yes. The witness may use any notes [fol. 1329] that he made of any of these meetings of the department, but his testimony should be from his recollection and not what is on the paper that he is using to refresh it. By that I don't mean to limit your use of the paper, but your answer should not be a reading from the paper.

The Witness: All right.

By Mr. Barnes:

Q. May I ask as a preliminary question there, this: Have you, in preparation for testifying here, reviewed any documents?

A. Yes, I have reviewed the documents that I have here before me, being copies of memoranda that I have prepared.

Q. Where did they come from? I mean, were those from your own files?

A. Yes, they are my own files, and they are my own memoranda. We made a great many copies, and when I left I took some of the last carbon copies.

Q. Now, going back to the question that I had asked, do you recall whether or not something occurred about the middle of 1942 to again direct your attention to the non-ferrous mining industry?

A. There was a shortage of miners reported in the Bureau of Employment Security Reports, and we at that time in the Labor Division were at work on some kind of program to overcome that shortage. That was part of our

[fol. 1330] duty as members of the Labor Division in the War Production Board.

Q. Incidentally, what was the Bureau of Employment Security?

A. It was then the U. S. Employment Service. It consists of the employment services of the various States, which were early in the war, right after Pearl Harbor, brought under Federal jurisdiction.

Q. What action, if any, did you take when this matter came to your attention?

A. I prepared a series of memoranda for different officers in the War Production Board, and also in the War Manpower Commission.

Q. Let me show you this document, which has been marked Plaintiffs' Exhibit 130, and ask whether that is a copy of one of the memorandas to which you refer?

A. Yes, this is one of the memoranda to which I refer. It is not the first one, but it is one of them.

Q. I notice in the opening sentence of that there is reference to an earlier memorandum of July 7, which would have been 1942. Do you have in your possession a copy of that memorandum?

A. I do not. I have in my possession a copy of a memorandum of July 7 to General McSherry, but not a memorandum of July 7 to Mr. Alex Henderson.

Mr. Barnes: Will plaintiffs' counsel agree with me that [fol. 1331] a diligent search of Archives fails to reveal the memorandum of July 7?

Mr. Rigney: I don't think I can go that far. We didn't find it. That is about as far as I could go.

Mr. Barnes: You aren't going to say that Mr. Misslbeck wasn't diligent, are you?

By Mr. Barnes:

Q. Do you have any independent recollection at this time as to the nature of the memorandum that you sent to Mr. Henderson on July 7?

A. The only basis on which I can reconstruct it would be the memorandum to General McSherry as of the same date.

Q. Could I see the copy that you have of your memorandum to General McSherry?

(Document handed to Mr. Barnes.)

The Commissioner: Who was Alex Henderson?

By Mr. Barnes:

Q. Who was he?

A. He was assistant to Mr. Batt, but I am not sure of his exact title.

Q. Incidentally, who was General McSherry?

A. General McSherry was head of the Labor Supply Branch of the War Production Board initially, and then when the War Manpower Commission was set up, I am not sure of his exact title but he was sort of Executive Director [fol. 1332] or in charge of operations.

Mr. Rigney: Is this July, 1942, that you are speaking of?

Mr. Barnes: July 7, 1942.

By Mr. Barnes:

Q. Can you tell us why you wrote to him on July 7, 1942? Were you then in WPB or were you in the War Manpower Commission?

Mr. Rigney: I object to "why," if Your Honor please.

Mr. Barnes: All right. I realized the question was objectionable. I probably should have stricken it.

By Mr. Barnes:

Q. Were you, on July 7, in WPB or in the War Manpower Commission?

A. I was technically in WPB; but what happened, when the War Manpower Commission was set up, the Labor Supply Branch of the Labor Division of the War Production Board was shifted into the War Manpower Commission. So, so to speak, part of our functions were shifted into the War Manpower Commission. That is the reason I would have been writing to General McSherry, because he was in charge of the Labor Supply functions at that time, and had the U. S. Employment Service and other labor supply operations under his jurisdiction.

Mr. Barnes: Could this be marked Defendant's Exhibit 33 for identification?

[fol. 1333] (Said document was marked for identification as Defendant's Exhibit No. 33.)

By Mr. Barnes:

Q. Showing you Defendant's Exhibit 33 for identification, Mr. Lester, is that the copy of the memorandum to General McSherry that appeared in your own files, and of the enclosures that accompany it?

A. Yes, it is.

OFFERS IN EVIDENCE

Mr. Barnes: I offer this in evidence as Defendant's Exhibit 33.

(Plaintiffs' counsel examining document.)

Mr. Rigney: If Your Honor please, I object to the admission of Defendant's Exhibit 33 for identification upon several grounds. In the first place, it seems to me there has been no adequate showing that the original of this document can not be produced. The fact that we didn't find it in Archives wouldn't mean that it could not be found. The Government certainly has—and I know from having been on both sides of the table—better facilities than we have for getting documents out of Archives.

The Commissioner: Let us dispose of that objection first. We agreed at pre-trial that a copy was just as good as an original for the purposes of use as an exhibit.

Mr. Rigney: But I would assume that there would have to be some showing that the original could not be produced.

[fol. 1334] The Commissioner: Not at all.

Mr. Barnes: That was not the pre-trial understanding.

Mr. Rigney: My next objection is that these documents here appear to be drafts. For example, there is one marked "second draft, 7-8-42." Another one is marked "earlier draft." Another one is marked "latest draft." I don't think there is any showing that this is a final document at all. I therefore object most seriously to the admissibility of these papers, because they are merely drafts. There is no

showing that they ever went to General McSherry or in what form they went.

Mr. Barnes: We have the testimony of the witness.

The Commissioner: He didn't testify that any of them went to McSherry.

Mr. Rigney: That is my recollection of his testimony.

Mr. Barnes: Would you go back and read the last question I asked the witness before the objection by plaintiffs' counsel?

(The record was read by the reporter as requested.)

The Commissioner: He hasn't testified that the original was sent, or what was sent.

By Mr. Barnes:

Q. Do you know whether or not the original of this memorandum was sent to General McSherry?

A. I am sure that the original of the first page was, but I can not be sure that the enclosures that were sent to him [fol. 1335] were exactly as they are there. I assume that they were, but I can't be sure.

Mr. Barnes: I reoffer Defendant's Exhibit 33 for identification, Your Honor.

Mr. Rigney: My objection continues, Your Honor.

The Commissioner: Sustained.

Mr. Barnes: I ask that it be marked Defendant's Exhibit for identification, and make an offer of proof, Your Honor.

By Mr. Barnes:

Q. Had you prior to that date written a memorandum to General McSherry on the same subject?

A. Yes, I had.

Mr. Barnes: Will you mark this Defendant's Exhibit 34 for identification.

(Said document was marked for identification as Defendant's Exhibit No. 34.)

By Mr. Barnes:

Q. Let me show you Defendant's Exhibit 34 for identification and ask you what that is?

A. It is a memorandum to General Frank J. McSherry dated July 4, 1942, from me, on the subject: Critical Shortage of Labor in Non-Ferrous Metal Mining and Employment in Nearby Gold and Silver Mines.

Q. Do you know whether or not the original of that Memorandum went to General McSherry?

[fol. 1336] A. Yes, I am sure that it did.

Q. From what source did that copy come?

A. This came from my files.

Q. I notice that in the concluding paragraph there is reference to an attachment. What was the nature of that attachment?

Mr. Rigney: I object. We ought to know whether the attachment is available or not and is to be offered. I would object to his testifying to what the attachment was.

Mr. Barnes: I am not asking for the contents of it. I am asking him to describe it.

The Commissioner: Do you withdraw that objection?

Mr. Rigney: Yes.

The Witness: It was a report by the U. S. Employment Service for May on the non-ferrous metals mining labor condition. At least that was included within it. I am not sure that that was all it contained.

By Mr. Barnes:

Q. Do you have a copy of that report in your files?

A. I do not. I assume that you can get that easily enough.

Mr. Barnes: I now offer Defendant's Exhibit 34 for identification, and I wish to state, Your Honor, that the first time I saw this memorandum was this morning. We are going to make a search in Archives for the attachment, and [fol. 1337] I will consent that the document be stricken if we do not supply a copy of the enclosure.

(Plaintiffs' counsel examining document.)

Mr. Rigney: Your Honor, I shall not raise the objection that the attachment to the document is missing. I shall not stand on that objection, but I do not mean by that that on a later offer in a similar situation, I might not stand on that objection.

The Commissioner: It may be received.

(Said memorandum dated 7-4-42, from R. A. Lester to General McSherry, marked "Defendant's Exhibit No. 34," admitted in evidence and made a part of this record.)

The Commissioner: I want to be sure that all counsel have full opportunity to state their positions, if they have any objections.

Mr. Rigney: I am sorry, Your Honor. That is my fault.

(Here followed discussion off the record.)

The Commissioner: All right.

By Mr. Barnes:

Q. Mr. Lester, what were the sources of your information as to employment in the non-ferrous mining industries?

A. They were largely the reports of the U. S. Employment Service, although to some extent we had reports from the Mining Branch and at one time we sent out Mr. Low on a trip to the different mining operations. I don't remember [fol. 1338] how many he visited.

By Mr. Rigney.

Q. Do you know when it was, approximately?

A. It was before the gold closing order. I would say it was approximately in the spring of 1942. I would have to get the date on which he was employed. He went out shortly after he was employed.

Q. You mean went out on the trip?

A. That is right, went out on a trip to some mines in the West. I don't remember the date.

By Mr. Barnes:

Q. Could you describe for us what the U. S. Employment Service was, generally?

A. And still is?

Q. And still is.

A. The State Employment Services——

Mr. Rigney: If I may suggest that the witness confine it to 1942, immediately preceding that.

Mr. Barnes: Yes.

The Witness: The U. S. Employment Service in 1942 con-

sisted of a Washington headquarters and the State Employment Services with their local offices that had been incorporated by an Executive Order into the U. S. Employment Service. I don't know how many local offices they had, but I would assume they ran up into the thousands.

[fol. 1339] By Mr. Barnes:

Q. Can you recall now whether or not the U. S. Employment Service issued periodic reports on the employment situation in 1942?

A. Yes. They had what was known then, if I recall the number correctly, as Ex. S. 260, which was compiled this way: They went around to the different war plants and defense operations particularly, and asked them what their current labor shortages were, and what their prospective hirings were over the next, I guess it was six months. Then they made each month a report based largely on that, plus whatever other data they acquired through their local offices.

Q. Generally, referring back to the middle of 1942, what was the employment situation in defense plants in the United States?

A. What was the employment situation in the United States during the middle of 1942?

Q. Yes.

Mr. Rigney: I think that is objectionable, Your Honor. The question is so broad, I don't see how he can answer it unless he has personal knowledge of each one of these industries. I don't see how he could have.

The Commissioner: Overruled.

Mr. Barnett: Your Honor, the thought occurs to me that apparently he is testifying from these various reports sub-[fol. 1340] mitted by some agent; that he has no knowledge, but he is interpreting what he believes those reports are, if I understand the testimony. It would be objectionable from that point of view unless the proper foundation might be laid. He has not been there, and he doesn't have personal knowledge.

The Commissioner: Can you point out where the foundation is lacking?

Mr. Barnett: He said from the various reports, Your Honor, he assembled certain data. I submit that the best

evidence would be the reports themselves. He has acquired some knowledge through other means than his own. Unless the proper foundation is laid as to where he got that knowledge, it would appear that it might be objectionable.

The Commissioner: Overruled.

Mr. Barnes: Will you read the question back, please?

(The question was read by the reporter.)

The Witness: I would say, basing my information largely on reports that I did not make personally, that it was beginning to be tight in certain areas. Particularly by then, the priorities unemployment had begun to disappear, and our program of certification of distressed areas, if I recall correctly, didn't continue beyond the middle of 1942.

By Mr. Barnes:

Q. What other sources of information did you have, other than these reports that you just referred to?

[fol. 1341] A. We also got reports from the Bureau of Labor Statistics, and we also had advisory committees. There was an advisory committee from the industry which met occasionally in Washington. We also had reports from the labor groups in those industries, the different unions.

Q. By advisory committee, you refer to a group representing the concerns in that industry, is that correct?

A. That is correct.

Q. With respect to all of the information you obtained from these sources, did you take action upon that information?

A. I took action in the way of sending memoranda to Mr. Henderson, Alex Henderson, who was nominally over the Industry Branches, particularly the Mining Branch, and I also wrote these memoranda to General McSherry. We prepared what we considered to be a program for curtailment for the gold, and initially it included some silver operations.

Q. In preparing that program, who did you work with? You used the "we." Was that an editorial "we" or did it refer to specific people?

A. In the first place, in my branch the working out of a program of that sort would be done in collaboration with the three men that I mentioned, Allen Buchanan, Bela Low,

and Samuel Lipkowitz. Secondly, I was in consultation and presented before the staff of General McSherry early in July, a statement with respect to the closing of the gold [fol. 1342] mines and the need for non-ferrous metal miners in the West.

Q. Was that something you presented orally?

A. I presented that orally.

Q. Did you consult with any representatives of the War Manpower Commission in connection with the development of this initial program?

A. I do not recall that I did.

We also, I might add, were in consultation with a group in the War Department about this time in the Services of Supply, I believe it was called the Industrial Personnel Division, under James P. Mitchell.

Q. Let me show you this document, which has been marked Plaintiffs' Exhibit 76, and ask you if you recognize that?

A. Yes, I do.

Q. That refers to a committee. Can you tell us, first, if you know, who appointed that committee?

A. I think it was an ad hoc committee, which I believe was initially called together by Mr. Mitchell's group in the War Department. I think it had no official standing, as such.

By Mr. Rigney:

Q. Could I ask you what you mean by an ad hoc committee?

A. I mean they were just a group called together. I think that the people in Mr. Mitchell's division decided, after we had been working on this a little while—two of the people [fol. 1343] in Mr. Mitchell's division, Mr. Harbison and Mr. Orr, I believe the other fellow's name is, Frederick Harbison and Orr, were initially in my division, in my branch, and subsequently, sometime in the spring of 1942, they went over into the War Department. They were active in the War Department in connection with the same sort of thing. They were aware of the operations that we had been carrying on in the Labor Division, and it is my recollection that someone in the War Department took the initiative in calling this group together.

By Mr. Barnes:

Q. Did you participate as a member of that group or committee?

A. Yes, I did.

Q. Do you recall who else participated in that?

A. I recall some of them, but I wouldn't recall all of them.

Q. Would you tell us, so far as you can, if you recall at the present time, who the members were?

A. I am sure that they included Frederick Harbison, whom I have mentioned, and undoubtedly included Allen Buchanan, but I could not swear that it did. I can not be positive.

Q. Do you recall whether or not there was any representative there of the War Manpower Commission?

A. No, I don't. I don't recall. I would presume that I [fol. 1344] would represent the War Manpower Commission.

Q. Do you recall whether or not there was anybody there representing Selective Service?

A. No, I do not. I know that the group was picked to be widely representative of the various branches in the Government that would be interested in the problem. They tried to get someone from the War Labor Board, from Selective Service, from the various branches of the service, from what we called War Production Committees. There was a man from Publicity whose name I don't recall, of the War Department or the Navy Department.

The Commissioner: We will recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearings.)

[fol. 1345] By Mr. Barnes:

Q. Mr. Lester, going back to this committee report, Plaintiffs' Exhibit 76, do you recall what was done physically with that document? I mean, what distribution was made?

A. It was distributed at least to all those who participated in the meeting, and I presume much more widely, since it was mimeographed.

Q. Did you call it to the attention of any of your superiors, do you recall?

A. Not that I recall.

Q. And whom did you report to, directly?

A. At this time, if I recall, I reported directly to Wendell Lund, who had succeeded Mr. Sidney Hillman as head of the Labor Division, or whatever it was called, at that time.

Q. What was the hierarchy above Mr. Lund?

A. Mr. Lund was under Mr. Nelson.

Q. Donald Nelson?

A. I would assume so, yes. I think there were four or five divisions, and he was head of the Labor Division.

Q. Now, in your capacity as a representative of the War Manpower Commission, do you recall whether or not you called the recommendations of this committee to the attention of any of your superiors?

A. I do not recall that I did.

Q. Whom did you report to in the War Manpower Commission?

[fol. 1346] A. General McSherry.

Q. Did this committee meet on more than one occasion, to your recollection?

A. My recollection is that it did not meet as a group more than once, but that there were subsequent meetings of parts of the group, for example, the part that involved the working out of morale, that group met separately, as I recall it. We all were putting pressure on the War Labor Board for an increase in the wage rates in the copper mines, and I know that I was active there. I don't know the material, but I know I was active in connection with pressuring for a wage increase in the War Labor Board.

Q. Did that occur before or after the issuance of this document, Plaintiffs' Exhibit 76, do you recall that?

A. I would not know. It was sort of a continuing matter. I would suspect that it was both before and after.

Mr. Rigney: I am not clear, now. You mean the pressuring of the War Labor Board?

Mr. Barnes: Yes, the further activities.

The Witness: Yes, I am sure that we are acting before, and probably we did after.

By Mr. Barnes:

Q. I notice in here on page 2 of this document a reference to selective service deferments for mining occupations. Do

you know what action, if any, was taken with respect to that?

[fol. 1347] Mr. Rigney: I want to say that I think the witness could just answer that yes or no, and then only testify if he has personal knowledge about selective service. I have not seen any showing yet that he would have.

The Commissioner: Read that question, please.

(The pending question was read by the reporter.)

The Witness: I did not participate personally in any action.

The Commissioner: All right.

The Witness: I do know that General McSherry and others were active in that capacity.

Mr. Rigney: We do not want any hearsay. That is the reason for my objection.

Mr. Barnes: I explained to the witness and gave him a brief dissertation on the hearsay rule this morning.

The Witness: Perhaps too brief.

By Mr. Barnes:

Q. Mr. Lester, going back to this meeting you refer to which took place in July of 1941, you had some notes that you yourself had made at that meeting. Do you recall whether or not there was any implication at that meeting of a shortage of men in the non-ferrous mining industry?

A. Yes. A number of companies reported a shortage at that time.

Q. Were there representatives of individual companies [fol. 1348] present at that time?

A. Yes. They were the ones that reported it, the representatives of individual companies. It was a meeting of the representatives of the individual companies with the people in the Price Administration and the people in the War Production Board.

Q. In your memorandum of July 31 to Mr. Henderson, Plaintiffs' Exhibit No. 130——

A. I have a copy.

Q. ——you made reference to a proposed limitation order on gold mining. What did you mean by the phrase "limitation order"?

A. What I meant was the same kind of limitation orders that we had been putting on various industries such as the automobile industry, the refrigerator, the washing machine, and so on, and various metal-using industries that had a civilian outlet. And prior to the date when we finally closed them down in each instance—and some of them we did not close down completely like the agricultural implement industry—orders were put out restricting their production on a certain percentage of some base period, and that was what I had in mind.

Q. Were you aware at the time of the preference ratings that were accorded industry for maintenance, repair and operating supplies?

A. Yes. In a general way I was aware that the gold and [fol. 1349] silver mines were receiving certain amounts of material for maintenance, repair and operating supplies.

Q. Can you tell us whether or not you gave consideration to the possibility that an adequate control could be imposed by that priority method?

Mr. Rigney: Now, if your Honor please, I do not think this witness is competent to testify on that. His functions were in the Labor and Production Division. He has testified the control of materials were in an entirely different branch of the WPB. That was not within the orbit of his office.

The Commissioner: Sustained.

By Mr. Barnes:

Q. What would have been the effect on the manpower in the gold mines if all priority assistance had been withdrawn?

Mr. Rigney: Don't answer that. Objection if your Honor please. It is hypothetical and speculative, what would be the effect. I object to the form of the question.

There is no basis [illegible], no foundation in the testimony of this witness to show that he is even competent to answer the question if it were otherwise unobjectionable.

The Commissioner: Sustained.

Mr. Barnes: The objection was based on two grounds. Are you sustaining it on the first ground stated or on the form of the question? May I ask you that?

The Commissioner: Well, I had in mind primarily the [fols. 1350-1351] ground relating to the failure to lay the proper foundation. The witness does not have the necessary information to properly answer the question.

[fol. 1352] By Mr. Barnes:

Q. Mr. Lester, did the Labor Division of the War Production Board give any consideration at all, in making its studies and recommendations, to usages of critical materials by industries?

A. Yes, it did. We were repeatedly attempting, in the various industry branches, to prevent further use of critical materials to keep civilian production going. In the appeals that were made, for example, under the M-9-c order we were objecting to the continuing use of copper on appeal to permit civilian production of refrigerators, washing machines, and so on.

Q. Was your division represented on the so-called appeals board?

A. Yes, we were.

Q. Who was the representative on that; do you recall?

A. At first I was; subsequently, I am not certain. But I remember being active, very active, right after Pearl Harbor in insisting that too many appeals were being granted to eke out the civilian production of different items.

[fol. 1353] Q. Did you, in connection with your studies of gold mining, give any consideration to the use of critical materials by gold mines?

A. Yes, we did.

Q. And what information did you have; do you recall?

A. I had the information that was supplied to me by people in the branch as to the extent to which materials were being used by gold mines for repair, maintenance, and operating supplies, and it also came, as I recall, before the Clearance Committee as well.

Q. Did you at any time, in discussing the possibility of a limitation order affecting the gold mines, discuss the question of the use by the gold mines of critical materials?

A. Yes.

Q. Can you tell us when that occurred?

Mr. Rigney: And with whom.

By Mr. Barnes:

Q. And with whom. I was taking one point at a time.

A. It occurs in this exhibit that I have just testified with respect to.

Q. Which one is that?

A. The memorandum to Mr. Henderson dated July 31, 1942.

Q. That is Plaintiffs' Exhibit 130.

A. The second part of the first paragraph says: "To save critical materials for which priorities are now being granted for maintenance, repair and operating supplies."

[fol. 1354] That was one of the bases upon which the Curtailment Order was requested, the other basis being in order to release labor and facilities for non-ferrous metal mining.

The Commissioner: What was the date of that?

The Witness: July 31.

By Mr. Barnes:

Q. 1942?

A. 1942.

Q. I think you mentioned that you had an oral discussion of this with the staff of the War Manpower Commission at some point in July, 1942. Do you have the notes that you used for that oral presentation?

A. Yes, I have the notes.

Q. Looking at those to refresh your recollection, can you tell us whether or not you made any reference to the use of critical materials in that?

A. Yes.

Q. And directing your attention to Defendant's Exhibit 33 for identification, and looking at that to refresh your recollection, can you tell me whether or not you made any reference to the use of critical materials at that time?

A. I would have to refer to the document to make sure. (Witness refers to document.)

Yes.

Q. What contacts, if any, did you have with the Limita-

[fol. 1355] tion Order on gold mining, the proposed limitation order on gold mining, after about July 31, 1942, the date of Plaintiffs' Exhibit No. 130?

Mr. Rigney: I am sorry, I did not hear the first part of that and I would like to have the question read back.

(The pending question was read by the reporter.)

Mr. Rigney: All right.

The Witness: So far as I know, I never participated in any drafting of any order. I met with various people with respect to it, but I never participated in any drafting of it.

By Mr. Barnes:

Q. Whom did you meet with, to the best of your recollection?

A. I have a memorandum here that indicates that I met with the manager of the Homestake Mining Company.

Q. Was that Mr. Guy Bjorge?

A. That is correct. The memorandum is dated August 25, 1942.

Q. What was the subject matter of that discussion, if you can tell us?

A. In general, the question was what would happen if the gold mines were closed down, and what the company was already doing in the way of utilizing some of its people on gold operations in other operations of the company, and the possibility that it could do more if it could acquire some other properties.

[fol. 1356] Q. What action, if any, did you take following that discussion with Mr. Bjorge?

A. I sent a memorandum to General McSherry with respect to it.

Q. Did you make any recommendations of any type?

Mr. Rigney: Could I inquire if that memorandum is going to be produced, the memo to General McSherry.

Mr. Barnes: The witness has been using it to refresh his recollection, but I can put it into evidence if counsel desires it.

Mr. Rigney: I inquired whether it was here so we can see it.

Mr. Barnes: There are two, so I will separate them. You can see this too, by the way.

(Document handed to Mr. Rigney.)

The Commissioner: There is a question pending, is there not?

Mr. Barnes: I think there was, sir.

The Commissioner: Will you read it, please?

(The pending question was read by the reporter.)

The Witness: I did not make any recommendations. Attached to this memorandum there is a summary of data on curtailment program for gold mining which apparently summarized for General McSherry the action until that time that had been taken.

Q. Is that something you prepared?

[fol. 1357] By Mr. Barnes:

A. Yes, I prepared it.

Mr. Barnes: Will you mark this Defendant's Exhibit 35 for identification?

(Said document was marked for identification as Defendant's Exhibit No. 35.)

By Mr. Barnes:

Q. And this document, which is now marked Defendant's Exhibit 35 for identification, was the copy of that memorandum to which you just referred, is that correct?

A. It was attached in my file to the memorandum to General McSherry, and it summarizes the situation with respect to the action that had been taken by various groups up until that time.

Mr. Barnes: I offer this in evidence, your Honor, as Defendant's Exhibit 35.

By Mr. Rigney.

Q. This memo, Mr. Lester, which has been marked Defendant's Exhibit 35 for identification, is this a copy of the memo which you sent to General McSherry? I mean, did the original of this go to General McSherry?

A. I haven't the positive proof that it did. All I know is that in my file it was attached to this memo that I did send to General McSherry. Whether it actually in practice [fol. 1358] went to General McSherry, I assume that it did,

but I have no memory. There is no reference here to that document.

Mr. Rigney: I have no objection to the admissibility of Defendant's Exhibit 35 for identification, but I think both papers should go in, the memo of August 25 to which it was attached.

Mr. Barnes: That is entirely satisfactory, and I am willing to expand my offer and put the two together as they were originally and offer the two documents together as Defendant's Exhibit 35.

Mr. Rigney: That is splendid.

The Commissioner: They may be received in evidence.

(Said memo, dated August 25, from Mr. Lester to General McSherry with attached data sheet, marked "Defendant's Exhibit No. 35," admitted in evidence and made a part of this record.)

By Mr. Barnes:

Q. Did you have any contact with operations under Limitation Order L-208 after it was issued on October 8, 1942?

A. No, I had no contact. I left the Government before that order was issued. I mean, I left the War Production Board and the Manpower Commission. I subsequently was connected with the War Labor Board.

Q. Referring now to Defendant's Exhibit 35 for a moment, I notice that there is a statement in here that it is [fol. 1359] estimated that there are between 8,000 and 10,000 persons working in gold mining and milling operations in the United States at the present time. Can you tell us the basis of that statement, if you recall?

A. I cannot be certain as to the basis of it. I would assume that it came from the statistics of the U.S.E.S., the United States Employment Service, and the statistics of the Bureau of Labor Statistics.

By Mr. Rigney:

Q. Mr. Lester, I do not mean to be captious, but when you say you assume that it came, do you mean by that that it is your best recollection that it came, or that it is a pure assumption?

A. We got information from both of those groups. They were a steady source of information. Now, it may be that it came from other sources. It may be that it came from the Mining Branch itself. But I simply say that we normally got steady information from both of those sources. We were in contact with both of those sources.

Mr. Rigney: Thank you.

By Mr. Barnes:

Q. You have listed your sources of information as being those two organizations, the branch concerned, which in this case would be the Mining Branch, and what other sources would you have?

[fol. 1360] A. I couldn't answer you offhand, but I think that there is in one of these earlier memoranda a statement of what the source of some of the figures was.

Mr. Barnes: That is all I have of Mr. Lester.

Cross-examination.

By Mr. Rigney:

Q. As I understand it, Mr. Lester, there was a serious copper shortage by the summer of 1941; is that correct?

A. That is correct.

Q. So that whatever shortage of copper existed in the summer or autumn of 1942 was not a situation which had suddenly come into existence, was it?

A. No, it did not suddenly come into existence.

Q. Now, would you explain to me a little more about this program for the concentration of production that you spoke of on your direct examination? When was that inaugurated or instituted?

A. Could I just refer to my documents here?

Q. Surely, anything you have there.

A. I thought I had a document that would show that. I haven't the material to answer that question specifically, but that would be done in preparation in my branch right after Pearl Harbor.

Q. What industries were you considering at that time?

A. The people in my branch were active, first, in the stove

[fol. 1361] and bicycle industries, in which a concentration order was issued. We were also active in the agricultural equipment industry.

Q. The stove and bicycle industries were the first that were affected, is that right?

A. That is right, in terms of orders.

Q. Yes. And could you tell us now approximately when the order with respect to the stove industry was issued? I do not speak of precise dates now.

A. It was issued in the spring of 1942.

Mr. Barnes: I may be able to help you. I have an index here that gives some of that information, if you want it, Mr. Rigney.

Mr. Rigney: If it will assist the witness I have no objection to his using it.

By Mr. Barnes:

Q. Let me hand you a copy of Priorities for June, 1943. You will find that an index of priority orders, and you may be able to place it. The table of contents is in the front, incidentally.

A. Can you tell me how to use this?

Q. Yes.

A. L-79 is one of the orders. Apparently it was first issued in June of 1942.

Q. Bicycles or L-52?

[fol. 1362] A. L-52. Bicycles came first. I do recall that bicycles came first. That was issued in March of 1942.

By Mr. Rigney:

Q. In the bicycle industry?

A. Yes, March 12.

Q. Could you tell us briefly the extent of that order, what that order provided?

A. Roughly, what it provided was this: there may have been, let us say, seven producers of bicycles. It provided that the bicycle production would be concentrated in, let us say, the plants of three producers. Also, in addition, it provided for certain standard kinds of bicycles.

Q. That was to save critical materials that went into the manufacture of those bicycles?

A. The second part of it was to save critical materials and to cut down on the varieties so that you would save on all kinds of items, machine tools, and what not. But the first part of it was in order to release facilities and manpower fully in some areas. We concentrated the production in the areas where the manpower was most available. We took it out of the critical areas. We took it out of Dayton, as I recall it, and Springfield, Massachusetts, and concentrated it in areas where we thought the labor supply was much more plentiful.

Q. And those bicycle manufacturers who were relieved of their production activities as a result of this order were [fol. 1363] given war contracts, is that right?

A. They got war contracts, but we did not certify them. We got them in the normal procedure.

Q. Yes.

A. That is right.

Q. Now, the stove industry, can you tell us approximately when that was?

A. Apparently that was in May of 1942.

Q. 1942. And how effective would you say the concentration was in the stove industry percentage-wise, if you can answer it that way?

A. Well, there were a large number of producers, and, as I recall, we tried to take some of the production out of California where the aircraft industry and the other industries were badly in need of manpower. But I cannot answer that in terms of the percentage of curtailment. It may have been about 50%.

Q. Would you say that your concentration program, insofar as the stove industry was concerned, was a success? Did you consider it a success or not?

A. We considered it successful, but we did not make any real study of it.

Q. Others considered it less successful, I mean, there was a considerable difference of opinion, wasn't there?

A. There was some difference of opinion, before the order [fol. 1364] went into effect. I was not in contact with it much after it went into effect.

Q. There again in stoves they embodied in the end product of a stove foundry or factory, or whatever you may call it, critical materials, didn't they?

A. That is right.

Q. What about these stove manufacturers whose production was stopped? They were given contracts, war contracts, weren't they?

A. We stopped them in part in terms of whether they would have facilities that were available for war contracts. That is, those that would be likely to have the most facilities were likely to be the ones that were to be stopped. That was one of the considerations, the other consideration was man power.

Q. You also considered this concentration of production with respect to farm machinery, didn't you?

A. That is correct.

Q. And you did not get very far with that, insofar as putting it into effect, is that right?

A. In the end it was not put into effect.

Q. Something like this was done in England, wasn't it?

A. That is correct.

Q. And was the practice which was followed in England in this regard something of a model for you people here?

A. That is correct. We studied the English experience [fol. 1365] and had reports on the English experience.

Q. Now, is it not a fact that in England, when this program was put into effect, those people who were put out of business by it were paid compensation by the government?

A. You mean the producers?

Q. Yes.

A. Not to my recollection. The issue of compensation did come up in some of our discussions.

Q. I am confining it now to England, if you know.

A. Not that I know of.

Q. Well, is it your testimony that to your best knowledge no compensation was paid under the program in England, or are you just lacking knowledge on the subject?

A. I just lack complete knowledge on the subject. I think, if I may answer that, there was some pooling of the resources, some pooling of the funds, but I am not certain.

Q. Do you mean that you are completely lacking in knowledge of the question of compensation in England?

A. That is right, at the present time.

Q. Now, the question of compensation received considera-

tion within the War Production Board in this program that you have been testifying about, didn't it?

A. That is correct.

Q. And isn't it a fact that it was on the question of whether or not compensation should be paid that the pro-
[fol. 1366] gram floundered and eventually died?

A. No.

The Commissioner: Which program?

By Mr. Rigney:

Q. The concentration program in the United States.

A. No. That is not correct, according to my knowledge It floundered because we picked the—the third one was the agricultural implement industry, and the agricultural implement industry was strong politically, because of the contact with the farmers through their agents, and the large companies were the ones that objected to it, the six large companies. They were able to defeat the program, partly because—also, it was accompanied by a very sharp cut, too sharp a cut actually, in the production of farm equipment.

Mr. Rigney: Now, may this be marked the next plaintiffs' exhibit for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 217.)

By Mr. Rigney:

Q. Now, Mr. Lester, let me show you Plaintiffs' Exhibit 217 for identification, being a report by the Historical Reports Agency on the concentration of civilian production by the War Production Board, September, 1941 to April, 1943, and I invite your attention to the third paragraph on page 125 which reads:

"It was in the matter of compensation, the principal
[fol. 1367] specific factor in the failure of the concentration program in the United States, that American respect for competitive business forced consideration of the most difficult and, in the end, unanswerable questions."

Would you consider that and tell us now if it was not the question of compensation or a consideration of it within the WPB that caused the end of the program?

A. No. According to my personal information and knowledge, the only time that compensation came up was within my own division with Mr. Sidney Hillman; it really came up forcefully. And in the meetings that I had in the Agricultural Equipment Branch it was really the other thing.

Q. When would you say your plans or program with regard to concentration had come to an end, for all practical purposes?

A. It came to an end, for all practical purposes, when the order was defeated, so to speak, within the War Production Board for agricultural equipment.

Q. That was in the summer of 1942?

A. That was in the summer of 1942. It was after the bicycle and stove orders.

Q. Whatever orders were issued with respect to the automobile industry had nothing to do with this program of concentration of production, did they?

A. No; that was separate.

Q. Now, I want to read a statement to you from an ex- [fol. 1368] hibit that has been received in evidence, and ask you whether or not that this was a fair statement of the situation which existed in the summer of 1942 with respect to copper mines: "The present critical situation developed when copper, lead, zinc, mercury, and other miners left their jobs and went to the west coast on shipbuilding and on aircraft jobs and to the mountain areas in new war industries work."

Would you say that that was a fair statement of the principal reasons for the shortage of copper miners in the summer of 1942?

A. It was a good part of the reason, but not, I would say, anything like the whole reason.

Q. I was reading to you from Plaintiffs' Exhibit 16 in evidence.

Well, the shipbuilding and aircraft industries were paying substantially higher wages than the copper mines; isn't that true?

A. I am not certain at that time. We got the copper mine wages raised by the War Labor Board at about that time.

Q. When did that raise go into effect?

A. I cannot testify as to the exact date.

Q. Could you by season and year say——

A. It was sometime around the middle of 1942.

Q. Wasn't it into the autumn, about the time of the issuance of L-208? That raise came about, did it, as a result [fol. 1369] of the War Labor Board action?

A. Yes.

Q. Is that the item you refer to?

A. That is right. But in the memorandum, which is Exhibit—whatever it is—the July 8 interdepartmental committee——

Q. Yes, the Services of Supply program.

A. Yes, Services of Supply program. — reference is made to this very case, and I assume that action was taken on that by the War Labor Board shortly thereafter.

Q. In any event, you would agree that it was either in the summer or autumn of 1942?

A. That is right.

Q. How much was the increase?

A. I cannot tell you.

Q. A dollar a day, wasn't it?

A. I think it was.

Q. And after the increase had gone into effect, isn't it a fact that wages being paid in the aircraft and shipbuilding industries and other war industries were substantially higher than in the copper mines?

A. To answer that question is difficult for two reasons: one is you have a question of how much overtime they were getting in each industry, because it is the take-home pay that may be important; another factor that makes it very [fol. 1370] difficult to answer that, is it depends on what level of classification the fellow went into, the job in aircraft or shipbuilding. If he went in at the bottom, no; but if he became considered quite skilled, it might be. I don't think you can make any direct generalization. I think it is very difficult to compare wages in the copper mines for comparable work with wages in the other two industries, on an hourly earnings basis.

Q. Take the lowest weekly wages, from your knowledge, that were being paid in the aircraft and shipbuilding industries and tell me if it is not a fact that such wages were substantially higher than the wages being paid the copper miners in the summer of 1942.

A. I could not testify to it. I would have to see the figures.

Q. Now, this continuing deficiency in the number of copper miners was going on all during 1942, was it not?

A. As far as in the War Production Board and War Manpower Commission, during that period.

Q. Up to October, say?

A. Yes, up until October.

Q. Where were they going to? Did your studies disclose anything on that?

A. Well, there were two or three things that our studies indicated. In the first place, the intake into the copper mines [fol. 1371] of people was quite high. There was a very high turnover. So that they were moving in and out. Sometimes they were moving to the west coast, and sometimes during the summer they would move into agriculture, when it was hot, particularly in the deep mines like around Butte. Some of it was moving from one mine to another. And shortly before I left we put in a program for both the non-ferrous metals and the lumber industry to attempt to freeze them in the occupations that they were in. That was done partly because of this terrific turnover. I don't think we know really the extent to which they went to the west coast, and some of them may have come back, the extent to which they were moving into agriculture, and the extent to which they were moving from employment out of employment temporarily and back into employment. To some extent, they were still going into the armed services, either on their own volition or by drafting.

Q. Did your studies disclose that they were leaving the copper mines in order to better their conditions of employment, regardless of where they were going in other work?

A. I don't think that I personally had enough knowledge of various reasons why they were leaving. I have some speculation on that, but it is only speculation.

Q. What is your best judgment now of the reasons why they were leaving the copper mines in such large numbers in 1942?

[fol. 1372] A. I think the attraction of finished military equipment, whether it was aircraft or possibly even shipbuilding, had much more of an attraction than working on raw materials. It seemed closer to the direct war effort. Secondly, I think there was a desire for people, if they could, to move to the west coast from mountain areas. I lived

on the west coast and I know there is quite a desire to get on the west coast in the mountain areas. There may be a number of other reasons of that sort which were tied up in it.

Q. Well, you would not exclude from it the appeal of the mighty dollar, would you?

A. No, but I think some of them went there to the west coast, I think we had evidence that some of them went to the west coast and earned quite a bit and then came back, partly because of the problem of maintaining families on the west coast, and other problems, housing and what-not.

Q. Did your studies cover the living conditions in the areas of the copper mines? Did you look into that?

A. I personally didn't. Maybe some of the U. S. Employment Service studies did. There were proposals for paying transportation of people to the copper mines, there were proposals for arranging for housing, and what-not.

Q. Housing conditions were not good, were they, in the principal copper areas, taking Butte for example?

A. No, not particularly.

[fol. 1373] Q. They were not good, you would agree with that, would you not?

A. Yes, I would agree with that.

Q. Would you also agree that the Anaconda mine at Butte, for example, is considered in the mining industry a hot mine in which to work?

A. That is absolutely correct.

Q. Now, you have referred to Mr. Buchanan and Mr. Lipkowitz as being in your division, I believe.

A. And Mr. Low.

Q. And Mr. Low. Mr. Buchanan came from the Tariff Commission, is that correct?

A. That is correct. He came there first.

Q. About when was that?

A. Donald Wallace, who went——

Q. Excuse me, just let me say this. When I say "about when" I am not asking you to give it precisely.

A. It was probably in the middle or late 1941. Let me explain it. Dean Brown went to the War Production Board. Isador Lubin was in the position that Dean Brown subsequently took. Mr. Lubin had a number of people from the Bureau of Labor Statistics and others in these branches. We either took over those people or they went elsewhere.

And Donald H. Wallace, who is now on the faculty at Princeton University, was the one Lubin had in non-ferrous metals. And when OPACS was established, or even before that, [fol. 1374] Wallace left. So we were looking around almost from the time I got there, or shortly after I got there, for somebody to fill Wallace's position. So I assume Buchanan was brought in by the fall of 1941.

Q. And he subsequently brought Mr. Lipkowitz over, is that correct?

A. Yes.

Q. They had served together in the Tariff Commission?

A. That is correct.

Q. When would you say Mr. Lipkowitz came with you?

A. To the best of my recollection, it was probably after Pearl Harbor.

Q. You have referred in your direct testimony to your interest in saving critical materials. You do not have any doubt, do you, that there was power in the War Production Board to cut gold mines off completely from obtaining critical materials?

A. The power existed.

Q. So that it was not necessary to issue a shut-down order in order to prevent gold mines from obtaining critical materials, was it? May I have a yes or no on that?

A. The power existed to cut off priority orders for them, that is correct. But as we knew from other experience, people were getting copper without priority orders, or even in violation of priority orders.

[fol. 1375] Q. You are not in possession of any information to the effect that Homestake was getting any?

A. No, I am not charging that to the gold mines.

Q. I am just asking the question.

A. No, I have no knowledge as far as gold mines are concerned, but I do have knowledge of certain other civilian industries.

Q. Other than gold mining?

A. That is right.

Q. Now, would you look, please, at Plaintiffs' Exhibit 130 in evidence, which is this memorandum of July 31, 1942. You did not write that yourself, did you?

A. Yes, I dictated that myself.

Q. Oh, you did?

A. Yes sir.

Q. Do you have a clear recollection of that now?

A. Yes. And here were the people that it was sent to (indicating).

Q. I see.

A. I am sure if my name was on it I dictated it.

By Mr. Barnes:

Q. You have your own copy that shows your name on the bottom as the dictator?

A. Yes, and the names of the people to whom it was sent.

By Mr. Rigney:

[fol. 1376] Q. Do you remember me interviewing you in your office on December 19?

A. Yes.

Q. Do you recall I showed you at that time a copy of that memorandum?

A. I think you did.

Q. And I don't mean to infer anything by my question now other than the fact, and isn't it your recollection, that you told me at that time that you did not write this memo but that either Allen Buchanan or Samuel Lipkowitz did?

A. That may be that I told you that, I wouldn't deny it, but essentially what happened is they prepared the material, and even prepared a document off of it, but I would take that document and prepare it in my own way. All of the documents that have my name on, in other words, I am pretty nearly positive I prepared. That does not mean that I started from scratch on it. I may have used paragraphs from something they prepared.

Q. In other words, it was a staff operation?

A. That is right.

Q. And Mr. Buchanan and Mr. Lipkowitz would furnish you basic material from which you would write the finished product?

A. That is correct, absolutely correct.

Q. Do you remember from where you got the data that you refer to in Exhibit 130?

[fol. 1377] A. You mean all of these statistics?

Q. Yes, specifically on page 2, Mr. Lester, at the bottom, or toward the bottom of the page.

A. These all came from the staff. Now, where they got them, I would not be certain.

Q. The paragraph that I invited your attention to at the bottom of the page, page 2, says that it is estimated that 221 mines that will be subject to curtailment employed between 15,000 and 20,000 men in the year 1941. The suggested basis of curtailment would probably freeze initially between 4,000 and 5,000 men.

Would you recall where you got that data? Was that from Mr. Lipkowitz perhaps?

A. No, undoubtedly I got it from Buchanan and Lipkowitz, but undoubtedly they got it from somewhere else, other sources that I mentioned such as the Bureau of Labor Statistics and the U. S. Employment Service. I think also I might add the publications of the Bureau of Mines. As a matter of fact, they went over to the Bureau of Mines to get material.

Q. Mr. Lipkowitz and Mr. Buchanan?

A. Yes. They were in contact with some people in the Bureau of Mines.

Q. When was that? Do you recall, approximately?

A. No.

Q. The summer of 1942?

[fols. 1378-1381] A. I cannot recall the exact date, but it was certainly in preparation for these memoranda.

Q. Now, you refer in that memoradum, in your first paragraph of the memoradum, to "I explained the need for a curtailment order in gold mining in order to release labor and facilities for non-ferrous metal mining and to save critical materials, for which priorities are now being granted for maintenance, repair, and operating supplies."

I would like to show you Defendant's Exhibit 35, which is the memorandum that I believe you said you sent to General McSherry, and ask you to look at that memorandum that you sent to General McSherry and tell us if anywhere in there you refer to the desire for saving critical materials by the issuance of this order (handing).

A. No, I did not. Normally, I would not.

Mr. Rigney: You answered it, sir.

[fol. 1382] Cross-examination (continued).

By Mr. Rigney:

Q. Mr. Lester, there has been received in evidence here Plaintiffs' Exhibit No. 33, which is a letter of September 1, 1942, from Donald M. Nelson to Senator McCarran, in response to a letter which Senator McCarran had written to Mr. Nelson. In this letter appears the statement, to which I direct your attention now, in paragraph 4:

"We quite agree that no legal power exists today by which workers may be forced to transfer to other mines. This accentuates the mine labor problem which faces us today."

I should like to ask you if you agree that that was the situation at the time this letter was written on September 1, 1942?

A. Yes, I would agree that there was no power on the part of the Government to force people to move from one job to another job.

Q. It was purely a voluntary proposition with them as to whether or not they wanted to go?

A. That is correct, with one exception, that those who were released from the Armed Services were required to stay where they were released; under the freezing orders, but there was no power on the part of the Government, as far as I know, to force a man to move from one job to another job.

[fol. 1383] Q. My question was only about civilians, not about people in the Army.

A. That is right.

Q. So, isn't it the fact that the extent of the power possessed by the War Manpower Commission was simply a power to request or to plead or to urge, but they couldn't order or compel?

A. That is correct.

Q. In your studies which you made on this problem in the summer of 1941 or at any time during the year 1941, did you or any of your staff go to any of the gold mines and talk to any of the gold miners about the proposition of transferring to the copper mines?

A. To the best of my knowledge, we did not.

Q. From your own experience and background, you have no special knowledge of the mining industry, have you?

A. Not any special knowledge. I was never an employee, for example, of the mining industry.

Q. If any of the gold miners had been induced to move from their place of residence and employment into copper mines for employment, they would presumably be taking the places of former copper miners who had left the copper mines for whatever reason?

A. Not necessarily. Sometimes it was a question of the expansion of the copper mines.

[fol. 1384] Q. As far as the labor situation in the copper mines, wasn't it a constantly leaking bucket, so to speak?

A. To some extent, but some new copper needs were coming in or some expansion in certain mines. My point would be that it wouldn't necessarily be just a matter of replacement.

Q. But you have already testified, I believe, that there was a terrific turnover, a large turnover of labor in the copper mines.

A. That is right.

Q. Let me ask you this: Did you have any particular reason to believe that there was anything peculiar to gold miners as such, which would induce them to stay in the copper mines if they had ever gone there when copper miners themselves had left? I mean, did you have any higher hope that the gold miner would stay permanently in the copper mines or would even go there?

A. No, except there were some instances that we had in which companies that owned both gold and non-ferrous metal mines had been able to transfer some people.

Q. Transfer their own employees from one job to another?

A. That is correct.

Mr. Rigney: That is all.

The Commissioner: Any further questions on this side of [fol. 1385] the table?

Mr. Barnett: Just one moment, Your Honor.

(Plaintiffs' counsel conferring.)

Mr. Rigney: Nothing else, sir.

By the Commissioner:

Q. Were you ever in attendance upon a War Production Board meeting at which this gold matter was discussed?

A. No, I was not in attendance.

The Commissioner: All right.

Mr. Barnes: By that, are you referring to meetings of the whole War Production Board, Your Honor?

The Commissioner: Yes.

Redirect examination.

By Mr. Barnes:

Q. Mr. Lester, in the questions that Mr. Rigney has asked you, he has been discussing almost exclusively the situation in the copper mines. Were there any other non-ferrous metal mines where manpower shortages existed during this period?

A. Yes, they existed in zinc, molybdenum, and others.

Q. Was copper any more or less a problem than the other metals, so far as manpower shortages were concerned?

A. I would say copper in terms of volume was more a problem.

Q. What do you mean, "in terms of volume"?

A. In terms of the volume of men needed.

[fol. 1386] Q. Did you have any information as to the essentiality of copper in the war program?

A. Yes. We had been troubled by the shortage of copper ever since the fall of 1941, and we had closed down the use of copper in a great many civilian lines. As I indicated earlier, even that early we were restricting the shipments of copper to about half the requests of the Chinese Nationalist Government. We had eliminated the use of copper in all kinds of domestic items, refrigerator trays, venetian blinds, a whole lot of other normal commercial uses of copper, as your taking copper out of your money indicates. We even took it out of use for pennies.

Q. I thought I might have—I do have a war substitute penny here. Do you know what metal was used as a substitute for copper in that coin?

A. I don't know specifically.

Mr. Rigney: That would be hearsay.

Mr. Barnes: I will have the man who did it state what it was.

By Mr. Barnes:

Q. What were some of the other non-ferrous metals that you mentioned a few moments ago where labor shortage existed, to your knowledge?

A. Zinc, lead, molybdenum. Without referring to the list here, I would have difficulty in mentioning some of the [fol. 1387] others. Cadmium was one.

Q. Tungsten?

A. Yes.

Q. Chrome?

A. Yes. I think mercury, also.

Q. Did you have any information as to what their wartime uses were?

A. Yes. We had information, because we were putting out these limitation orders on the use of each of these different metals.

Q. Did you have any information at all as to any wartime uses for gold?

A. No, so far as we knew there was no wartime use for gold. As an economist, I knew there were some $20 billion worth of gold already in the monetary supply of the Government, most of which at that time was at Fort Knox.

Q. As an economist, can you tell us whether or not the continued production of gold during the war would have been essential to support our monetary system?

Mr. Rigney: I take it this is just an expression of his opinion, is that right?

Mr. Barnes: That is right. We have had several expressions of opinion on the same subject before, Mr. Rigney.

Mr. Rigney: I just wanted to be sure.

The Witness: In my opinion, we needed no more gold, and [fol. 1388] additional gold was of no value, and it was of disadvantage in a certain sense because the Government would be paying out money to buy it.

By Mr. Barnes:

Q. In your opinion, was additional gold to that at Fort Knox required during the war for the purpose of meeting unfavorable trade balances?

A. So far as I know, there was no need for it for that purpose.

Q. You referred to the fact that the copper shortage started in 1941. Did the shortage in supply of copper remain constant thereafter, or did it change down to 1942, about the date of the issuance of this order?

A. In one sense copper was increasingly short. In another sense that wasn't quite so true. As we cut off the civilian uses, the demand that was permitted was reduced, so to speak, and consequently it may not have seemed as if it was so short, but it was continued short all during this period. I know that it was so short that they considered and utilized, I believe, steel for shell casings.

Q. On the basis of the information you were receiving in your position, had the labor situation in the copper mines changed during the period from the time you came with OPM in 1941 until the summer of 1942?

A. I would say it became—it was worse in the summer [fol. 1389] of 1942, the spring and summer of 1942, than it was in the summer and fall of 1941.

By the Commissioner: In any of the conferences that you participated in within the War Production Board or any of their subordinate activities, did any express opposition to the issuance of this gold closing order come to your attention?

A. Yes. The Mining Branch in general was opposed to it.

By Mr. Barnes:

Q. And the Mining Branch spoke through what individual?

A. Wilbur Nelson in particular.

Q. To your knowledge, was there any support for the issuance of the order in these same discussions?

A. Yes. I would say that the Copper Branch, of course the various Services—the War Department—the War Manpower Commissioner, General McSherry and the War Manpower Commission, and I also think that in general, Alex Henderson, at least in the conferences that I had with him, was in favor of issuing the gold closing order.

Q. Mr. Rigney referred to a conference which he had with you I think during last December. Do you recall that?

A. Yes, I do.

Q. Did you know before Mr. Rigney came to see you what he wanted to discuss?

[fol. 1390] A. I don't believe that I did. I had no preparation.

Q. Did you have available at the time you discussed this matter with him, the various documents from your own file that you have used to refresh your recollection?

A. No. My files were at home, and he visited me at my office.

Q. Do you recall how your appointment with Mr. Rigney was arranged?

A. As I recall, I received a telegram from Mr. Archibald Gulick asking me if I would see someone in his firm, and I agreed on the date.

Q. Mr. Archibald Gulick is one of the charter trustees of Princeton University, is that correct?

A. I think he is emeritus now, yes.

Q. He is also a member of the firm of Alexander & Green in New York?

A. I presume so.

Mr. Rigney: I think we will stipulate that.

By Mr. Barnes:

Q. Mr. Rigney asked you certain questions as to whether or not it would be possible for the War Production Board to cut off materials from the gold mines. What mechanism existed for the War Production Board to cut off materials from the gold mines, or from any other user of materials.

Mr. Rigney: I think we should be very accurate. My [fol. 1391] question was: Didn't the WPB possess the power; not whether it was possible, but did they possess the power to do it.

By Mr. Barnes: I will accept that amendment. The question is: Mechanically, what means were available to the War Production Board to cut off materials from the gold mines or any other user of materials?

A. The War Production Board had the priority power which would permit them to issue priorities, and those who did not have the priority then would have to, so to speak, scratch for what was available, or the War Production

Board could issue Limitation Orders forbidding the use of materials for certain purposes.

And the "M" orders, as well, the Material Orders. Both the "L" orders and the "M" orders could be issued.

Q. But the mere absence of a priority order wouldn't necessarily cut a firm off from materials?

A. No. A firm could have, as some firms did, a large supply of materials on hand which were partly processed. I remember there was one firm, a pencil firm, that had already processed nine years' supply of copper ferrules, which they continued to use throughout the war, so far as I can recall. We had the problem with the Talon Zipper Company——

Mr. Rigney: I am going to object now to his volunteering about these other things which are not responsive to the question. I think he has answered the question.

[fol. 1392] Mr. Barnes: I submit; Your Honor, they were illustrative of the point he was making, that is all.

The Commissioner: I think that is true. Overruled.

By the Commissioner:

Q. Was there any power in the War Production Board to deprive a company of these inventories that you speak of?

A. Yes, there was power if they had acquired those inventories in violation of, I think it was called, Regulation 1; that is, if they had built up abnormal inventories, the War Production Board had the power to go in and take it away, had the power initially to take it away, but most of these people were in violation of Priority Regulation No. 1, I believe it was called.

Q. My question didn't go to inventories that they had built up in violation of any law, necessarily. My question went to the inventory generally, whether they were acquired properly or otherwise.

A. I am not a lawyer, but it is my understanding that they had the power to go in and take those inventories.

By Mr. Barnes:

Q. Did you ever have any contact with the programs established, one of which was called the Copper Recovery Program?

A. Yes, I do recall it, but I never had any close contact with it.

[fol. 1393] Q. A few minutes ago, in referring to the transfer of men, you referred to men released from the Armed Services as being in a special category. Were you referring to men who may have been furloughed?

A. That is correct.

Q. Furloughed for what purpose.

A. To go back into the copper mines and other non-ferrous metal mines, for purposes of increasing the labor supply there.

Q. Do you have any recollection as to when that occurred?

A. I don't have a recollection as to the exact date, but it occurred either in the summer or fall of 1942, and I think, as a matter of fact, there were two different instances in which it occurred. I think there were 4,000 at one time, and the other number runs in my mind as 7,000, but I am not certain as to that.

Q. What was your understanding as to the status of those men who were so furloughed to work in non-ferrous metal mines? You said they were in a different position from others with respect to their freedom to transfer.

Mr. Rigney: If he knows.

The witness: I wasn't in direct contact with this program, but my understanding, from having been subsequently in the office of the Secretary of War in the summer of 1943, I believe it was, was that they were released subject to re-[fol. 1394] maining in the positions to which they were released. If they did not remain there, they would then be called into the Armed Services.

Mr. Barnes: That is all.

Recross-examination.

By Mr. Rigney:

Q. These men who were released, furloughed as it were, to work in the copper mines—they were former copper miners who had ben inducted into the Services?

A. In general that was the case. I would say any metal miners. I think the order was for metal miners.

Q. Yes.

A. They wouldn't necessarily have been former copper miners.

Q. Not restricting it necessarily to copper; any non-ferrous metal?

A. I suppose also former gold miners.

Q. They were former miners who had been inducted into the Army generally from the non-ferrous metal mines?

A. In general, yes.

Q. Then they furloughed them back to work in the copper mines in September of 1942?

A. What they did, as I recall it, was to go through the records and see whether this person had worked at any time in metal mines. In other words, he might not have been [fol. 1395] inducted from the metal mines initially, but if he had in his background metal mining experience, they would permit him, if he wished to, to be released back into the mines.

Q. But you know that many of them had been inducted directly from the metal mines into the Army, don't you?

A. That is right, some of them were undoubtedly.

Q. There were other non-essential industries—when I say "other," I mean other than gold mines—which received maintenance, repair and operating supplies throughout the war years and were never closed down, isn't that true?

A. It may be. I don't to my knowledge recall any that I would define as non-essential. I doubt, for example, that the confetti industry or the race track industry or some of these industries would have received supplies for maintenance, repair and operating purposes.

Q. Isn't it a fact that under Order P-100 and subsequently under CMP No. 5, many businesses and industries in this country which were not deemed essential war industries in any sense, received MRO supplies and continued to operate?

A. If they were considered essential civilian industries, that is correct.

Q. Was there any definition of that anywhere, of what was an essential civilian industry?

A. We attempted to arrange orders of essentiality when we shut off certain civilian industries, for example, from the [fol. 1396] use of metals. In doing that, we had to classify the order of essentiality in a sense.

Q. But there was no over-all definition of what an essential war industry or an essential civilian industry was anywhere laid down, was there, as a standard?

A. I don't recall any one that was adopted universally, but we did the same thing in the War Manpower Commission. We tried to work out the order of essentiality of various occupations.

Q. For the purpose of issuing a specific order?

A. For the purposes, also, of recruitment and other operations in connection with labor supply.

Q. How about breweries? They continued to operate, didn't they, during the war?

A. Yes, we——

Q. How about nurseries, flower growers and shrubbery growers? They continued in business, didn't they?

A. I don't——

Q. I mean, there was no order shutting them down?

A. There was no order shutting them down, no.

Q. How about soft drink establishments, Coca Cola, Pepsi-Cola, Seven Up—they continued to operate, didn't they?

A. Yes. We had orders that affected them, though, in terms of closures.

Q. There was never any order issued which closed them [fol. 1397] down?

A. No, because they didn't use much in the way of materials, particularly metals.

Q. How about bobby pins? They continued to operate, didn't they? I am not being facetious. I am serious.

A. I believe that they did. I didn't participate in any discussions of that matter, but I believe they continued to produce them.

Q. Does the state of your knowledge enable you to testify with respect to whether or not at any time during the war there was any substantial pool of unemployed in the City of New York?

A. Yes, there was.

Q. When was that most acute?

A. That was most acute shortly after the founding of the War Manpower Commission, around the spring and summer of 1942, I would say.

Q. Do you know what were the best estimates of people

within the Government concerned with that problem, as to the total number of unemployed in New York City at that time?

A. No, but I participated in a conference at which Mayor LaGuardia, Donald Nelson, and a great many others in Mr. McNutt's office, discussed this whole matter, and the question was up for certification of New York City as a distress area.

[fol. 1398] Q. A very serious situation, wasn't it?

A. Temporarily, it was, yes.

Q. Would you agree that perhaps as many as 400,000 people were unemployed in New York City in the summer of 1942?

A. That is entirely possible.

Q. About this visit that I made to Princeton to see you, did you or Mr. Gulick have any discussion about what I was coming down to see you about?

A. I don't recall that we did.

Q. You don't recall his saying anything to you about what it was about?

A. No, I don't recall that he did, because I made no preparation for your coming.

Q. He didn't ask me what I was coming down about?

A. I don't remember that he did. I think he just said, "Will you see someone?" And I said, "Yes," I would be glad to.

Q. He didn't mention that we represented Homestake?

A. He may have said that he represented Homestake. I think, as a matter of fact, he did, but I don't think I knew the reason for it. It is entirely possible that I did, but I made no preparation for it.

Q. Be that as it may, would it be fair to say that at the outset of our meeting I told you that I did represent Homestake?

[fol. 1399] A. That is absolutely correct.

Q. And that this suit was pending in the Court of Claims, and that I was working in preparation for the trial of the action?

A. Yes.

Q. I made it clear to you before I asked you anything about this what our situation was, didn't I?

A. Yes, sir.

Q. You referred a few moments ago to the power of the WPB to requisition inventories, and I don't know for sure whether you were confining that to inventories which had been accumulated in violation of governmental orders——

A. I think they had the power also to accumulate any inventory.

Q. To requisition inventory?

A. That is right, they had requisition power.

Q. No knowledge ever came to you in your official capacity that any inventory held by Homestake, any part of it, was accumulated in violation of any Government order?

A. Not to my knowledge, no.

Q. Isn't it the fact that the War Production Board never requisitioned any materials or supplies from Homestake at any time during World War II?

A. Not to my knowledge, they never did.

Q. Did you ever discuss this gold closing order with Mr. [fol. 1400] W. L. Batt?

A. I think I was at a meeting, if my recollection is correct, with General McSherry and Mr. Batt with respect to this gold closing order at one time.

Q. Let me ask you if it isn't the fact that as late as October 1, 1942, Mr. Batt personally and officially was opposed to the issuance of the order?

A. My recollection is that Mr. Batt was at different times on different sides.

Q. Do you recall which side he was on on October 1?

A. No, I think I was out of the Government at that time, but he varied. My information was that his position varied depending on what pressures had been brought to bear and what arguments.

Q. Was there considerable pressure brought to bear from the War Department, specifically Secretary Patterson's office?

A. That was my understanding, that considerable pressure was brought to bear from the War Department, although again, I was not directly involved, and don't know it by personal experience.

Q. I want to ask you about this, Mr. Lester. There was a meeting of this Interdepartmental Committee on Non-Ferrous Metals, which was held on September 15, according to the minutes, which are in evidence as Plaintiffs'

Exhibit 82, and they reflect that you were in attendance at [fol. 1401] that particular meeting. I have checked your name there. I would like you just to look at that and see if you can recall having attended that meeting?

A. I don't specifically recall the exact circumstances or the exact location of the meeting, but everything here would indicate that I was present.

Q. Very well. I would like to direct your attention to this paragraph in the middle of page 3, which says:

"It was suggested that even if the gold miners were not directly transferred to other essential mines they still would be serving a more useful function in the aircraft or shipbuilding industries than they would in gold mining."

Do you recall any discussion out of which this conclusion grew?

A. I recall that we did have some discussions as to whether all of them could be, so to speak, channeled into the non-ferrous metal mines, and the argument that was made by some people was that even if they were not to be channeled into the non-ferrous metal mines, even if they went to the West Coast into aircraft and shipbuilding, it would be a net gain, since we were short of people in aircraft and shipbuilding on the West Coast.

Q. Wasn't the question raised whether it would be possible to channel any considerable number of them into the [fol. 1402] non-ferrous metal mines?

A. Yes. From an early memorandum that I produced, I emphasized that. And the Employment Service was fairly sure that they could do it. They were more certain of what they could do than I myself was certain of what they could do. They were sure if they brought their own people and had the companies also bring their people to the employment offices right in the companies that were being closed down, they could channel them.

Q. You turned out to be nearer right than they, based on hindsight?

A. I have not seen the exact figures, but I have a memorandum——.

Q. In any event, is it fair to say that you personally shared the view that even if no considerable number of them could be transferred or could be induced to go into non ferrous metal mines, it still was a wise move to close the

gold mines down in order to get their labor into more essential war activities?

A. That is right.

The Commissioner: Just a minute.

Had you completed your last answer?

The Witness: I think so.

Yes, I would say it would be my own personal opinion that they would be more valuable in aircraft and shipbuilding [fol. 1403] and in the construction activities in that area, defense plant construction and what not, than they would to continue in the gold mines.

By Mr. Rigney:

Q. In connection with the question I asked you a moment ago about Homestake's inventory situation, co-counsel representing Idaho Maryland Mines and Central Eureka have asked that I inquire of you whether you had any knowledge of any of their inventories having been improperly acquired?

A. No. The knowledge that I had with respect to inventories was in terms of end items that were being produced for civilian purposes primarily.

By Mr. Orrick:

Q. Mr. Lester, did you have any knowledge that the War Production Board ever attempted to requisition any of the inventory of Idaho Maryland Mines Corporation?

A. No, I have no knowledge that they ever attempted to requisition the inventory of any particular mining company.

By Mr. Barnett:

Q. That applies to gold mines?

A. To all gold mines and other mines.

Q. Have you ever been in a gold mine?

A. No, I have never been in a gold mine.

Q. Have you ever been at Sutter Creek or Grass Valley, California?

[fol. 1404] A. No, I have not.

Q. You don't know anything about how close they are or the economic dependence upon the mines?

A. I have been in areas like Montana, but I have not been to the mines in California. We relied to some extent on

Mr. Low, who was a mining engineer, for some of our information, and then, of course, we relied on our own Mining Branch.

Q. He is the one who went out about a week after he got into the Government service, is that correct?

A. I think that is correct. That was our reason for bringing him in, because we wanted someone who was an engineer with particular experience in non-ferrous metal mining.

Mr. Barnett: That is all.

By Mr. Rigney:

Q. I would like to ask just one more question. Were arguments advanced by persons within the War Production Board during the summer and autumn of 1942 against the order, on the grounds that it would not be possible to get any substantial number of the gold miners to go to the non-ferrous metal mines? Did you hear those arguments advanced?

A. Yes, I heard those arguments advanced, and I think Wilbur Nelson was one, for example, who was fearful that they would not; that the bulk of them would not go.

Q. And there were others, too, in the War Production [fol. 1405] Board?

A. There may well have been. I don't recall them, but I do recall Wilbur Nelson.

Q. How about Miles Smith?

A. He may have, but I don't recall him right offhand.

Redirect examination.

By Mr. Barnes:

Q. Dr. Lester, did I understand you to say that the U. S. Employment Service had represented to you that it felt that it would be able to transfer these people from the gold mines to the other non ferrous metals mines?

A. They felt that they could set up a machinery which would enable them to make a direct offer at the time, and to use considerable influence in channeling them, yes.

Q. When, in point of time, did they make those representations, do you recall?

A. I would say they made those representations begin-

ning with this discussion in July, and at these meetings for which memoranda have been indicated here, this Interdepartmental Committee meeting; and I might add, incidentally, that some of those people who appeared there for the War and Navy Departments, at least one of them was a former employee of the Employment Service.

Q. Who was that?

A. Garlock, as I recall the name. There may have been [fol. 1406] others. They were people who had been officials in the Employment Service and were commissioned in the Armed Services.

Q. Was there any relationship between War Manpower Commission and USES?

A. Oh, yes. USES was made part of the Manpower Commission set-up.

Q. There has been extensive discussion here about the justifications advanced for this order from the standpoint of savings of materials and redistribution of manpower, if you want to call it that. Do you recall at any time any other considerations being advanced in connection with the issuance of this order?

A. There was this consideration present in the discussions, and that was that if we permitted the gold mines to continue operating, we would have very little basis for coming to any other industry and saying, "We are limiting you or closing you down." It was sort of in that sense a test of the extent to which the country was willing to go all-out on war production.

Q. Did you hear that point specifically discussed?

A. Yes, that was mentioned; that if we could not close down the gold mines, it would be very difficult for us to face other industries with real restrictions. To that extent, it was something of a test case, I would say, because we were going through with these programs of concentration of [fol. 1407] production. We were cutting all kinds of end uses of materials and metals, and to that extent it was something of a factor as to how far we would go.

Mr. Barnes: That is all.

Mr. Rigney: I have nothing further, sir.

The Commissioner: The witness may be excused.

(Witness excused.)

Mr. Barnes: Your Honor, I would like to offer in evidence as Defendant's Exhibit 36, the document which was marked Plaintiffs' Exhibit 9 for identification at the pre-trial conference, being War Manpower Commission Directive No. XIII.

Mr. Rigney: That is already in evidence, I believe, Your Honor, as part of Exhibit No. 8. I wouldn't think we would need it twice. If my information is correct, a copy of that was attached to the WPB letter of October 13, 1942.

Mr. Barnes: I haven't compared the two documents, Your Honor. As a matter of fact, I didn't see that the two were there. This was a document which was offered by Plaintiffs and marked at pre-trial, and it has not been offered in evidence since that time.

Mr. Rigney: We didn't offer Exhibit 9, Your Honor, because the directive had already gone in as a part of Exhibit 8.

The Commissioner: I presume you question it because [fols. 1408-1409] you don't want to rely upon the comparison of the documents.

Mr. Barnes: Without taking some time to do it.

The Commissioner: Let's let it in, then.

[fol. 1410] Mr. Barnes: I offer as Defendant's Exhibits 38 and 38A, B, C, and D, the documents which at pre trial convereince were marked for identification as Plaintiffs' Exhibits 35 and 35A, B, C, and D, being the report of Donald M. Nelson to the Supply Priorities and Allocation Board of December 23, 1941, with respect to gold mining equipment, and the four attachments to that, being communications to [fols. 1411-1446] Mr. Nelson from the Department of State, the Federal Reserve Board, the Department of the Treasury, and an additional document which accompanied that, being a copy of a letter from the Secretary of the Treasury to the Ambassador of the South African Legation.

The Commissioner: I have a question here. You have indicated you are offering three documents, 38A, B, and C——

Mr. Barnes: No, 38, A, B, C, and D. I am offering all five that were marked at pre-trial as Plaintiffs' Exhibit 35, 35A, 35B, 35C, and 35D.

The Commissioner: Do you have "D" there?

Mr. Barnes: There was a "D" marked at pre trial, yes, sir.

The Commissioner: All right.

Mr. Barnes: I am offering the whole group.

[fol. 1447] **Transcript of testimony—February 10, 1953**

TESTIMONY FOR DEFENDANT (Resumed)

OFFERS IN EVIDENCE

MR. BARNES: Your Honor, I would like to offer in evidence as Defendant's Exhibit 42, a letter from the Assistant General Manager of Homestake Mining Company to Mr. Merle Guise, dated January 13, 1942, and the schedule appended to that.

(Plaintiffs' counsel examining document.)

(Here followed discussion off the record.)

Mr. Rigney: No objection, Your Honor.

The Commissioner: It may be received.

(Said letter, dated 1-13-42, from Homestake to Merle Guise, with attached schedule, was marked as "Defendant's Exhibit No. 42," and was admitted in evidence and made a part of this record.)

[fol. 1448] Mr. Barnes: I would like to offer in evidence as Defendant's Exhibit 43, a document entitled, "Status of Gold Mining," being the minutes of the Supply Priorities and Allocation Board of November 18, 1941, and marked Document 12-D.

Mr. Rigney: Hasn't that been admitted? It is Exhibit No. 10, I think, SPAB minutes of November 18, 1941.

Mr. Barnes: My records showed that it was not put into evidence.

The Commissioner: Yes, it was offered the first day. It is in.

Mr. Barnes: It is still marked for identification, Your Honor.

The Commissioner: It is in evidence. It was received on the first day.

Mr. Barnes: I will withdraw that offer, then.

I offer, then, as Defendant's Exhibit 43, a memorandum from Mr. R. J. Lund to Mr. A. I. Henderson, dated September 9, 1942, entitled "Gold Mining Order."

Mr. Rigney: This one, Your Honor, refers to enclosures which are missing, but I shan't press that objection in this instance. I would not want to waive it at some future time if I deemed it an appropriate objection.

The Commissioner: If you wish to make an objection, state it now.

[fol. 1449] Mr. Rigney: I say I have no objection to this document. I just didn't want my waiving it to be construed as a waiver at any future time with respect to another document.

The Commissioner: It may be received.

(Said memorandum, dated 9-9-42, from R. J. Lund to A. I. Henderson; Subject: Gold Mining Order, was marked as "Defendant's Exhibit No. 43," and was admitted in evidence and made a part of this record.)

Mr. Barnes: I offer as Defendant's Exhibit 44, a memorandum dated July 31, 1942, from Mr. A. I. Henderson to Mr. J. A. Krug and Mr. C. H. Matthiessen.

Mr. Rigney: No objection.

The Commissioner: Admitted.

(Said memorandum, dated 7-31-42, from A. I. Henderson to J. A. Krug and C. H. Matthiessen, was marked as "Defendant's Exhibit No. 44," and was admitted in evidence and made a part of this record.)

Mr. Barnes: I offer as Defendant's Exhibit 45, a memorandum dated September 11, 1942, from Wilbur A. Nelson to W. L. Batt.

Mr. Rigney: No objection.

The Commissioner: Admitted.

(Said memorandum, dated 9-11-42, from Wilbur A. Nelson to W. L. Batt, was marked as "Defendant's Exhibit No. 45," and was admitted in evidence and made a part of this record.)

Mr. Barnes: I offer in evidence as Defendant's Exhibit [fol. 1450] 46, a memorandum dated September 11, 1942, from Mr. J. M. Scribner to Donald M. Nelson, and the attachment referred to in that memorandum.

Mr. Rigney: No objection.

The Commissioner: Admitted.

(Said memorandum, dated 9-11-42, from J. M. Scribner to Donald M. Nelson, with attachment, was marked as "Defendant's Exhibit No. 46," and was admitted in evidence and made a part of this record.)

Mr. Barnes: I offer as Defendant's Exhibit 47, a copy of the minutes of the Planning Committee of the War Production Board for its meeting on September 17, 1942.

Mr. Rigney: No objection.

The Commissioner: Admitted.

(Said Minutes of Planning Committee of WPB for meeting 9-17-42 was marked as "Defendant's Exhibit No. 47," and was admitted in evidence and made a part of this record.)

Mr. Barnes: I offer in evidence as Defendant's Exhibit 48, a document taken from the Policy Documentation File of the War Production Board in the National Archives, entitled "Summary of Proposed Gold Curtailment Order."

Mr. Rigney: There is no objection to this. I wonder if you are able to fix the date at all by reference to any other documents?

Mr. Barnes: Not on the basis of anything I have here. [fol. 1451] The contents of the document indicate that it relates to an order that is substantially identical, at least, with the order that was issued, so it places its time as being probably at least in September of 1942.

Mr. Rigney: That is good enough, if we could stipulate that it was undoubtedly——

Mr. Barnes: Do you have any better information than that?

Mr. Misslbeck: No.

Mr. Rigney: I refer it to our document expert.

(Mr. Misslbeck examining document.)

Mr. Rigney: So we agree that it is September, 1942?

Mr. Barnes: I would be willing to agree that that indicates the approximate date of its circulation.

The Commissioner: Why don't you write it on there as an agreed date?

Mr. Barnes: All right.

The Commissioner: Then I won't have to look at the record to see what it is.

Mr. Barnes: I have written "September 1942" on the head of this document in ink. Because it is a photostat, it isn't as legible as it might be, but I think you will be able to read it.

The Commissioner: Received as Exhibit 48.

(Said document, entitled "Sumary of Proposed Gold Curtailment Order," with agreed date of September 1942, was marked as "Defendant's Exhibit No. 48," and was ad [fol. 1452] mitted in evidence and made a part of this record.)

Mr. Barnes: I offer in evidence as Defendant's Exhibit No. 49, a memorandum from Mr. Edward H. Rott, Deputy Administrator, Order L-208, to Mr. Edward T. Dickinson, Jr., Executive Director, Planning Committee, dated April 24, 1943.

Parenthetically, Your Honor, I think that this is the document that Dr. Nelson was referring to in the course of his testimony when he said that he had seen one of Mr. Rott's reports that used a $15 million figure, but that the one which was in his possession was not that one. This does at least use that figure.

Mr. Rigney: We would have no objection to the admissibility of this document on the proviso that it is not offered as proof of the fact of the allegations made in the letter or of the figures set forth in the letter, but merely that such a letter or memorandum passed from Mr. Rott to Mr. Dickinson.

Mr. Barnes: It is being offered as a supplement, if you wish, sir, to the report of Mr. Rott's that had previously been marked by the Plaintiffs as their Exhibit 13 and 13A. This is another document that he prepared at approximately the same date as that, giving slightly different information. If 13 and 13A have been offered as proof of their contents, it seems to me that this is similarly admissible on the same

basis. If they haven't been, I am perfectly willing to have [fol. 1453] this offered only as a document in the same standing that they stand on.

Mr. Rigney: The difficulty with this sort of thing, Your Honor, is that Mr. Rott refers to the fact that these are rough estimates, and so on. He has a lot of figures in there which are assumptions and estimates and guesses, perhaps. So I would have no objection to agreeing, as far as Plaintiff Homestake is concerned, that Exhibit 13 in evidence has been offered with the same limitation that I would like to place upon the admissibility of this document, namely, that the statements in there, in so far as statistics, figures, and so on, are concerned, are not proof of those facts.

Mr. Barnes: That is satisfactory to me, sir.

The Commissioner: All right. It is admitted.

(Said memorandum, dated 4-24-43, from Edw. H. Rott to Edw. T. Dickinson, Jr., was marked as Defendant's Exhibit No. 49," and was admitted in evidence and made a part of this record.)

Mr. Barnes: I should like to offer in evidence as Defendant's Exhibit 50, Document 228 of the War Production Board, entitled "Gold Mining Order L-208, Executive Secretary's Note, June 15, 1943."

In connection with that offer, I think it might be well to state, Your Honor, that the next exhibit I intend to offer [fol. 1454] is the minutes of the War Production Board meeting of June 15, 1943, where gold mining was considered, and those minutes start with the statement, "The Chairman referred to the Executive Secretary's Note on the question whether the present closing order. . . ." And this is being offered as an element of completeness so there can be no objection to the next exhibit.

The Commissioner: Very well.

Mr. Rigney: I have no objection, Your Honor, if this document can be received under the same reservation that I indicated for the previous document. This also contains a lot of statistics, figures, and what-not. There is no way to cross-examine. There is no indication, in many instances, of the source.

There again, I don't think that it is of the quality of

evidence which should be received as proof of the facts contained therein. With that proviso——

Mr. Barnes: It is being offered, Your Honor, as evidence of the information which was before the War Production Board when it took action on the question of the possible revocation of Order L 298 at its meeting of June 15, 1943.

Mr. Rigney: As to the fact that this document was circulated, if it was, within the War Production Board, we raise no objection; but we don't want to be bound by these figures as being proof of the facts to which they relate, and I don't think that it should be received in that category. It is like [fol. 1455] those letters that we offered from Senator McCarran and other members of the Senate, in which they set forth various statements. We don't offer them as proof of the fact of those statements or the figures that they might have contained, but only that those arguments were submitted to the War Production Board.

The Commissioner: I think that is true. Do you have any objection now with respect to the purpose for which counsel states that he is offering this document?

Mr. Rigney: If it is for that limited purpose, it is all right.

The Commissioner: It may be received.

(Said Document 228 of WPB, entitled "Gold Mining Order—L-208, Executive Secretary's Note, June 15, 1943," was marked as "Defendant's Exhibit No. 50," and was admitted in evidence and made a part of this record.)

Mr. Barnes: I now offer in evidence as Defendant's Exhibit 51, the minutes of the War Production Board meeting of June 15, 1943. The next to the last item on the agenda of that meeting was Gold Mining.

Mr. Rigney: It wasn't so important by then.

Mr. Barnes: I might say, Your Honor, that if it had not been for the fact that you permitted receipt into evidence of numerous documents circulated within the War Production Board during the period antedating this, I would have [fols. 1456-1461] felt that it was not material to the issues involved here. However, since you have received those documents, I feel that the final action of the War Production Board, which was the culmination of the various reports

and recommendations and memorandums which have been received in evidence, is likewise material.

The Commissioner: All right.

Mr. Rigney: This document seems to contain at least some of the figures which are set forth in the Executive Secretary's Note, the previous exhibit, and I have no objection to the admissibility of these June 15, 1943, minutes, provided it can be limited in the same fashion as the previous exhibit, Exhibit 50.

Mr. Barnes: Your Honor, this is being offered to show the action taken by the Board and the discussion within the Board pertaining to the possible revocation of the order. That is the only purpose of the offer.

Mr. Rigney: I think that is satisfactory.

The Commissioner: It may be received.

[fol. 1462] Samuel Lipkowitz, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined and, in answer to interrogatories, testified as follows:

Direct examination.

[fol. 1463] By Mr. Barnes:

Q. Will you state your full name, please?

A. Samuel Lipkowitz.

Q. Mr. Lipkowitz, what has been your formal education?

A. I was graduated from the public schools in New York City, both grammar school and high school. I then attended New York University for six years in the evening and was graduated in June, 1934.

Q. What subject or subjects did you specialize in at that time?

A. Economics.

Q. And have you had any graduate work since that time?

A. Yes. I attended American University here in Washington from 1937 to 1939, and was graduated with an M.A. degree, and then I received a fellowship to the Littauer School of Public Administration at Harvard and attended that school from September, 1939 until June, 1940.

Mr. Rigney: What school was that?

The Witness: Littauer School of Public Administration.

By Mr. Barnes:

Q. Is that L-i-t-t-a-u-r?

A. L-i-t-t-a-u-e-r.

If I may say, that school is conducted jointly with the Graduate School at Harvard University and courses that are given are interchangeable. So that in effect it is the [fol. 1464] graduate school at Harvard University.

Q. Did your work at American University cover economics also?

A. Yes sir.

Q. What has been your practical experience? What work have you been doing?

A. Well, my practical experience in the field of economics has been entirely in the government service, or in an international agency with which I am now—well, we will get to that chronologically. I came here as a clerk in 1936 with the U. S. Employees Compensation Commission and transferred to the Security and Exchange Commission and worked as a statistical clerk.

By Mr. Rigney:

Q. Would you give us the years as you go along that you changed?

A. I came to Washington in April, 1936, and was first employed at the United States Employees Compensation Commission. In December, 1936, I transferred from that Commission to the Securities and Exchange Commission. In June, 1937, I transferred to the National Labor Relations Board, Division of Economic Research.

By Mr. Barnes:

Q. What was your position at that time there, do you recall?

[fol. 1465] A. I cannot remember the exact Civil Service classification, but in effect I was a research analyst, and later economist and assistant economist. The latter two are the Civil Service classifications. I don't recall the first Civil

Service classification, but in effect the work was economic research.

Q. And how long were you with NLRB?

A. I was with NLRB from June, 1937, until January, 1941, except for the interlude that I referred to earlier for the graduate work at Harvard University, when I was on an official leave of absence.

Q. And where did you go from NLRB?

A. I was transferred to the United States Tariff Commission, where I was employed in the Division of Economic Research until December 15, 1941.

Q. What was your position in the Tariff Commission?

A. Assistant and Associate Economist.

Q. When you left there where did you go?

A. I was transferred to the War Production Board, Labor Division, which changed its name frequently, but in a sense did the same job continuously.

Q. What were your duties there?

A. My duties there were in the Raw Materials Branch of the Labor Division, and our concern was with the labor problems arising in raw materials, and in my particular case [fol. 1466] particularly with non-ferrous metals.

Q. How long were you with WPB?

A. Until August of 1944.

Q. Where did you go from there?

A. I was transferred to the Department of State, Commodities Division, where I became Chief of the Section on Metals and Minerals.

Q. How long did you remain with the Department of State?

A. Until February, 1947.

Q. And where did you go then?

A. Then I resigned to join the International Bank for Reconstruction and Development, commonly known as the World Bank.

Q. Are you still employed there?

A. Yes, I am.

Q. Has your employment there been continuous since that date?

A. Well, yes, except for a brief period early in 1951 when, at the request of the Office of Price Stablization, and, later, the National Security Resources Board, I was given a leave.

of absence to work for the United States Government in the field of non-ferrous metals.

Q. What type of work have you been doing with the World Bank?

A. My task has been to be economic adviser on metals [fol. 1467] and minerals, and more recently the scope of that job has been expanded to include all non-agricultural industries.

Q. During the period of your employment with the War Production Board, did you have contact, among other divisions, with the Mining Division?

A. Yes sir.

Q. Do you have any recollection of discussions relating to a proposed order to close the gold mines?

A. A very good recollection.

Q. Do you recall approximately when you first came in contact with that matter?

A. Well, I would be very hesitant to set a particular time, because it is now about eleven years and I am not sure as to the precise timing, but it must be somewhere around June or July, at least in any active sense. Perhaps on looking at the document that counsel referred to earlier I might perhaps refresh my——

Q. By June or July you mean 1942?

A. Yes. It might have been slightly earlier, but I am not sure of the precise time.

Q. And the document to which you are referring now is the——

A. Closing of the Gold Mines, August, 1941, to March, 1944, Special Study No. 9, which was referred to earlier.

I could date it in this way, broadly speaking: the serious- [fol. 1468] ness of the labor problem which would have brought us into the picture, that is, the mine-labor shortage in non-ferrous metal mining, attained a certain amount of prominence, in the sense of getting repeated requests from mine operators, particularly in the west, about June, as I remember now. That is when it came to our notice. It may have been critical in some other people's minds, and to some other people's knowledge earlier, but I am only speaking for myself now.

Q. You say approximately June of 1942?

A. Approximately.

Q. What action, if any, did you take when this shortage of men in the non-ferrous mines came to your attention?

A. Well, we immediately began to try to find out how many people were being lost, what were the causes of their leaving, and trying to determine what devices or expedients might be used to stop this flow of manpower out of the mines because the copper mining, particularly, was considered extremely vital.

Q. What sources of information were available to you on the manpower in these mining enterprises?

A. Well, there were several. We were receiving from the Bureau of Labor Statistics the figures on the individual mining establishments on a confidential basis, of course, to indicate the employment at the mines by mines so that we could measure the change from month to month. We were—I am [fol. 1469] not sure exactly when we began receiving the War Manpower Commission forms. I think those came somewhat later, but I cannot place the precise time. Then we began to receive a form which the War Production Board had been issuing to, I believe, all establishments, but variants of that form were issued to the mining companies. I think it is WPB 732, and the initial, I believe is, B, but I am not sure of that. It is quite a long time now. But this basic 732 form was issued to all establishments.

Then there were variants for different types of enterprise so that a count of the peculiarities of an industry could be taken into account. For example, as I remember it, in one of the revisions of that form we wanted the information more precisely on production in mine, mill, smelter, underground, on the surface. Well, obviously, you would not ask for underground employment in a steel mill or a rubber factory. So that we had to ask for variations in that form.

There were many discussions with the Budget Bureau and the statistical people in WPB where all forms had to be cleared.

Q. Let me ask you this: in the course of your examination of this manpower shortage in the non-ferrous metal mines, do you have any recollection as to whether or not you began looking some time at the gold mines and the potential source of supply?

A. I know we began, and I cannot place the date. I know

that it was before the end of July because, as I have re-
[fol. 1470] freshed my memory in reading this, I notice that it stated that a memorandum was sent from our Division dated July 31 in which proposals were made, and I know that I participated in assembling some of that data and discussing various alternatives. And it is a fair presumption that I began before that time, but I cannot place the precise date.

Q. Is this document which has been marked Plaintiffs' Exhibit No. 130 the memorandum to which you refer?

A. Yes sir.

Q. Looking at that document, Mr. Lipkowitz, can you tell me whether you had any part in assembling any of the material that is incorporated into that? That is, factual material?

A. I am sure that I had a good deal to do with the assembling of the statistical information which went to make up the summary statement on page 2 talking about 50% of average monthly ore production in 1941 and 70% and 90%, that reference.

Q. What about the paragraph below that, "According to hastily gathered data"—is that any material which you had assembled?

A. Yes. That, I believe, was taken from the annual issues of the Minerals Yearbook.

Q. Issued by the Bureau of Mines?

A. That is right.

Q. Did you have any information at that time as to the number of employees in the gold mines?

[fol. 1471] A. Well, at that time I would say this: we had at that time a relatively limited amount of information based on generalizations from overall statistics of the BLS, of the War Manpower Commission, of the Bureau of Mines, for an earlier period, and we were beginning to get data on individual mines in some quantity which would enable us to analyze a problem more precisely. And by that I mean this: that the classification of a gold mine differed with each agency which made the classification. The Bureau of Mines had one classification, the Bureau of Labor Statistics had apparently another. I am not sure that I know what the Manpower Commission classification was, but I know that on occasion afterwards we checked some of the lists of the

mines included in one or the other and they were quite different.

As a result, we insisted on getting the data for individual mines so as to be able to make a more precise estimate of which mines came into which categories. You could not possibly do it from an overall tabulation of the type that appears, for example, in the Minerals Yearbook, because of the question of the classification for the purposes of the Minerals Yearbook as against the purpose, let us say, for a gold mine closing order.

The Commissioner: Just a second. The question as propounded asked about you, and in reply you used the pronoun "we". I am going to suggest that where your activities were a part of a group activity you try to delineate [fol. 1472] where you left off and somebody else picked up.

Mr. Rigney: Could we have the time fixed now when he says that "we insisted that some other figures be furnished". As I recall your testimony, you were saying that you were getting figures from various sources and various definitions of a mine, and that there came a point when I think you said "We insisted upon" something or other, and I was wondering if you could fix the time of that.

The Witness: Well, I would say at about this time, the date of the memorandum, July 31, 1942.

By Mr. Barnes:

Q. And when you used the word "we" in answering that question what group were you including?

A. Excuse me, I meant the people in the Labor Production Division, particularly Mr. Buchanan who was my superior, and I don't know that there was anybody else at that time in the shop. There may have been—Well, there were secretaries. I don't think there was anybody else. I am not sure. There were later, but not at that time.

Q. Were you and Mr. Buchanan working on the Raw Materials Branch or were you working on the non-ferrous metals together?

A. Non-ferrous metals.

Q. Incidentally, do you have any recollection now as to the figures shown by the Bureau of Mines, or available to you at that time from the Bureau of Mines, as to the employment in gold mines?

[fol. 1473] A. Well, it was a very substantial figure, if I remember, something of the order of 40,000 to 50,000 for the year 1941. I could check that if a Minerals Yearbook is available here, in the Employment and Accidents chapter, where usually the figures are given. But as I said earlier—I am going to qualify this—these figures related to the Bureau of Mines classification of gold and silver mines; and that was one of the difficulties, as I said earlier, in that the classifications served different purposes.

Q. Now, referring specifically to this memorandum, Plaintiffs' Exhibit No. 130, there is a statement in the next-to-the-last paragraph on the second page, "The suggested basis of curtailment would probably free initially between 4,000 and 5,000 men."

Do you recall whether or not that is based on any estimate that you had prepared?

A. Well, it was based on the assumptions in the preceding part of this memorandum that the schedule of limitation be 50, 70, 90, depending on classifications, and on the basis of the statement that 221 mines which would be subject to curtailment employed between 15,000 and 20,000 men in the year 1941.

Q. Was that an estimate which you made on those bases? Do you recall that?

A. Well, I am sure that I participated with Mr. Low, Bela Low, the engineer who worked on it, and probably Mr. [fol. 1474] Buchanan did too. But I don't recall at this time what precise data we had in addition to what is specifically stated here to go on. But, whether we had enough of a breakdown, let us say, by size categories, to make a precise estimate or merely a round estimate as is indicated here, it is, as I say, eleven years since that was done, and I don't remember the basic data.

Q. Did you, after July 31, participate in discussions with members of the Mining Division and other employees of the War Production Board with respect to the proposed gold curtailment order?

A. Yes. There were innumerable meetings, I guess. It would be very difficult to place any number on them. But some of these meetings were recorded in minutes of interdepartmental committees, and intra WPB meetings. Others may have been purely informal discussions of two or three

individuals, which probably were not recorded in any memoranda.

Q. Do you recall making any estimates during that time as to the number of employees who might be released from the gold mines by a gold mine closing order?

A. I have refreshed my memory by reading this in the last few days.

Q. By "this" you are referring to Study 9 again?

A. Excuse me, Special Study No. 9. And I came across the statement on page 42 of that document that someone accused me of having said at one time that 20,000 men would [fol. 1475] be released by the closing of the gold mines, and that I denied this, offering reports to show that the figure was about 5,000.

Now, I recall quite vividly the offering of the documents because that occurred in a meeting which was held in the War Production Board, of officials of the War Production Board and other Government agencies, and representatives of large gold mining firms—and I believe the date was October 1st, but the record would show that here—yes, October 1st—and at that meeting, as the text of this special study indicates, after some discussion as to the advisability of issuing such an order, I believe it was Mr. Batt who suggested that Dr. Nelson and others stay with the gold mining representatives to get the precise figures, or as precise figures as could be gotten, as to how many people could be released from gold mines if such an order were put into effect. And that meeting, as I remember, lasted until about seven o'clock. I remember my wife being very mad at me for coming home quite late. This was just two weeks after my daughter had been born, so she was quite worried about that.

At that meeting Dr. Nelson, I believe—perhaps Mr. Batt at first, but the exact timing of when Mr. Batt left and somebody else took the chair I am not sure of now—started to go around the table asking the various gentlemen who were present to report on their operations. And it was clear that—I don't know, maybe six to ten at the most operators [fol. 1476] were present at the meeting, so that this obviously did not cover all of the gold mining industry, although it did cover most of the important firms. At that meeting I made the point that I had in my hand, these WPB 732-D forms which showed reports from various gold mining com-

panies of either the month before or two months before, depending upon what the latest report was that was available to me at the time, indicating that there were a number of firms who were still operating at that time who were not included in this list, and that in any tabulation which was made that these firms should presumably be included. And I made the point again at the time that there were obviously other gold mining firms on whom I did not have a particular report who should also be included, but I wasn't in any position to say that Mine X had so many people or didn't, but that I was quite certain that there were more mines than were listed by going around the table, and the ones that I had documentary data to show. The difficulty was, of course, that no one was in a particularly good position to say that the figure which would account for that would be X, Y or Z, except that my point was that as the tabulation was being made nothing was being allowed, and that was obviously, if anything, an understatement.

By Mr. Rigney:

Q. Nothing was being allowed for what?

A. For these other mines who were not represented at the meeting.

[fol. 1477] Mr. Rigney: Thank you.

By Mr. Barnes:

Q. Do you recall the charge being made at that meeting that you had previously stated an estimate of 15,000 to 20,000 men who would be released from the gold mines?

A. Yes. I believe it was made—I am trying to remember who said it—and if my memory serves me rightly I got up quite indignantly at the time and said that I had not said that and waved this sheaf of papers that I had in my mind, saying, "This is the data about which I am talking and represents the rough estimate, plus an allowance for those not represented in this list of labor which would be affected by this order."

Q. Do you recall whether you ever stated in any meeting or in writing an estimate that 15,000 to 20,000 men would be released from the gold mines by a gold shut-down order?

A. I don't believe I stated that in that sense. The nearest thing that might be said to come to that is this; and it is the statement that appears in this memorandum: "It is estimated that the 221 mines that would be subject to curtailment employed between 15,000 and 20,000 men in the year 1941."

By the Commissioner:

Q. Where do you get the 221 figure?

A. That was on a basis of—if my memory is correct, these figures were available on a state-by-state basis in the State [fol. 1478] chapters of the Minerals Yearbook. And we then added up the mines in this category, above and below certain kinds by states and came to this total. That is my memory of the way we did it then. I am sorry I cannot recall precisely, but I am sure that that must have been the basis. If someone has a Mineral Yearbook at hand I would like very briefly to look at it. I think that might help me to clarify that point.

The Commissioner: Do you have one?

Mr. Barnes: I do not believe there is one.

Mr. Rigney: We do not have one at hand.

The Witness: I am sorry, that is the best I can do under the circumstances.

By Mr. Barnes:

Q. When you refer to "this memorandum" you are referring to Plaintiffs' Exhibit No. 130?

A. Yes, the one you handed me earlier.

By the Commissioner:

Q. From how many mines had you received this form that you refer to?

A. The employment——

By Mr. Barnes:

Q. The 736.

A. The 732?

Q. The 732.

A. You mean of mines which would presumably be

[fol. 1479] affected by this order, because we received them on copper mines, lead-zinc mines, tungsten mines, which would presumably not be affected by this order also.

By the Commissioner:

Q. you have testified that you had a number of them at this meeting.

A. Yes, but the ones I had at the meeting were of mines which I considered would be affected by this order.

Q. How many were they?

A. I would say probably no more than 20.

By Mr. Barnes:

Q. Now, referring to this meeting which you have just mentioned, the one which I believe you said was attended by representatives of a number of the gold mines, by representatives of the War Production Board, including Mr. Batt and Wilbur Nelson, were there any representatives of the Army there that you recall?

A. Oh, yes. General Clay, General McSherry and several other people. I think the list of some of those people who were in attendance is probably given in here, I am not sure.

Q. Is that the list, I think, on page 42 of that book?

A. It says, "The following is a partial list of those in attendance at this meeting." And then it gives, from the War Department, General Clay, Mr. Harbison, and General McSherry from the Army. That room was quite crowded [fol. 1480] and there may have been other people that are not listed here. But at least those three people, I am sure, were there, from the Army I mean.

Q. Do you recall a discussion at that time as to the essentiality of gold in the war program?

A. Well, I don't think it was discussed directly, but there was an indirect reference to it which might bear on the subject. One of the representatives of the gold mines—and I am not quite sure who the gentleman was—at one point got up and said, "But these gold mines ought to be kept open so that the boys will have something to come back to after the war is over."

And the argument or the answer at that particular point was made, as I remember it, by General Clay, who said, "Gentlemen, I want to be sure that the boys come home."

Now, as I said, indirectly, I think that was a reference by the General to his belief that gold was not essential. I don't say that he said it specifically——

Mr. Rigney: I object to——

The Witness: That would be my interpretation.

Mr. Rigney: I object to the characterization put upon it and move to strike.

The Commissioner: Sustained.

Mr. Barnes: I assume you are only striking the last characterization?

[fol. 1481] The Commissioner: Yes, the characterization.

By Mr. Barnes:

Q. Mr. Lipkowitz, do you recall having attended at or about this time a meeting with Mr. Batt and certain members of Congress?

A. Yes, I do.

Q. Do you recall when that was in point of time in relation to this meeting where the representatives of the gold mines were present?

A. I think it was the day before, or it may have been two days, but it was just shortly before.

Q. Can you tell us in the first place the people present as well as you can recollect them at the present time?

A. Well, I received the call from the office of Mr. Lund, who was the head of the Labor Division, asking me to attend this meeting, that Mr. Lund was not available, and other superiors were not available, and since I was partially involved in this, would I attend.

I went to Mr. Batt's office to find several legislators present. I cannot recall the names, all the names. I recall Congressmen Englebright of California, one of either a representative or senator from South Dakota—I am not sure which of the gentlemen it was at the time—and at least one if not two other legislators, but my memory is quite vague on the names at the moment. But I do remember Congressman Englebright by name.

[fol. 1482] Q. Do you recall whether or not there was any discussion at that meeting as to the essentiality of gold?

A. Yes. In the course of the discussion, at which the legislators made a very substantial plea to Mr. Batt about

the impact of any such proposed order on the community life and the economic position of the community. I think the word "ghost town" was used quite liberally. Mr. Batt at one point turned to one of the legislators and said, "Well, you know, I wish you fellows would find some essential use for gold like you did for silver. We discovered one for silver in bus-bars and other things, and we are able to use all this silver, and we wouldn't think of doing this kind of thing for a straight silver mine, but, frankly, we have not been able to find any big, essential uses for gold. This would solve our problem very nicely if you could do it."

Q. Do you recall whether or not there were any suggestions made at that time as to essential uses for gold other than possibly a monetary use?

A. Not of any importance that I remember. There may have been some suggestion of—well, frankly, I don't remember any. The emphasis was on the monetary use of gold, and the importance to the economy, and that line of argument.

Q. Incidentally, at either this meeting with the legislators or the later meeting with the representatives of the gold mines, do you recall whether or not there was any discussion [fol. 1483] as to the use of critical materials by the gold mines?

A. Would you mind rephrasing that question, or repeating it?

Mr. Barnes: Read it back, please.

(The pending question was read by the reporter.)

The Witness: Well, I don't recall specifically, but I would say that if any discussion——

Mr. Rigney: If your Honor please, he said he doesn't recall. I think that is his answer. If he is going to assume something, I object to it.

The Commissioner: Yes, I think that he has answered the question, unless the last few words that you used were a suggestion that perhaps your recollection could be improved upon.

The Witness: Well, my recollection could certainly be improved upon.

The Commissioner: I mean by yourself. I mean if you can search your recollection and find any recollection of the point, you may testify about it, but if you start off by saying

"I don't recall" that disposes of that question unless as you proceed you can succeed in recalling it.

The Witness: I don't recall any discussion of it at any meeting with the legislators, or at this meeting with the gold mining industry. There were other meetings at which it was discussed. That is one of the points I was trying to bring out.

Mr. Rigney: You were not asked about those at this time.

[fol. 1484] By Mr. Barnes:

Q. Where you say you did hear it discussed at some meetings, what types of meetings were those?

A. Those were discussions by people within the WPB or with people in other branches of the Government in which mention was made of the savings that might occur from, for example, the use of mercury in certain processes or producing refined gold, the fuels that obviously had to be used in the treatment, the timbers that had to be used in the mines, and other accessory materials, for instance, work shop, mining equipment, repair materials, and various things of that sort.

Q. Had you given any consideration to the mechanisms whereby men from the gold mines would be moved to other non-ferrous metal mines if an order were issued shutting down the gold mines?

A. Well, the primary responsibility for the actual transfer routing of manpower rested with the War Manpower Commission rather than with the War Production Board. We obviously had very close contact with the War Manpower Commission. Our job was, in fact, liaison, but the implementation obviously rested with another agency.

Q. Did you discuss with them whether or not any implementation existed or was in process?

A. Yes. I recall a meeting in the War Production Board Building, the one on Fourth and Independence, the big [fol. 1485] building, and the representatives of the War Manpower Commission, I believe present were Colis Stocking, Louis Levine, and perhaps others, I don't know. I think there were others present, but I don't recall the names of the others.

Mr. Rigney: Fix the time, please.

By Mr. Barnes:

Q. What organizations were those men connected with?

A. With the War Manpower Commission—or the Bureau—I am not sure of the precise title—Bureau of Employment Security, and whether it had as yet been absorbed by the War Manpower Commission or was independent but working with it, I am not sure of the organizational status, but in our view that was the War Manpower Commission.

The Commissioner: Would the reporter read back the question about five questions back, the basic question that started off this line?

(Whereupon, the record was read by the reporter as follows: "Had you given any consideration to the mechanisms whereby men from the gold mines would be moved to other non-ferrous metal mines if an order were issued shutting down the gold mines?")

The Commissioner: All right.

Mr. Rigney: Would you have him fix the time of this meeting?

By Mr. Barnes:

Q. Would you tell us when this occurred, to the best of [fol. 1486] your recollection?

A. I am not—I cannot be precise on the meeting, unless perhaps this document will refresh my memory, but I believe it was after September 1st, when the freeze, voluntary freeze order on miners and loggers was issued by the War Manpower Commission.

Q. Was it prior to the issuance of L-208?

A. Oh, certainly it was, yes.

Q. Did the representatives of the War Manpower Commission make any representations at this meeting as to means that would be available to move the gold miners to other non-ferrous mines?

A. Yes, I think there were two factors: one, that they were relying on cooperation from the mining companies who needed the men, copper, lead, zinc, et cetera, and some arrangement that might be arrived at for paying transportation of the workers from the place where he would be displaced to the place where he presumably would be employed.

And I don't recall the precise assurances that were given in terms of whether they had the funds, or what precise steps they would take, but we certainly came away from the meeting with——

Mr. Rigney: I object.

The Witness: —a very strong assurance——

The Commissioner: Just a minute. There is an objection stated. When there is an objection stated you should await a ruling.

[fol. 1487] The Witness: I am sorry.

The Commissioner: And I think the objection is good, because he was about to give his impressions of what happened.

By Mr. Barnes:

Q. I think the difficulty there, Mr. Lipkowitz, is this: you may not be able to recall the exact terms that they used, but without stating what mental condition it induced in you, will you tell us to the best of your recollection what the terms were, what the language was that they used?

Mr. Rigney: If your Honor please, I object. He has concluded his answer, as I understood it, and was saying "we came away from the meeting with" and so on. Anything further would be repetitious of what he has already testified to.

The Commissioner: No, I think that he may answer with the instruction that he got from counsel. And I will give him further instruction. You can testify with regard to the substance of the meeting, but you cannot expand into any impressions that you may have received as a result of what transpired. We know you cannot remember the precise language.

The Witness: I can't possibly remember the language, I can't remember precise statements of the particular things they said they would do, but I know that we felt——

The Commissioner: That is what you cannot testify about. You can testify about the substance, that such and such was discussed in general, but you cannot say that "we believed [fol. 1488] so and so as a result of the discussion".

Mr. Witness: Well, we discussed various ways and means of moving workers from the mines that would be closed by

the gold mine order to the mines, and various lists were had of various mines that were short of workers, and discussions about appropriations, as I remember it, but I cannot remember the details of such appropriations, which satisfied us that they could do an effective job in moving those people if they were released.

The Commissioner: That is just where the objection goes, to everything that you said after the word "satisfied".

Mr. Rigney: I move to strike it.

The Commissioner: Sustained.

The Witness: I cannot recollect anything specific at the moment.

Mr. Barnes: We have a very peculiar situation here. The contention of the plaintiffs is that the War Production Board acted arbitrarily. That means that we are forced by plaintiffs' petition to examine the mental state of the War Production Board. This witness is testifying to a mental state which is ascribable to the War Production Board. It seems to me that this is competent under the peculiar contention of this case.

The Commissioner: I do not think it is all. I think that there has been testimony similar to this that has gone into the record without any objection. But when an objection [fol. 1489] is made it must be ruled upon. I have got to apply the yardstick of the rules of evidence to the question and answer.

By Mr. Barnes:

Q. Do you recall whether or not at this meeting there was any discussion of this September 1st freeze order issued by the War Manpower Commission?

A. At this meeting or after this meeting?

Q. At this meeting that you just referred to.

A. I can't say specifically, but I am sure, as I said earlier, that it was after the order had been issued, and I know that I, at the time, was relying on its being effective——

Mr. Rigney: I object to that, what he was relying upon, as not responsive to the question.

The Commissioner: Sustained.

Mr. Rigney: And I move to strike it.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Did you have any opinion as to the effectiveness of the September 1 freeze order in moving miners from the gold mines, if they were closed down, to other non-ferrous mining operations?

Mr. Rigney: I object to that. It is irrelevant and immaterial what his opinion may or may not have been about the freeze order.

The Commissioner: Overruled, if that is your objection. [fol. 1490] Mr. Rigney: And it is incompetent, too, because he is asking him to give his state of mind.

The Commissioner: All right, that is sustained.

The Witness: May I insert a question?

Mr. Rigney: No, the objection was sustained.

By Mr. Barnes:

Q. Mr. Lipkowitz——

The Witness: Excuse me, I have refreshed my memory——

Mr. Rigney: If your Honor please——

The Commissioner: There is no question pending.

By Mr. Barnes:

Q. Mr. Lipkowitz, let me ask you this: Dr. Wilbur Nelson has testified here that if mechanisms had existed for moving the gold miners to other non-ferrous mining enterprises he would have had no objection to the issuance of an order closing the gold mines. Let me ask you, first, did you ever hear Dr. Nelson make a statement similar to that prior to the issuance of Order L-208?

Mr. Rigney: I object to that, as to whether he ever heard him make it or not.

The Commissioner: Overruled.

The Witness: May I answer?

By Mr. Barnes:

Q. Yes.

A. I don't recall such a statement.

[fol. 1491] Q. Do you recall discussing with any repre-

sentatives of the Mining Division mechanisms that might exist for moving gold miners to other non-ferrous metal mines?

A: I am sorry, would you mind repeating the question so I could make sure of what was intended?

(The pending question was read by the reporter.)

The Witness: I don't recall discussing it individually, but I do recall that this subject was discussed on several occasions in these interdepartmental meetings, at which time I am sure, that somebody from the Mining Division was present.

Mr. Rigney: It is too late to object, I suppose, now, but it was not responsive and I move to strike the latter part of it. He says he does not have any recollection of discussions with the Mining Division. I think that is the end of his answer and the balance should be stricken.

The Commissioner: Overruled.

I would like to ask a question at this point. I would like to ask the same question except where Mr. Barnes says "might exist" I would insert "might be employed", and I am going to ask you to read that question as it is and I will make the insertion.

(Whereupon, the record was read by the reporter as follows: "Do you recall discussing with any representatives of the Mining Division mechanisms that might exist"——)

The Commissioner: There I would insert "might be employed".

[fol. 1492] (The reporter continues reading: "—for moving gold miners to other non-ferrous metal mines?")

The Commissioner: May I expand the question to other people in the Mining Division.

The Witness: Where I find the difficulty is to recall the conversation with a particular person on a particular facet of this gold mine closing order. There were so many discussions going on with so many people at different times on the whole issue of closing gold mines that to recall whether I spoke about a specific point with a specific person or group of persons in the Mining Division or any other is very difficult at this time.

By the Commissioner:

Q. Let me ask you this question then: was there any discussion within WPB, at which you were present, at which a method of transferring gold miners—transferring is not quite the word——

A. Of facilitating.

Q. —of moving the gold miners to the non-ferrous metal mines was discussed?

A. It is my memory that that was discussed in those various interdepartmental meetings. Now, I wasn't present at all of them, but I would be willing to—well, I wouldn't say be willing to swear, because I cannot remember that well—but I am reasonably certain that that was discussed [fol. 1493] at those meetings, and if those minutes are available they would tell the story. I don't see why I should be asked to remember something that is down in writing. It is very difficult for me at this stage of the game.

By Mr. Barnes:

Q. Let me show you Plaintiffs' Exhibits 82 and 94——

Mr. Rigney: Would you mind giving the dates? It would help me to find them.

Mr. Barnes: 9-15-42 and 10-9-42, are these two.

By Mr. Barnes:

Q. (Continuing)—which are the minutes of two meetings in which I see your name listed as among those present, and I ask you whether that refreshes your recollection.

A. Yes sir. These are the meetings which I was referring to before you brought the papers here, and reading this, I note that Mr. Harbison of the War Department had outlined steps that the various agencies had taken to meet the manpower shortage in non-ferrous metals mines and pointed out that the transfer of gold miners to essential mining was being held up by the lack of a gold curtailment order. He pointed out that the U. S. Employment Service had been unable to obtain many recruits at Rapid City because the gold mines had not been closed down, although Anaconda Copper Mining had agreed to pay transportation costs.

Q. Let me ask you this: aside from your having read that,

[fol. 1494] does that refresh your recollection that that happened?

A. Yes. I remember discussing these matters at length with Mr. Harbison before this meeting.

Q. Do you recall whether or not in the course of those discussions you expressed an opinion as to whether or not means were available that could be employed to arrange such transfers?

Mr. Rigney: I object to that. I do not see how this witness is competent to testify on that. The War Manpower Commission was charged with it and was handling it. He was not with the War Manpower Commission. I don't think it is competent.

The Commissioner: Overruled.

Let us have the question so the witness understands it.

(The pending question was read by the reporter.)

The Witness: I suggested, according to this document, that an advisory committee be established with representatives from the Labor Production Division of the War Manpower Commission——

Mr. Rigney: Where are you directing your attention now, Mr. Lipkowitz?

The Witness: This is on Document 823, page 2, the last paragraph. You will notice that it continues over to page 3. It says: "The functions of this committee"—the committee that I am suggesting be established—"were, one, to review the extension of serial numbers, and, two, to recommend the establishment of machinery for transferring gold miners."

[fol. 1495] By Mr. Barnes:

Q. Let me ask you this: do you recall whether or not any such committee was established?

A. Frankly, I don't remember.

Q. Aside from these minutes, do you have any recollection of discussions with anybody in the War Production Board as to means that could be employed for moving gold miners to other non-ferrous mines?

A. Well, Mr. Buchanan and I discussed this day in and day out, so to speak, in that period. We talked with people

in the Copper Division, I am sure. I cannot recall others specifically.

Q. Did you at that time, as you recall it now, express any opinion as to the means that could be employed for such transfer?

A. Well, I am sure that I mentioned at various times the existence of that freeze order which had been put in. It was something—I had attended the meeting in the building when the labor and industry advisory people were present. I was quite well aware of this freeze order going into effect, and I am sure that that was considered by me, and probably by others as one means of—how should I put it—assuring that the mining industry and the lumbering industry would have very high priority in referrals of labor from the War Manpower Commission, because the problem had been upper- [fol. 1496] most in their minds as a result of the freeze order.

Q. Do you have any recollection as to information that you may have received subsequent to the issuance of L-208, as to the number of men who were actually transferred from the gold mines to other non-ferrous mining activities?

A. If I may preface my remarks, there were various conflicting estimates made by different people based on different sets of data. We relied, as I remember it, largely on the reports of the War Manpower Commission. I forget the form number, it was 280—I am not sure—it was later consolidated with 732. The Mining Branch and the other production divisions of the War Production Board got most of their information by communications from the companies.

Mr. Rigney: I object now to this, your Honor. It seems to be digressing from the question and not responsive. He was asked did he have any information on the number of men that were transferred, and now he is going off into some kind of answer.

The Commissioner: I think he is leaving the question. The question was: what information you had after the gold closing order.

The Witness: Yes. Well, our information in the Labor Production Division was based largely, if not entirely, on the data of the War Manpower Commission forms I referred to earlier.

By the Commissioner:

[fol. 1497] Q. Did they have information on where these miners went?

A. There were, as I remember it, special requests made to the various offices of the War Manpower Commission, largely from the western mining areas, for information on this, and those reports were made available to us.

Q. You have not answered the question. Did they have information on where the gold miners went?

A. They submitted what information they had.

The Commissioner: All right.

By Mr. Rigney:

Q. Did they have any, though?

A. Yes. I am not saying it was complete, but they had some.

By Mr. Barnes:

Q. Mr. Lipkowitz, there has been some reference here to the fact that a relatively small number of miners—and the figure again varies somewhat even in this record—went into non-ferrous mining enterprises and stayed for a period of 100 days or more. Do you feel that that is a valid measure of the operation of L-208, so far as the movement of manpower is concerned?

Mr. Rigney: I think that is objectionable, your Honor.

The Commissioner: I am going to have to overrule that objection. I take it this is being asked of the economist as an expert.

[fol. 1498] Mr. Rigney: If it is, then I want to interpose a more pertinent objection.

The Commissioner: Let us find out if it is. Is it?

Mr. Barnes: Yes sir.

The Commissioner: All right.

Mr. Rigney: Your Honor, I don't think that Mr. Lipkowitz' qualifications are such that he is an economist. I think he is a statistician, is all that has been shown so far. And if he is going to be called upon to give testimony now as an economist, in the field of economics, I should like to have an opportunity to conduct a voir dire examination of him as to whether he is qualified or not.

Mr. Barnes: In view of counsel's concession that the witness is at least a statistician, it seems to me that that question is aimed more at the statistician than economist.

Mr. Rigney: I do not want any doubt about whether he is going to be permitted to testify as an economist, as an expert in the field of economics, and I interpose an objection now to testimony from him on that score. He just collected figures, based on his own testimony, and that is all he did.

The Commissioner: Well, if you want to ask any questions of the witness, go ahead.

Mr. Rigney: Well, I will withhold that for the moment, and I take it Your Honor is going to overrule the objection that I have made to this particular question.

[fol. 1499] The Commissioner: Yes.

Mr. Rigney: We will see how far we go on this.

The Commissioner: All right.

Mr. Barnett: Could we have the question again, Your Honor?

The Commissioner: Will you read the question, please?

(Whereupon, the record was read by the reporter as follows: "Mr. Lipkowitz, there has been some reference here to the fact that a relatively small number of miners—and the figure again varies even in this record—went into nonferrous mining enterprises and stayed for a period of 100 days or more. Do you feel that that is a valid measure of the operation of L-208, so far as the movement of manpower is concerned?")

Mr. Barnett: Wouldn't it be necessary that he knows just what the evidence has been up to this point in order to answer that? Unless there is a proper foundation showing that he knows that evidence, I cannot see how he can answer——

The Commissioner: Unless you quarrel with the——

Mr. Barnett: —as to what he feels. And the word "valid" seems to be objectionable.

Mr. Rigney: And proper measure. That is argumentative and debateable, as to what is a proper measure of the effectiveness of the order.

The Commissioner: Well, unless you can find some sub-

stantial fault with the facts as posed as being present in the [fol. 1500] record, I am going to overrule all the objections.

Mr. Pittman: As I understand it, the witness has not testified that he knows how many went back in the non-ferrous mines. Until the proper foundation is laid I will challenge his right to make an observation on the matter.

The Commissioner: Overruled.

By Mr. Barnes:

Q. Mr. Lipkowitz, can you answer the question now, please?

A. I had a good deal to do with the preparation of the figures which are cited as——

The Commissioner: You are not answering the question. Read the question, please.

(Whereupon, the record was read by the reporter as follows: "Mr. Lipkowitz, there has been some reference here to the fact that a relatively small number of miners—and the figure again varies somewhat even in this record—went into non-ferrous mining enterprises and stayed for a period of 100 days or more. Do you feel that that is a valid measure of the operation of L-208, so far as the movement of manpower is concerned?")

Mr. Barnett: That question certainly appears to be ambiguous, to say the least, "is that a fair measure?"

The Commissioner: For what it is worth, I want to hear from the witness, if he can answer it. I find that it saves time—we do not have a jury here—to go ahead with the [fol. 1501] question. If I have any doubt about admissibility I resolve that pretty quickly in favor of admissibility, because I can sit back in my office and go over it.

Mr. Rigney: I am sure Your Honor will weigh it.

The Witness: You have stopped me from making certain preliminary remarks earlier, and I want to indicate why I wanted to make those remarks before I answer the question without making them.

The Commissioner: All right.

The Witness: As I said earlier, this is eleven years. I don't have the figures at my fingertips. I have not read anything on the gold mining thing for four or five years now, so

that my memory has been refreshed in the last day or so, and only partially.

I remember that this document, Special Study No. 9, was circulated while I was in the War Production Board when I had access to the data, when the data which I had prepared was fresh in my mind, and so I wish to refer to tables in this document which I know were prepared in the division I worked in, and which I am sure I had a large hand in preparing, in answering the question. Now, is that permissible?

Mr. Barnes: I don't think the question calls for or requires such a reference, Mr. Lipkowitz. I think that that is the basic problem, and maybe the objection is well taken, Your Honor, that the question is ambiguous, because I don't [fol. 1502] think that the witness has understood it, so I will withdraw the question.

The Commissioner: We will recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearing.)

[fol. 1503] By Mr. Barnes:

Q. Mr. Lipkowitz, let me direct your attention to Plaintiffs' Exhibit No. 125, a memorandum from Mr. Edward T. Dickinson, dated April 22, 1943, and ask you whether you recognize the statistical information that appears in the first paragraph relating to displacement of labor and the paragraph related to displacement of labor.

A. Yes. This apparently came from frequent statistical tabulations which we in the Labor Production Division made which were——

Mr. Rigney: If Your Honor please, I don't like to be objecting here, but we are entitled to the rules of evidence and it seems to me wrong that this man be shown an exhibit and he starts out saying, "This apparently came" when it isn't an exhibit he had anything to do with, as it appears from the face of the exhibit. I think a direct question should be put to him and I move to strike what he has made so far.

By Mr. Barnes:

Q. Let me direct your attention first to the last page——

The Commissioner: Do you withdraw the question?

Mr. Barnes: Yes.

By Mr. Barnes:

Q. Do you recognize that?

A. The table as the last page of the exhibit?

Q. That is right.

[fol. 1504] A. Yes.

Q. Where was that prepared?

A. In the Raw Materials Section of the Labor Production Division.

Q. Did you have anything to do with that?

A. Yes, I devised the technique for doing this.

Q. Did you supervise the tabulation?

A. My assistants did it; I am sure, and I imagine I checked it over. We were so busy then I don't know whether I checked this particular table or not. We did it.

Q. Have you during the recess read the material under the heading "Displacement of Labor by Order and Results"?

A. Yes, sir.

Q. Do you recognize the material that appears there?

A. Yes. It refers to a study made by the Labor Production Division on the displacement of gold miners, and I recall our having made that survey in our division.

Q. I notice that the statement is made in this memorandum that the 1156 gold miners were placed in other non-ferrous mines. Now I would like to direct your attention to Plaintiffs' Exhibit No. 52, which is a memorandum from Wilbur Nelson to Howard I. Young, which is in form a commentary on the exhibit we have just been looking at; Plaintiffs' Exhibit No. 125. I direct your attention to the material under the heading "Paragraph A-1."

[fol. 1505] A. Yes.

Q. I notice in the two documents a considerable discrepancy of opinion as to the number of gold miners who were placed in the non-ferrous mines. Can you, on the basis of your experience, offer any explanation of that discrepancy?

Mr. Rigney: I think that is objectionable, Your Honor. The documents are in and they speak for themselves. It would be for Your Honor to resolve discrepancies or conflicts in the evidence, if there are any such. It is not for this witness to do that.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Mr. Lipkowitz, in preparing your tabulations as to the number of gold miners placed in non-ferrous metal mines, did you give any consideration to the length of time they stayed in those non-ferrous mines?

A. It was not possible for us to give consideration to the length of time that they stayed, because we were working on a basis of statistics of employment as of one period as against another, and there was no detailed breakdown of the names of the individuals, so we wouldn't know whether everybody who was employed on a given date had come in within the last month or if some individuals had worked there for twenty years. We had no particular facilities for determining that issue. I mean in the Labor Production [fol. 1506] Division. I am not speaking for anybody else.

Q. In your opinion as a statistician in evaluating the effectiveness of Order L-208 so far as it served to transfer men from the gold mines to the other non-ferrous mining operations, is the length of time that a man stayed a significant factor?

A. It may be a significant factor to a particular mine, but it is not necessarily a crucial factor for the mining industry as a whole because, suppose that a man is moved from, let us say for example, Homestake to the Coeur d'Alene area in Idaho. These gentlemen here know that there are, what, ten or fifteen, perhaps more lead-zinc mines in that area. Suppose that the man moved from Homestake to Bunker Hill, the next day he moved from Bunker Hill to Morning—Morning is the name of another mine.

When he came to the second mine he would not be reported as a displaced gold miner because he had come from a previous job which was not a gold mine.

Suppose that he had transferred from a gold mine to one lead-zinc mine and then he had moved to another lead-zinc mine which had a higher productively that the first lead-zinc mine. The total production of lead and zinc would rise even though he were the only person who moved.

I am taking an extreme example in one person, but the principle applies. So the significance to the industry in my [fol. 1507] view is the total number of people that went to

the part of the non-ferrous mining industry which was considered by the War Production Board at that time more essential than gold mining.

Mr. Rigney: This is all suppositious and hypothetical, what you have been saying, isn't it? You are attempting to illustrate something by what you said?

The Witness: That is right. I don't recall now which men went to which mines and how frequently they moved. It is very unlikely that a man would move the next day, but I just used that as an example, as you say. But I would like to say this, if I may——

Mr. Rigney: I object to anything that is not responsive to a question that is put to the witness, and I think——

The Commissioner: Of course, if he hasn't completed his answer, he may do so. If what you want to say is a further response to the question, you may finish.

The Witness: I think it is responsive, Your Honor. You know your duty.

The controversy frequently came up among the people in the War Production Board after the order was issued as to what the effect of this order was in terms of improving the labor supply in the essential mines. We in the Labor Production Division generally took the attitude that if the total supply of labor to the essential mining industry was in- [fol. 1508] creased, that resulted in more production in that industry than otherwise would have come about. Whether the man moved from one mine to another and there was extensive oral talk, and I notice it again in this document that you handed me——

By Mr. Barnes:

Q. Plaintiffs' Exhibit No. 52?

A. Yes, from Nelson to Young. —that people came to a mine and stayed only a short time. Therefore, they didn't help the mining industry. It seems to me that statistically if you adopt that assumption you assume that these people disappeared from the face of the earth.

Q. After they left the mine?

A. After they left the first mine that they came to from the gold mine. I think that is an inadmissible assumption

with respect to this problem, because it seems to me it is incumbent on these people to prove that these people did not do any productive effort thereafter.

Mr. Rigney: If Your Honor please, I move to strike the witness's observation about what is incumbent upon anybody to prove.

The Witness: I am sorry.

The Commissioner: It may be stricken.

The Witness: I agree.

By Mr. Barnes:

Q. Mr. Lipkowitz, directing your attention to Plaintiffs' [fol. 1509] Exhibit No. 125 and particularly to the tabulation that appears at the foot of the first page of that relating to where gold miners went, on the basis of your study of this matter can you tell us whether or not in your opinion that is an accurate portrayal of what happened to the gold miners?

Mr. Rigney: I object to that, if Your Honor please.

The Commissioner: Let's have that question so I can get your objection right.

(The question was read by the reporter.)

Mr. Rigney: I object, if Your Honor please, because I think it is improper to call a witness and ask him to characterize the quality of other evidence in the record. It is a very unusual procedure and I have never heard it allowed, to put a witness on the stand to characterize another witness's testimony or physical exhibits.

Mr. Barnes: Your Honor, the witness has stated that that portion of the exhibit is based upon studies made in his division under his supervision and adopted by Mr. Dickinson in his memorandum.

The Commissioner: I am going to sustain the objection. You can put in an offer of proof if you want to. You can do it by question and answer. I think the objection is all right.

Mr. Barnes: Your Honor, I will let the exhibit itself and the prior record stand as an offer of proof. I think the record is clear as to the source of this information.

[fol. 1510] By Mr. Barnes:

Q. Let me ask you this at this point, Mr. Lipkowitz. I notice that in Mr. Dickinson's memorandum there is a reference to the fact that certain miners were placed in other essential industries. Do you recall whether or not your studies indicated that some miners went into industries other than non-ferrous mining?

A. Yes, I do. I recall that we asked the Social Security Board to make a special tabulation of the people who were employed in—I can't remember how many gold mines from the employment records for the employment tax—I believe in either the second or third quarter of 1942. I am not sure now. It was a long time ago.

The survey itself is referred to in Special Study No. 9. We ask the Social Security Board to make that survey of each individual employee who had been employed at that base date, which I can't place precisely, and where he was employed one year later, if the records showed it, so we could have some idea on this problem that you raised earlier of what happened to these people.

Suppose they had gone here and then moved on and you would never be able to trace them as a gold miner again. We wanted to know where they were, let us say, one year later no matter where they had been in between. A tabulation was made and some results of that are recorded in here.

[fols. 1511-1520] Q. By "here" you are referring again to Special Study No. 9?

A. Yes.

[fol. 1521] By Mr. Barnes:

Q. Mr. Lipkowitz, my recollection is that before we embarked on this discussion you were referring to the fact that you had had a special study made as to what had happened to certain gold miners, is that correct?

A. Yes, and that is the study referred to in the footnote that His Honor read to the reporter.

Q. That indicates that gold miners went into occupations other than non-ferrous mining, is that correct?

A. Yes.

Q. On the basis of your knowledge of the labor situation

which existed during the war, can you tell me how those [fol. 1522] occupations compared in degree of essentiality with gold mines?

Mr. Rigney: If Your Honor please, I object to that. There is no standard, I think, by which he can testify to that. It might be merely his personal opinion as to what degree of essentiality, but that would be meaningless.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Do you recall whether or not any of these employees went into shipbuilding?

A. Yes.

Q. What was the labor situation in 1942 in the shipbuilding industry?

Mr. Rigney: I don't think he is competent to testify on that and I object unless there is a showing and a better foundation laid for the question than has been so far.

The Commissioner: Sustained.

Mr. Barnes: With respect to that point, Your Honor, I will rest.

By Mr. Barnes:

Q. What knowledge did you have as to the labor situation in industries other than non-ferrous mining, in 1942?

A. We were informed at various times by the War Manpower Commission, by people in the Army Manpower Office who had come in to Washington from the field or who had gone out from Washington to the field and had come back, that a number of large construction projects were being [fol. 1523] operated in areas adjacent to the non-ferrous metal mines and were drawing labor from non-ferrous mines and other industries, that many of the men had left the mines because they could secure higher pay at aircraft plants, shipbuilding plants, construction jobs—well, a number of other industries.

I can't recall all of them, but aircraft, shipbuilding, and construction were the three bete-noires so to speak, of the period, and it was quite a problem with the military establishments at the time because they were equally concerned

with the production, the shipbuilding, aircraft and in these army and naval base training centers and other construction projects sponsored either directly by one of the military services or by a contractor to the military services.

Q. Let me ask you this question: In your opinion how effective was Limitation Order L-208 in relation to its purpose or motive to move manpower from gold mining to other labor areas?

Mr. Rigney: If Your Honor please, I think that is objectionable. I don't think a proper foundation has been laid with this witness to answer that question. I think it presupposes a store of knowledge that he does not possess on the basis of the record here.

The Commissioner: Sustained.

Mr. Barnes: Your Honor, I limited the question specifi- [fol. 1524] cally to the manpower situation which the witness said was a matter he was concerned with in 1942 and thereafter through his connection with the War Production Board in the summer of 1944. I think that his qualifications have been shown. That was the specific matter with which he was charged, the manpower proposition in the War Production Board.

The Commissioner: Your first two words were "how effective" was the order. This witness may have information with respect to where these people went, but I think when he has testified concerning those points, he has done about as much as he can towards answering that kind of question. You can put it in as an offer of proof. I may be wrong.

Mr. Rigney: That kind of question, too, is tied up with the entire controversy which You Honor has to decide.

Mr. Barnes: Your Honor, I offer to prove that if the witness were permitted to answer the question he would——

The Commissioner: Do it by question and answer.

Mr. Barnes: Will you please answer the question I just put to you, Mr. Lipkowitz?

Will you read the question back, please?

(The pending question was read by the reporter.)

The Witness: May I answer that?

The Commissioner: Yes.

The Witness: I think the effectiveness in moving from the gold mines is unquestioned. The areas to which they moved [fol. 1525] were the subject of considerable controversy for quite some time. I don't think all the facts are in yet. But the fact that they moved, I think, is unquestioned, and the partial evidence which we have in various ways, particularly in the study to which referred, this letter from Mr. Corson to Stacy May, is the only study of which I know anything that indicates where these people were at a specific time later on, rather than a spot check of one particular mine on one day and how many people are still working who came from a gold mine.

Do you see my point? It is a more extensive study of that point than any that I have seen. All of the others have been very small samples of particular firms to which the men went, and they were gotten by asking the particular firms a specific question, but this was a check of the individual's employment record on the basis of tax paid by the employer, so there is a record in the Government of where he went to.

Even there, as I recall now, something on the order of—this is very vague, but probably 800 or 1,000, but I wouldn't want to be held to the particular figure because I can't remember it—people were not accounted for in this survey of the people who had been on the payroll in the base period before the gold mine closing order.

That can be accounted for, and this is a subject we talked about for some time, by their employment in what we call non-covered industries, that is, industries which do not have [fol. 1526] to pay any Social Security tax, induction into the Army, death, or unemployment. There is no way of knowing what happened to that other number. Some of them may have gone into agriculture, for example, which is a non-covered industry. Some may have gone into the Army.

So, on the effectiveness of the transfer, as I said earlier, that the people were moved from the gold mining industry is quite clear. There is more data in that sample survey that I have talked about on where these people were at a specific time later on than in any other survey. If my memory serves me rightly, it accounted for something on the order of 2,000 to 3,000 people, but I can't be sure of those figures at this time.

By Mr. Barnes:

Q. Still as part of the offer of proof, Mr. Lipkowitz, in your opinion will you tell us whether or not the order was a failure to the extent that people moved to industries other than non-ferrous mining?

A. I don't believe so, because the Labor Production Division at that time was concerned with getting more employees for shipyards, aircraft plants, construction plants, and a multitude of other industries which it would be very difficult to name completely. For example, the foundry industry. We had several of our people in the War Production Board going out to individual foundries to do some-
[fols. 1527-1528] thing about determining why people left foundries.

Again we came to the same problem, dirty jobs. It was a whole series of these industries which were seeking labor at the time. It is my opinion, and it was certainly our opinion in the Labor Production Division at the time, that the movement of these people from gold to any other productive industry was a net gain to the economy from the point of view of availability of labor.

[fol. 1529] Cross-examination.

By Mr. Rigney:

Q. Congress never passed a statute during the war which gave the War Production Board or any other agency of the Government power to compel labor to move from one place to another, did it?

A. No. I believe a request was made by President Roosevelt, but it never was acted upon.

Q. Bills were introduced to accomplish that purpose, weren't they; specifically, the Austin-Wadsworth Bill?

A. Yes.

Q. And Congress refused to enact any such legislation, didn't they?

A. I don't remember all the details. I remember the Austin-Wadsworth Bill, and I presume that it included a feature there which I am sure was not included in subsequent legislation.

Q. No so-called draft labor legislation was ever passed?

A. Not as far as I know.

Q. Your testimony was, I believe, that you became actively interested in this proposal to close the gold mines in June or July of 1942?

A. To the best of my memory, yes.

Q. And from then on until the order was issued, you had a great many meetings and conferences and discussions of it, [fol. 1530] is that right, sir?

A. Yes.

Q. You would agree with me, wouldn't you, that you were the most active member of the staff of the War Production Board in furthering this order, from the time it was originally proposed? In other words, no one took a more active part than you did in endeavoring to get this order adopted?

A. I think it is unfair to ask me to characterize my activities. You are asking me to appraise my activities relative to other people's activities at the same time. I don't think I am the best judge of that.

Q. I am not asking you to assay the quality of your work or anybody else's. I am just asking you if there was anyone in the War Production Board, to your knowledge, who was as active as you were in support of this order, from the time it was first proposed or that you first started working on it?

A. Well, there were other people. For instance, Mr. Buchanan, my associate, was equally active, although he happened to be away on field trips part of the time, so he obviously couldn't be active during the time he was away.

Q. So would you agree that you were more active than anyone else?

A. In the earlier stages, yes. I am not sure that I was, for example, in the last week or two before the order was issued, because frankly, in the last week after that October [fol. 1531] 1st meeting, I knew almost nothing about what was happening to the order until it was issued on October 8. Who was active in what way in that period, the Lord only knows. I don't.

Q. Then you would say that in June and July of 1942 until the 1st of October, you were more active than anyone else in support of the order?

A. Probably, but it is hard for me to know exactly who else was active on other—you see, there were several levels in the War Production Board at which these things were

taking place, and I didn't have direct access, for example, to Mr. Batt and Mr. Nelson. I don't know who may have been very active on that level.

Q. Just based upon your own personal knowledge of the meetings that you have testified to, the discussions that you say you participated in, limiting it to your personal knowledge, can you give us the name of anyone who was more active than you were in the period from June to October 1st, say, 1942?

A. I can't say that anybody was more active.

Q. This started out as a means of getting gold miners into the copper mines in October 1942, this proposed closure order?

A. All non-ferrous mines. Copper was the symbol, so to speak.

[fol. 1532] Q. But all of the discussion, as far as you recall, in the summer of 1942, say, June, July, and August, concerned the desirability of getting gold miners into the non-ferrous metal mines, is that right?

A. That is right.

Q. Did there come a time in September or at any other time when you decided that maybe it wouldn't be successful in that regard, although it might get them into something besides copper mining?

A. I would say that we always recognized that you had no compulsive powers over individuals; that you could not direct them completely and irrevocably as to where they would go.

Q. You couldn't direct them in any way, could you?

A. Well, you had a voluntary freeze order which was a governmental order which presumably would influence people.

Q. But all the freeze order did was to keep those who were there, in the spot they were in?

A. That is right, but it also publicized, sir, the importance attached by the Government to those industries, over and above other industries which were not so singled out.

Q. Publicized their importance, you say?

A. Yes, and their importance from the Government's point of view, and the desirability of having adequate labor for those industries.

[fol. 1533] Q. But it had no effectiveness or no power whatsoever to accomplish a transfer of labor from one place to another, did it?

A. No.

Q. So what you were really faced with was the fact that you couldn't move one gold miner from his gold mine to any non-ferrous metal mine unless he wanted to go, could you?

A. We obviously could not compel a person to move against his wishes.

Q. He had to be willing to go voluntarily, didn't he?

A. Yes. Perhaps you could induce him to go by a variety of incentives or inducements or disincentives, but you could not say to him, "You must go there."

Q. What were the causes of the shortage of copper miners as they existed in 1942? What would you say the causes were for the out-migration of copper miners and all non-ferrous metal miners?

Let me just ask you this, parenthetically: The copper miners represented the largest body of non-ferrous metal miners, didn't they?

A. Yes, particularly in the West, because lead-zinc is in the Middle West and in the East, whereas there is very little copper in that area.

Q. Copper was far more important numerically, as far as numbers of miners, than all the others put together?

[fol. 1534] A. Probably. I don't remember the exact figures, but that wouldn't be badly off, certainly.

Q. What do you say the causes were for the out-migration of non-ferrous metal miners from the mines in the summer of 1942?

Mr. Barnes: I object to that as assuming a state of facts not shown in the record: that there had been an out-migration of copper miners.

Mr. Rigney: He testified on his direct that there was.

The Commissioner: Overruled.

The Witness: There was an out-migration. There isn't any question of that. But——

By Mr. Rigney:

Q. Would you please now tell me what the reasons for that were?

A. The causes, as we saw them, were numerous. One was the relatively low wages paid in copper mining as compared with alternative employment opportunities—construction, shipbuilding, et cetera.

Two: That in these other industries, the opportunity to work more than 8 hours a day at overtime pay was readily available, whereas in many States the State law prohibits more than 8 hours' work per day underground.

Three: The occupation has certain hazards and risks which I believe are recognized in insurance, which are not [fol. 1535] present to the same degree in other industries.

Four: The replacement of, shall we say, normal turnover which occurs in any plant, was particularly difficult for the metal mining industry because the wages and the other factors were unfavorable and more people had, say, skill in one or another type of construction work than would likely have skills, let us say, in underground mining. So you had a very small supply.

Going back a long ways, part of the difficulty is that a large part of the mining labor supply comes from original immigrant families, and the flow of immigration, which was not completely checked but greatly reduced in the 20's, had a great deal to do with cutting off the long-range new supply of labor to the mining industry.

The depression——

Q. I am asking you to confine your answer now to reasons for the 1942 out-migration that you were testifying to. Confine it to that.

A. This bears on the fact that you could not get people to replace them because you could not train new people in this industry for the reasons I cited.

Q. Do any other reasons occur to you, any other important reasons?

A. In particular cases, questions were raised as to the availability of adequate housing; other factors which had [fol. 1536] particular application in particular places, but were not an over-all factor, like relatively low wages as against construction.

Q. Some of these miners were being lost to the non-ferrous metal mines by reason of Selective Service in 1942?

A. Oh, yes, of course, but that was true of almost every industry.

Q. You spoke about housing. Were you acquainted with the housing conditions at or near the principal copper mines in 1942?

A. No, I was not at that time, except in Michigan, which I had visited earlier that year.

Q. I see. You had no knowledge of that.

A. Not personally, no.

Q. But you did know, from whatever source you derived your information, that housing conditions were not good?

A. These were the statements that came in from various field offices of the War Manpower Commission.

Q. That the housing conditions were not good?

A. In a particular area, or inadequate; that we needed more people and there wasn't enough housing.

Q. In the non-ferrous metal mine areas?

A. Yes.

Mr. Barnes: All, or some?

The Witness: Some. I wouldn't say that it was wide-
[fol. 1537] spread, I don't know whether it was widespread, but it certainly wasn't universal.

By Mr. Rigney:

Q. When were you with the Tariff Commission?

A. From January 1941 to December 1941.

Q. What were your duties there?

A. Assistant and Associate Economist.

Q. You referred to being in Michigan on duties for the Tariff Commission; is that right?

A. No, for the War Production Board.

Q. For the War Production Board; I see.

Are you familiar, from your service with the Tariff Commission, with a study which the Tariff Commission made with respect to the copper range in Upper Michigan?

A. Yes.

Q. You know about that, don't you? Have you read that study?

A. Yes.

Q. When did you read that?

A. I helped prepare it.

Q. When was it completed?

A. In the first half of 1941. I am not sure whether it was

May or June, or maybe late April. I don't recall just the exact date. I think May.

Q. Didn't that study disclose that there had been a con- [fol. 1538] stant loss of copper miners to the industrial areas, particularly Detroit, which had gone on for some time prior to the completion of your study?

A. It was beginning at about that time. The difficulty with that is that the emphasis in our study was on the fact that there was a large hard core of unemployed up in the Michigan area because total employment in Michigan copper had declined over a long period of time, as the figures would show. Copper production figures had gone down. Until 1941, there had been really a hard core unemployment problem, a major relief problem. It was so characterized in various Government surveys, I believe.

At just about that time the tide was turning, but there was not a real total shortage of labor in Michigan at that time. It was merely exercising its influence in the sense that people were no longer willing to work, let us say, for the wages that were being paid in Michigan at that time, because employment opportunities in Detroit and in other areas there were opening up, and these people said, "We can get more there, and let's go."

Q. They were leaving the copper regions for that reason?

A. Yes. But we didn't feel, if I remember correctly, that there was any immediate labor shortage at that time; that this was more or less taking up the slack of unemployed [fol. 1539] which had existed up to that time.

Q. But you found that people were leaving the copper mines at that time to take work in Detroit and other industrial centers because it was more attractive to them?

A. Yes.

Q. You knew there was that migration of labor going on?

A. Definitely.

Q. Did you know Gustav Peck?

A. Yes.

Q. He was Special Adviser to Donald Nelson on manpower problems, wasn't he?

A. Yes.

Q. Prior to October 8, 1942, when this order was issued, did you ever discuss the order with him?

A. I am not sure that I did.

Q. Can you tell us whether or not——

A. I know I discussed it at various times afterwards, but I don't remember discussing it before.

Q. Did you discuss this proposed closing order during the summer or autumn of 1942 with anybody from the War Department?

A. Yes, I am sure we did.

Q. Who did you discuss it with from the War Department?

A. Certainly Mr. Harbison.

Q. He was the representative of the Services of Supply, [fol. 1540] was he, on this Interdepartmental Committee?

A. Let's see his exact title, which appears on one of these things.

Q. His title is not important.

A. He was in the Services of Supply. I don't know the exact division or branch.

Q. You discussed it with him on several occasions?

A. Yes.

Q. Anybody else from the War Department that you recall?

A. There was a Captain Long. If you would mention some names, I am sure I could remember one or the other.

Q. You were there, and I wasn't. I thought maybe you could remember.

A. I thought maybe you had the record of some of these meetings, because some of these people who were there would certainly——

Q. Did you discuss it with anybody from Secretary Patterson's office?

A. We had a meeting with Mr. Mitchell.

Q. James P. Mitchell?

A. Yes, James P. Mitchell. I believe he was attached to Mr. Patterson. He presided over that meeting. This was not a personal discussion, but obviously a group like this, and everybody talked.

Q. Could you fix the time——

[fol. 1541] By Mr. Barnes:

Q. "Like this"—are you referring to counsel table for plaintiffs or defendant?

A. Both.

By Mr. Rigney:

Q. Can you fix the time, as near as you can, by months?

A. I would imagine July, but I think that is mentioned here, if my memory serves me right.

Q. Mr. Mitchell was the consultant to the Under Secretary of War on Industrial Labor Problems, wasn't he?

A. I don't know.

Q. That may not be the precise title, but that is the kind of work he did?

A. That is the main idea, yes. I don't know what his precise title was.

Q. Coming to this meeting of September 30 which you have testified about, do you remember if Congressman Case was at that meeting, now Senator Francis Case, of South Dakota?

A. I know one of the Legislators from South Dakota was there, and I will say, frankly, I can't remember whether it was Gurney or Case.

Q. I see.

A. One of them was there. Which one, I am not sure.

Q. Do you recall about the following day, October 1st, [fol. 1542] meeting, that they were there at that time, Mr. Case and Mr. Gurney?

A. I believe so.

Q. Don't you remember Congressman Case, either on September 30 or October 1, having a specific discussion with you with regard to the figures which you were advancing as the number of men who would be made available for non-ferrous mines if the gold mines were closed down? Do you recall having some man-to-man discussion with him about that?

A. I am sure that we discussed the situation. What precisely we discussed——

Q. Do you recall that he took rather vigorous exception to the total figures which you had? Do you remember that?

A. No. I don't recall that. I am not saying that it didn't happen. I just don't recall that.

Q. I understand. I am just trying to assist you now in your recollection. Do you remember anything about Congressman Case pointing out to you that he had been at Homestake, and that he knew what the setup was at Homestake, their hospital, their offices, and so on?

A. Yes, I remember that.

Q. Do you recall that he pointed out that a great many of the approximately 2,000 employees of Homestake were people who were nurses, doctors, clerical people; that a great many of them, at least, were not underground miners? Do [fol. 1543] you remember that?

A. Yes.

Q. So there was a rather violent clash of opinion between you and Congressman Case with respect to the total figures of men then engaged in gold mining, wasn't there?

A. It depended upon one's definition of gold mining, yes.

Q. Do you recall that at this meeting of October 1 when you waved these Forms 732D, I think you call them, do you remember if you had one from Homestake?

A. I think I did, but I couldn't be absolutely sure now.

Q. You can't be sure?

A. I think I did, but I can't be sure.

Q. Do you remember Mr. Bjorge's furnishing figures? You remember Mr. Bjorge, the General Manager?

A. Yes.

Q. Do you remember his furnishing figures as to Homestake's employees at this October 1st meeting?

A. Yes. Individuals around the table furnished them on each of the mines that they represented. I know that he did, too.

Q. Let me show you Plaintiffs' Exhibit 24, the memorandum of October 3, 1942, from Wilbur Nelson to W. L. Batt. Would you look at that and tell us if you have ever seen the [fol. 1544] original of that or any copy of it?

A. I have seen the figures in this, because I think these figures were made up from that meeting on October 1, that evening, and I stayed for that meeting. I think those figures are also reproduced, in part at least, in this document. I don't know whether I ever saw the document, as such.

I would say this: I certainly did not see that document, as such, before the gold mining order was issued. Whether I saw it afterwards, I don't recall.

Q. But you saw the figures set forth there?

A. Yes. I was present at the meeting at which these were put together.

Q. The figure given, so far as miners and muckers at Homestake are concerned, was 421, is that correct?

A. That is stated, yes.

Q. If you had the Homestake Form 732D there; did you find that there was any discrepancy between it and the figure that Mr. Bjorge furnished there as 421 miners and muckers from Homestake?

A. Let me put it this way: I don't think that the 732 Form showed miners and muckers separately. I think it did show total underground employment. It did show surface employment—smelter, mill, et cetera, and auxiliary. So you could not have a completely comparable figure. There are other employees underground besides miners and [fol. 1545] muckers, as I am sure you know.

Q. But the great bulk of them are miners and muckers, who work underground, aren't they?

A. Yes, but there would be no way of checking whether there was or was not any difference, because the two things are not strictly comparable.

Q. Do I understand that you have no recollection now of having the Homestake Form 732?

A. As I said, I don't remember whether I did or not.

Q. But presumably, if you did, you would have checked that against the figures that Mr. Bjorge furnished, wouldn't you?

A. I would have looked at them, definitely.

Q. You have no present recollection, have you, of finding any discrepancy, if you did make such a check?

A. On the basis of the various suppositions, I would say yes.

Q. You would say "yes" or "no"?

A. I mean assuming all the suppositions——

Mr. Barnes: You have no recollection?

The Witness: I have no recollection.

By Mr. Rigney:

Q. That there was any discrepancy?

A. That is right.

Q. Isn't it fair to say that when these figures were fur- [fol. 1546] nished at this October 1st meeting, you disagreed or disbelieved the industry representatives as to the accuracy of their figures?

A. May I qualify that answer? I didn't necessarily ques-

tion the accuracy of a figure for a particular company. All I said was that this was not a total for the gold mining industry, and that there were a number of mines on which, as I said earlier; I had reports in my hands as of an earlier date which showed employment which were not separately listed here, which led me to believe that the total of men available from other mines here was a drastic understatement.

Q. You thought that there were two or three times as many people employed in gold mines at that time as are reflected in the figures gathered at this October 1 meeting, didn't you?

A. No, I don't believe so. I think I was talking in terms of something like 5,000.

By Mr. Barnes:

Q. Total?

A. Yes.

By Mr. Rigney:

Q. When you said 5,000, was that your over-all figure for the employees of all gold mines, regardless of what kind of work they did?

A. That was an over-all estimate, yes.

[fol. 1547] Q. Were you including in that the clerical people, women?

A. No. This would include wage earners, but not salaried employees, the customary thing which is shown in the forms of employment, which excludes clerical and supervisory help of that sort.

Q. I see. Male wage earners, excluding the groups that you have indicated?

A. In this case, male wage earners would be perfectly appropriate, because females would be quite limited in a mining operation.

Q. Isn't it a fact that at this meeting of October 1, there were representatives of gold mine companies accounting for more than 75 per cent of the total production, gold production, in the country at that time?

A. I don't know, frankly. I haven't checked it. One of the difficulties, as you know, is that a lot of gold production

comes from mines which are not gold mines, and there was no way of getting precisely the gold production from strictly gold mines at that time, without a great deal of research.

Q. When did you first begin to assemble figures on the total employees of the gold mines? Would that be in June or July?

A. Approximately. As I said earlier, I can't give any [fol. 1548] closer recollection than that.

Q. You were giving your attention to that from June or July through September, presumably, is that right?

A. Yes.

Q. Did you during that time make any personal visit to any of the gold mines to determine how many people were actually employed there?

A. No.

Q. You did not?

A. No.

Q. Had there been a time prior to the October 1 meeting when you had a figure substantially higher than 5,000 as the number of people who would be available?

A. Let me put it this way: When we started to work on the problem—I can't fix the precise date, but it was somewhere in the June-July period there—we started to try to get data from various sources. We came to figures of employment in the BLS, in the War Manpower Commission, and in the Bureau of Mines' tabulation, and we recognized that in all these cases the definitions were such as to include mines which would not be gold mines from the point of view of the purpose of any gold mine closing order, that is, to route this labor to mines producing lead, zinc, copper, et cetera, that were considered essential. We obviously didn't want to close down the Howe Sound Copper Mine in Wash- [fol. 1549] ington, which had a very high gold content, because it also produced 8,000 or 9,000 tons of copper. I am giving that as an example.

So the problem was taking those figures and then trying to break them down to something which more closely approximated where one would draw a dividing line.

The same problem came up in the administration of Order P-56, when you had a level of 30 per cent gold and

silver, and then the problem hit a lot of important mines, and exceptions had to be made.

Mr. Rigney: Would you read my question back?

(Thereupon, the question was read by the reporter.)

By Mr. Rigney:

Q. Now, could you give us an answer to that question?

A. I don't know that I definitely had a figure. I think we did cite figures of larger employment in an earlier period.

Q. Let me direct your attention to Plaintiffs' Exhibit 129 in evidence, the minutes of the Interdepartmental Committee on Non-Ferrous Metals dated August 25, 1942, and I invite your attention to page 4, where it says:

"Mr. Raushenbush asked for some information on the probable number of gold mine workers who could be transferred."

Incidentally, this cover sheet reflects that you were in attendance at this meeting.

[fol. 1550] "There was no definite agreement on just how many would be obtained. Data from the Bureau of Employment Security as of March 31, 1942, indicated that there were some 12,000 workers employed in lode gold mines and probably an additional 6,000 in placer operations, but these totals have to be revised because there has been a heavy withdrawal of workers from the gold mine industry since then."

Does that refresh your recollection that in August of 1942, you at least furnished figures substantially higher than 5,000 as the number?

The Commissioner: Did he furnish those figures?

The Witness: That is the question I was going to ask. Does it say that I furnished them?

Would you mind answering my question?

By Mr. Rigney:

Q. You are here to answer the questions, sir, not me.

The Commissioner: Just a minute. I think that the question to the witness is improper because it hasn't been established.

Mr. Rigney: Very well. I will withdraw the question, Your Honor, and proceed from there.

By Mr. Rigney:

Q. Did you participate in this discussion at this August 25 meeting?

[fol. 1551] A. Yes, I am sure I was present at the meeting. I remember a meeting with Mr. Raushenbush present.

By Mr. Barnes:

Q. Who was Mr. Raushenbush, incidentally?

A. He was the representative of Mr. Ickes from the Department of the Interior. I don't know what his exact title was; but he was sort of liaison between Mr. Ickes and the Bureau of Mines, I believe.

I am not sure that I furnished these figures. In fact, I would think that I did not, because it says "data from the Bureau of Employment Security," and I believe people from the Bureau of Employment Security were present.

I can't say that I didn't, because I don't recall that, but I am sure that these figures were not figures that we relied upon heavily, because we knew, and I will make this quite clear, that the Bureau of Employment Security did not have a good definition of the different mines as to what they produced. There were mines like Mammoth St. Anthony in Arizona, which we found was classified as a gold mine, produced very large amounts of lead and zinc. That is one I remember. There were others.

So I feel very certain we did not rely on total figures like this. It may have been a figure from which we began to make calculations in the absence of better data at the time, but I am sure that we did not rely on those totals.

[fol. 1552] By Mr. Rigney:

Q. Would your memory serve you or by reference to this August 25 minutes would you be able to tell us what your recollection is as to the figure which you had at that time, August 25?

A. It is very difficult for me to try to estimate what estimates went through my mind at different times in that kind of period.

Q. Would you say it was more than 5,000 at that time, in August 1942?

A. Perhaps, but I couldn't be certain.

Q. Will you look at Exhibit 22, minutes of September 8, and they reflect that you were in attendance there.

At the top of page 4 is a paragraph reading:

"In a discussion of the proposed gold order, it was the firm belief of the members of the committee that gold mining was now a non-essential industry and that even if the manpower released by the gold order was not directly transferred to copper, lead or zinc mining, it still might help relieve the shortage of labor in other war industries such as aircraft and shipbuilding."

I would like to ask you whether or not that expressed your view at that time?

A. In part, I would say that it did. I don't think that was the main reason for it, but we felt that if that did [fol. 1553] happen, and if worst came to worst and none of the people were moved to non-ferrous mining, it would still help relieve the shortage of labor in these other industries. We had confidence, however, that the worst wouldn't come to that worst.

Q. Do I understand that the figures which were attached to Plaintiffs' Exhibit 125, page 7, were assembled by your division or under your direction?

A. Yes.

Q. You personally, I mean?

A. As much supervising as was feasible in those hectic days. I took the responsibility. Whether I actually had a chance to review the figures themselves, I don't know.

Q. Would you agree with me that no large proportion of the gold miners went to strategic metal mines as a result of the Order L-208?

A. It depends on the definition of "large." I would say certainly less than half. I don't recall the exact figures. There were, as I pointed out to you earlier, differences in methods of calculation and computation on whether it was as of a certain date, as of a later date, how long they said, et cetera.

Q. Didn't you testify on March 11, 1946, before the Engle Committee, in response to the question right here, on page

117, "Do you think that many of the gold miners went to [fol. 1554] the strategic metal mines as a result of that close order?" and you answered, "I would say no large proportion of the men actually went to the strategic-metal mines as it was hoped would go."

A. Grammatically, it is incorrect. I don't recall now, but I probably said that it was not as large a proportion as was expected to go, and that I would heartily subscribe to. You would agree this is ungrammatical, I am sure.

Q. Is it your recollection that that question was asked and that you gave that answer?

A. Yes. I don't doubt that the question was asked or answered. I am not sure as to how well I was recorded or how well I spoke. Shall I say that.

Q. Do you remember on the same occasion, page 118, being asked the question by Mr. Byrnes of the committee:

"But you take a whole industry, the purpose of closing down those gold mines was to get more miners into the non ferrous metal mines. That was the basic purpose?"

And did you answer: "Yes"?

A. Yes.

Q. Were you then asked:

"It did not accomplish that purpose, did it?"

and did you then answer:

"The order did not accomplish it fully. You had no control of people going," and so forth, as appears here: [fol. 1555].

A. Yes, I did, that is right.

Q. You testified, I believe, that you came to the War Production Board in December of 1941, did you say?

A. December 15, I believe was the date.

Q. What was the first knowledge that you gained from any conversations or any communications that you received in the War Production Board, of a movement to close down the gold mines? How early did you hear anything about such a move?

A. I don't recall the exact time, but I recall being struck by this fact: When this thing was published in a review copy, Special Study No. 9, for review within the Board, I was struck by the fact that there had been discussions earlier, late in 1941 and early in 1942, of which I knew nothing at

the time of my becoming involved in the discussions in June-July, 1942.

Q. After you started working on this problem yourself, there came a time, didn't there, when you learned that even prior to Pearl Harbor, proposals had been put forward to close down the gold mines?

A. There came a time, but I am not sure whether I learned that before the order was issued or not, frankly. I did know about the hearings before Senator McCarran's committee on P-56, but I didn't know about these discussions which had in effect preceded P-56. P-56 was on the books [fol. 1556] and this was the order. I didn't know how it had come to be, so to speak.

By the Commissioner:

Q. What was your introduction to the problem? How did you get started on it?

A. My introduction to the problem was that I was working on the availability of manpower for non-ferrous metal mining. People were leaving in numbers the non-ferrous mines. This was considered an important industry by the War Department and other people, and we were being urged somehow or other to get labor for these industries.

One of the avenues to which we turned in the attempt to get more people was an attempt to get labor from the gold mining industry.

Q. You haven't answered my question. Did you do it on your own, or did someone tell you to do something?

A. Frankly, I don't remember how it came up.

Mr. Barnes: May we take a recess?

The Commissioner: Yes, we will take a recess.

Mr. Rigney: Your Honor, I will try to conclude very shortly after that.

(Thereupon, a short recess was taken in the hearings.)

By Mr. Rigney:

Q. You referred to Mr. Wendell Lund. What was his position in the summer of 1942?

[fol. 1557] A. He was the head of the Labor Production Division, succeeding Mr. Sidney Hillman.

Q. Where did your particular branch or office fit into the scheme of things with relation to Mr. Lund? I mean, were you under him in the chain of command?

A. Beneath him, yes, but not directly. For a time Mr. Richard Lester was the head of it.

By Mr. Barnes:

Q. Labor Priorities Division?

A. Labor Priorities Division at that time. The names changed so frequently that I can't remember them. Under him came several people, like Mr. Buchanan, who was my immediate superior, who had charge of basic industries like non-ferrous or textiles or steel, or something else. I was Mr. Buchanan's assistant.

By Mr. Rigney:

Q. I see. Do you know, did Mr. Wendell Lund represent Donald Nelson as a sort of liaison representative with the War Manpower Commission? Was there a time when he had a dual capacity?

A. I believe that was one of his roles in that. Later that office, as you know, split into two parts, Labor Requirements Division and Labor Production Division. I don't know. One CIO, one AF of L.

Q. But directing your attention to, say, September 1942, [fol. 1558] did Mr. Lund occupy this dual capacity at that time?

A. I believe so, yes.

Q. Mr. Lipkowitz, in your consideration of this problem of the issuance of Order L-208, I presume, regardless of what the figure was of the total of the employees in the gold mines, you took into account that there would be some who would not go to the copper mines or anywhere else, because of age, did you?

A. We recognized that that would be a factor.

Q. Did you take into account that there would be some of them who would be required to stay in the gold mines where they worked for maintenance purposes?

A. Yes, of course.

Q. Did you also take into account that perhaps because of reasons of health or other personal reasons, there would be others who would choose not to go to the copper mines?

A. Quite likely.

Q. And that there would be others of them who would prefer to take employment in the community in which they lived?

A. Quite likely.

Q. Let me ask you this: Was there anything about the gold miners as a group which caused you to believe that employment in the copper mines would appeal to them more than it had to the people who had left the copper mines to go [fol. 1559] into these other industries that you have mentioned?

A. No——

Q. Or to put it the other way, did you recognize that the same forces which had caused the out-migration of the copper miners prior to October 8, 1942, would be operating with respect to any gold miners that were willing to go to the copper mines as a result of the closedown?

A. We of course recognized that there were all of these factors operating in any one of these industries. One of the purposes of this Interdepartmental Committee was to take such action on the interdepartmental level—wages, Selective Service, manpower freeze, gold mine closing order, housing, and any other factor, I can't recall all the factors, but the idea was to bring together all of the agencies of the Government that had to deal with specific aspects of this and try to get a coordinated action on this.

As I think you remember, there were releases made which pointed out that this gold mine closing order was part of an interdepartmental program to do something about the whole manpower problem. There was the War Labor Board wage case, in which the War Labor Board finally acted to raise the "Little Steel" formula especially for non-ferrous metal mining because it was felt that that would help attract labor to this industry.

There were all of these things. I can't recall all the [fol. 1560] details, but the movement was as a coordinated move to take account of all these factors to help.

Mr. Rigney: Could I have the question read back, and the first part of the answer?

(The record was read by the reporter as requested.)

By Mr. Rigney:

Q. If I could just have a direct answer to that question whether or not you recognized that these factors were operating?

A. We recognized that these factors were operating, and we were doing our best to mitigate the effects of these factors by operating on the wage, on the Selective Service, on the manpower freeze, and all the other aspects that were mentioned, and have been, I am sure, put into the record in these various hearings.

Mr. Rigney: That is all.

Redirect examination.

By Mr. Barnes:

Q. Just one or two questions, Mr. Lipkowitz.

You were asked about your degree of relative activity, I suppose is the proper phrase, in the negotiations and discussions which led up to the issuance of Order L-208. Were there other people who were pushing for the issuance of such an order at that time?

A. Oh, yes. There were people in the Planning Division [fol. 1561] under Mr. Nathan. There were people in the War Department who were frequently consulting us. There were Mr. King and other people in the Copper Division.

Q. What was Mr. King's position in the Copper Division?

A. Mr. Harry King was head—Director, I believe, was the title, of the Copper Division.

[fol. 1562] Q. Were there any others that you recall?

A. I would say, broadly speaking, that most of the people who attended these interdepartmental meetings were concerned with the problem. There were several, obviously, who were not sympathetic or, shall I say, were skeptical of the effects, primarily on the grounds of the effectiveness of the transfer of men in terms of what it would do for production in copper, et cetera.

Q. Limiting yourself to these people you have referred to in the War Production Board, people in the Planning Committee, staff, Mr. King in the Copper Division, for example, where did they stand in the hierarchy of organization as compared with you?

A. Well, my answer to that is that Mr. King was a dollar-a-year man who probably would have been getting $10,000 a year if he were on a salary at the time by virtue of his position. At the time that I joined the War Production Board I was making $3,800. I may have had one raise by that time, although I doubt it. I think that is a reasonable explanation of the political heirarchy. Mr. King in effect had a position at least equivalent to that of Mr. Lester, and I indicated that I was at least two notches down. I would say that in influence probably Mr. King had more influence than Mr. Lester and probably more than Mr. Lund, who was Mr. Lester's superior.

[fol. 1563] Q. Do you recall in any of the discussions that you had with the representatives of the gold mines—did you have any other than this meeting of October first, to begin with?

A. Yes, I believe we talked with Mr. Bjorge in Mr. Lund's office, Mr. Bjorge of Homestake Mines, I believe.

Q. Do you recall any discussion at that time by Mr. Bjorge or other representatives of the gold mining companies as to other activities which they might undertake in the event that their gold mines were shut down?

A. I remember references to them. I can't be sure that the reference came in that meeting from Mr. Bjorge or whether it came in these other meetings with somebody else reporting them, but I do remember the references to a manganese mine in lower California, a vanadium mine in Idaho or Montana, I am not sure. The company also operated a lignite mine in one of its operations. I believe it produced timber for its own operations, maybe selling some. It had a very large workshop. As I recall it, I don't know whether they actually did, but I understand there was some mention of their workshops being used as subcontractors in the war effort. Whether that actually happened I am not sure.

Q. Do you recall whether there was any discussion at any time as to the increase in the timber supply or increase in the general availability of lignite to other consumers as a result of closing down the gold mines?

[fol. 1564] A. The assumption was that the timber——

Mr. Rigney: I object to assumptions.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Did you give any consideration to that factor yourself?

A. I assumed that this would be available.

Mr. Rigney: I object to his assumption and move to strike.

The Commissioner: It may be stricken.

By Mr. Barnes:

Q. Do you recall whether or not the matter was ever discussed? Did you recall ever discussing the matter with anybody?

A. I remember these facts being mentioned. I don't remember any extensive discussion of the effects of them.

Q. With respect to Mr. Lund's position at this time, did you testify on cross-examination that he maintained liaison between the War Production Board and the War Manpower Commission?

A. Yes, that was the function of our division headed by Mr. Lund. I am not sure, but I believe he was actually on the Board of the War Manpower Commission. I am not certain of that, but I believe that that was the form in which the WPB exercised some voice in the divisions of the War Man-
[fol. 1565] power Commission, although a minority voice, obviously.

Mr. Rigney: That is Wendell Lund as distinguished from R. J. Lund?

The Witness: Oh, yes, Wendell Lund, the head of the Labor Production Division.

By Mr. Barnes:

Q. You were asked whether you considered the possibility that some of these displaced gold miners might prefer to accept employment in the communities where they lived, and you said you had given that some consideration, is that correct?

A. Yes.

Q. Do you recall discussions or arguments advanced by gold mine companies or by congressmen to the effect that the closing of the gold mines would make these communities ghost towns?

A. Yes, I believe I referred to that earlier.

Q. Were you in any position to evaluate the possibilities of employment in a ghost town?

A. I think it would have to be conceded that the phrase is not susceptible to precise evaluation. It is a term. I don't know what the definition of a ghost town is. I think it is just common, general usage and I think quite well understood by people in those terms.

Q. Did you at any time after the closing of the gold mines [fol. 1566] visit any of the communities where they were located?

A. I drove through Lead, South Dakota, in July 1949.

Q. But at no time during the close down?

A. No, not in the short period immediately before or after. I did get to Colorado, to Denver, in I think it was the summer or fall of 1943. I did drive around the environs of Denver and saw some of the smaller lead-zinc mines in the neighborhood, but I didn't get down to Cripple Creek, for instance.

Mr. Barnes: That is all.

Recross examination.

By Mr. Rigney:

Q. If you took into account that there would be some of these gold miners who, for the reasons that I asked you about before, would not go to the copper mines, that would accordingly reduce the number that would be available, would it not?

A. Obviously. That is mathematically so.

Q. You were aware, of course, of the distance between the principal copper mines and the principal gold mines, were you not?

A. Yes, but we were also aware of the fact that Anaconda had made arrangements, for example, to pay for the transportation of these people.

Q. You mean had perhaps offered to pay for the trans- [fol. 1567] portation?

A. Yes, that is right. May I explain that obviously I did not try to do this single-handed, and when a fact of this nature was reported to me by the War Manpower Commis-

sion I accepted it as a fact. I had no reason for doubting it and I had no reason to check it on my own.

Q. But with respect to Anaconda, what had happened was that they had perhaps made an offer to pay transportation. When you said they had made arrangements, you didn't mean by that that they had concluded some kind of binding agreement with a group?

A. I didn't know the precise form in which the arrangement took place. As I said, it was not my function.

[fol. 1568] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

Transcript of testimony—February 14, 1953

TESTIMONY FOR DEFENDANT (Resumed)

The hearing was resumed, at the time above indicated, pursuant to the recess previously taken.

(Present: The same appearances as previously noted.)

Mr. Barnes: Mr. Anderson, will you come up, please?

HARVEY A. ANDERSON, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined and, in answering to interrogatories, testified as follows:

[fol. 1569] Direct examination.

By Mr. Barnes:

Q. Will you state your full name, please?
A. Harvey A. Anderson.
Q. By whom are you employed at the present time?
A. Western Electric Company.
Q. In what capacity?
A. Chief of the Raw Materials Development Department.
Q. What academic training have you had?

A. Graduate Engineer, Bachelor, Engineering Degree [fol. 1570] from Northwestern University.

Q. When did you receive that degree?

A. My Bachelor in 1915; my Engineering Degree in 1916.

Q. Would you describe for us briefly your experience since that date?

A. I spent my entire life in the development of materials, initially employed by the Southern Pacific Railroad, and was brought to Washington during World War I to work on materials at the Bureau of Standards and the National Advisory Committee for Aeronautics.

In the last 32 years I have been with the Bell System, ten years at the Bell Laboratories, and the last 22 years with the Western Electric Company at the Hawthorn Works at Chicago.

Q. When you refer to the development of materials, would you explain a little more what that entails?

A. The Western Electric Company is a builder of telephone equipment, and my responsibility is to specify and attempt to insure the utilization of the material which is most economical for the application. We attempt to build telephones as cheaply as possible, and still without elements in them that will fail and give trouble in service.

I have worked on metals and non-metallics for the Bell System at both the Bell Laboratories and the Western Electric Company.

[fol. 1571] Q. During World War II, were you employed by the Government in any capacity?

A. Yes. I was brought down, first, at the instigation of Dr. Jeffries to work on the utilization of the die-casting industry, in April 1941, in connection with the OPM. I was initially on a dollar-a-year basis, and then subsequently at the request of my superiors I went on Civil Service status, but still retained my connection with the Western Electric Company, from which I was on leave of absence then.

Subsequent to the work on the die-casting, my services were enlisted in connection with the possible savings in critical materials. As such materials became more and more scarce, it was necessary to make substitutions and effect conservation.

Q. With what division were you connected?

A. In the latter two-thirds of my term here, I was Deputy Director of the Conservation Division.

Q. What were the general duties or responsibilities of the Conservation Division?

A. We attempted, in so far as possible, to screen the Government requisitions which came out of the military organization and to see if we could not obtain a reduction in the amount of materials that they said they needed and, failing that and realizing the necessity for those materials, we attempted in so far as possible to divert those materials [fol. 1572] from civilian applications to the extent that it didn't cause suffering or dislocation of industry any more than was necessary, and to channel those materials into the Government, at the same time, as I say, trying to assure that the Government didn't utilize them wastefully.

Q. Did your activities at any time involve the possible substitution of one type of material for another?

A. Constantly.

Q. In what respects did that arise? Was that confined to civilian or did it include military, too?

A. Both.

Q. How did it arise in general?

A. The OPM, later the WPB, had statistical staffs which computed the available supply of materials, and those being checked, scrutiny of the requisition of the military services indicated that we needed more materials than were available, and progressively more and more materials became scarce in our economy; and as those materials became scarce we attempted in so far as possible to suggest materials which at that time were not as scarce, and suggest their use in place of the scarcer materials.

Q. Directing your attention to the summer of 1942, Mr. Anderson, do you recall what the materials situation was that existed at that time?

A. The materials situation was extremely tight. One of [fol. 1573] our first activities had been on aluminum, and the next material to become extremely tight was copper. The military were saying that they couldn't make enough cartridge cases to satisfy the firing needs of the Army in the field if larger supplies of copper were not made available to them. A great deal of our effort was directed toward attempting to reduce the use of copper for all unnecessary

needs, both in and out of the military services, and suggesting the use of other materials, particularly with respect to ornamentation and decorative items that might be made out of copper.

The WPB, in successive orders, proscribed the use of those materials.

Q. Do you recall approximately when the first order which had limited the uses of copper was issued with respect to the outbreak of war, say?

A. It was prior to Pearl Harbor. It was in the fall of 1941.

Q. Had there been, between that date and the summer of 1942, amendments to that order?

A. Yes, numerous amendments, more restrictive.

Q. Did those restrictions apply to civilian or military uses of copper?

A. The restrictions applied primarily to civilian uses, but they were also, in certain applications where the use of copper wasn't deemed to be essential, also applied to the [fol. 1574] military services.

Q. Had the effect of those successive restrictions been to bring the demand for copper into balance with the supply by, say, August of 1942?

A. Far from it.

Q. To what extent, in the summer of 1942, was the demand for copper a military demand, do you recall that?

A. It was very largely military demand. Cartridge cases were the outstanding example, and we were working in the War Production Board at the time in an attempt to make steel cartridge cases, which seemed to be the only way. With all of the restrictions placed upon copper and the limited supply available, it was not enough to make enough cartridges to take care of the needs.

Q. Had the restrictions that had been imposed on copper been on all uses, or on only large uses of copper?

A. They had not been on all uses. There were some places where it was impossible to substitute copper and where copper was utilized in connection with the war effort. If there were any applications which we were able to determine, we prohibited the use of copper in those items unless it was considered to be absolutely essential to the successful prosecution of the war.

Q. Was that regardless of the amount of copper used in that application?

[fol. 1575] A. Yes. It extended into items which were relatively small users.

Q. You spoke of the study you had made on the possibility of steel cartridge cases. Do you recall whether or not those ever were successful and the Army ever used steel cartridge cases?

A. Yes. They got into production in small quantities in 1943, but there had not been a successful steel cartridge case developed in 1942. It was too deep drawing operation to be successful in steel at that time.

Q. Do you recall in connection with the copper situation giving any consideration to the use of copper in our coinage?

A. Yes. One of the items which we seriously considered was the substitution of copper in pennies, and I talked with Nellie Tayloe Ross, the then Director of the Mint, and we explored the possibility of changing over to low carbon steel, which was more abundant than copper at that time. The Treasury played ball with us and went along with it, and we substituted the steel penny with a flash coat of zinc on the surface, which I have been reviled and persecuted about ever since. It was called the "Anderson penny."

Q. Do you recall what the use of copper was by the Mint in pennies, on an annual basis?

A. The consumption of copper by the Mint for pennies ran about 300 tons a year. In the year and a half in which [fol. 1576] they minted steel pennies, we saved about 400 tons of copper.

Q. In round numbers, during 1942, for example, what was the consumption of copper in this country?

A. I don't recall the figure.

Q. How did 400 tons compare with it? Is it a large or small figure?

A. It is a very small fraction of the total consumption.

Q. There has been some mention here of the use of materials other than copper in bus bars. Did you have anything to do with that?

A. Yes, we worked with the Treasury Department attempting to reduce the immobilization of large quantities of copper in the form of bus bars, and we continued our search to find materials which were not performing their full func-

tion in the war; and it seemed to us that silver, which was a high conductivity material closely approximating the conductivity of copper, might serve suitably as bus-bars in an aluminum or magnesium reduction plant, of which there were a number under construction at the time.

We talked with the Assistant Secretary of the Treasury, and Lessing Rosenwald, who was my immediate superior at that time, and I went over to see him several times, and finally worked out an arrangement whereby the DPC, the Defense Plant Corporation, borrowed from the Treasury something over a thousand tons of silver which was in stor-
[fol. 1577] age in the vaults at West Point. We had that melted down and rolled by Revere out in Detroit, and it went into the aluminum reduction plants in Maspeth, Long Island, and a plant outside of Portland, and some in the magnesium plant down in New Mexico or Texas. That silver was loaned to us by the Treasury Department on the understanding that it would be continually guarded, and that at the conclusion of the war it would be remelted into the small bars in which it is stored in the Treasury vaults at West Point and returned to the Treasury Department without loss or contamination.

It was used to a considerable extent successfully, and it released an equivalent amount of copper for cartridge cases and other essential uses.

Q. Would you explain for the sake of the record what a bus-bar is, what its function is?

A. A bus-bar is a conductor of electricity. It is a large cross-section piece running two to three inches thick and perhaps eight to ten inches or more wide, which conducts the power which is used in the electrolytic reduction of aluminum, which is a very high consuming electric energy reduction process. Also, similarly in the reduction of magnesium. It is a case of separating the metal from its oxide in order to make it available for fabrication.

Q. Do you know whether or not any of those silver bus bars went into what we generally came to know as atomic
[fol. 1578] energy plants?

A. Yes, it did. At that time Mr. Nelson had delegated me to certify essential applications for the use of bus-bars, and one application which he did not delegate to me was known as the Manhattan Project. I wasn't in the confidence of Mr.

Nelson with respect to the atomic energy preparations, but some of those silver bus-bars went down to the place down in Tennessee where they initially started the production of the atom, the spitting of the atom.

Q. Referring to copper, can you recall any other substitutions that were made during 1942 or that were under consideration during that period?

A. The substitutions were legion. I spoke of the fact that we attempted to restrict all uses in ornamentation, and we attempted in so far as possible to utilize glass and other ceramic materials; and at the time lumber was more abundant than metals, in some cases we substituted wood for applications. We even got into a discussion of the desirability of restricting the use of brass for church vessels. There was a considerable controversy over that.

Q. You mentioned a few minutes ago that the first metal that had been critical, so far as the relationship of supply to demand is concerned, was aluminum, is that correct?

A. That is correct.

Q. When did that become critical, do you recall?

[fol. 1579] A. Early in 1941. When the plane production program got under way, we didn't have anywhere near the production of aluminum that was necessary for the manufacture of planes for the Air Force.

Q. Had any steps been taken with respect to aluminum to reduce its consumption in non-military uses?

A. Yes. One of the A-1 orders or M-1 orders, as I recall it, was on aluminum, the first one of the conservation orders that was put out. That prohibited the use of aluminum, but the opportunity for saving by taking aluminum out of the domestic economy was far less than it was for copper, of course, as you know, because at that time the aluminum applications were relatively limited relative to those of aluminum and copper now.

Q. Incidentally, do you recall whether during this same period there were attempts made to increase scrap recovery of these metals, aluminum and copper, for example?

A. Yes. Associated with the same group that I was a member of in the OPM was a salvage group, and they conducted scrap drives throughout the country and succeeded in enlisting the services of not only the scrap dealers, but also patriotic organizations throughout the country to col-

lect old metal. That was refined under Government supervision for specified applications.

Q. Incidentally, do you remember the so-called pots and [fol. 1580] pans drive that was conducted in the fall of 1941?

A. I do, and I remember a great deal of criticism was attached to it because they said a lot of the piles of pots and pans stayed out in the village square and were the object of scorn for some time thereafter, but there was a real attempt made to collect all of that aluminum which could be secured.

Q. By the summer of 1942, what was the relationship of the supply of aluminum to the existing demand?

A. It was still extremely short. There was a large program of expansion of aluminum producing industry which, just like the production of synthetic rubber, had not yet attained large proportions in its expansion.

Q. What proportion did the aircraft requirements bear to the total demand for aluminum in 1942?

A. They were a very large percentage of the total demand.

Mr. Barnett: Your Honor, this is very interesting, but we were wondering as to the exact materiality of this testimony to the issues presented in this case.

Mr. Barnes: Your Honor, I hesitate to read this again. I have read what I consider to be the mandate of the Court so many times to counsel. The allegation of the petition, as the Court phrased it, is that the order went beyond what was required by the exigency of the situation existing in [fol. 1581] October 1942. I have to show what the exigency of the situation was, what the necessity was for reducing all non-essential consumption of critical materials. This testimony is offered for that purpose.

The Commissioner: I don't hear any objection.

Mr. Barnett: It is not made in the form of an objection, Your Honor. It is just that we felt it was not quite material.

The Commissioner: Unless I hear an objection, you may continue.

Mr. Barnett: We will make the objection, Your Honor, that it is immaterial.

The Commissioner: Overruled.

Mr. Barnes: What was the last question and answer?

(Thereupon, the last question and answer was read by the reporter.)

By Mr. Barnes:

Q. Do you recall whether or not there were any other military requirements for aluminum in 1942?

A. Yes, there were certain shipboard applications in which the attempt was to reduce the amount of load on the ship, and the shipbuilding industry required quite a lot of aluminum.

Q. Had there been any consideration given to the substitution of other metals for aluminum?

A. Yes.

[fol. 1582] Q. In what connection, if you can recall? Were there any military applications where that had been done?

A. Yes, there were a number of military applications in the form of trim, and of non-functional uses of aluminum.

Q. Does magnesium share the characteristic of aluminum of lightness of weight?

A. Yes.

Q. Is it available generally as a substitute for aluminum?

A. It isn't available in anywhere near the volume that aluminum is. Magnesium is a third lighter than aluminum, but it is more corrosive and is not suitable for substitution in many applications. It has never been developed to the extent that it is available in anywhere near the quantity of aluminum.

Q. Generally, what was the situation with respect to the supply and demand for magnesium in 1942?

A. It was short. The Air Force was planning to build the hubs of landing wheels for aircraft out of magnesium because it offered the lightest strong metal that was available.

Q. You referred to the fact that steps were under way in 1942 to increase the production of aluminum. Had anything comparable been done in the field of copper?

A. I know of no major additions, large facilities, but there had been attempts made to stimulate the production of [fol. 1583] copper. Harry King, Chief of the Copper Divi-

sion, had worked with us and used the material which we had prepared in some cases to indicate the great need for increasing the amount of copper, and foreign copper was being imported as far as it could be secured, to meet our shortages.

Q. What was the situation that existed in the middle of 1942 with respect to iron and steel?

A. Iron and steel were tight. The shortage of steel was in certain fabricated forms primarily, and in alloy steels. The alloying elements, such as nickel, chromium, vanadium, and manganese, were extremely tight, and the shortage of manganese restricted the potential production of even carbon steel, which is plain, every-day, ordinary steel, but which requires manganese in its manufacture. It also uses aluminum as a deoxidizer, which was one of the applications of aluminum.

Q. Incidentally, is molybdenum an alloying element? You didn't refer to it.

A. Yes, molybdenum is used in alloy structural steels, and molybdenum is also a substitute for tungsten in high speed steel and in certain other types of heavy duty tool steels.

Q. I take it from your description that the shortage in steel was perhaps a more selective shortage, is that correct?

A. That is correct.

Q. In what shapes or forms of steel was the shortage [fol. 1584] most acute in the summer of 1942?

A. Sheet and strip steel, and certain structural members.

Q. What do you mean by "sheet and strip"? Does that include plate, for example?

A. Heavier plate was not in as tight supply as strip, which is thinner sheet steel, a thinner grade of steel than plate steel.

Q. Had any steps been taken to cut down the uses of steel during this period?

A. Yes, sir. There was a Limitation Order applied to steel, and applications of steel, particularly of the shapes, which were shortest and most in demand by the military, had been proscribed.

Q. Do you recall the issuance of a steel order, which I think was called M-126, which listed a considerable number of prohibited uses of steel?

A. Yes.

Q. Did you have anything to do with the formulation of the schedules for that?

A. Yes, I did. We worked with the divisions which were directly responsible for putting out the orders of the War Production Board, and we attempted to temper the restrictions they made so that, if possible, we would not prevent the use of steel for essential applications which could not [fol. 1585] have a substitute suggested for them.

Q. Do you recall, with respect to the inclusion of items on that list, whether an attempt was made to weigh the amount of steel that was used?

A. Yes, there was.

Q. Did you adopt a different criterion, for example, for the use of steel in bicycles and in bird cages? Would that be a fair example?

A. A difference between bicycles and bird cages, you mean?

Q. Yes, would you use different criteria as to whether you included those in an order of that type?

A. Both of them would be placed on the order if it was felt that it could be done with minimum effect on the essential economy. In some cases the amount of steel that could be used, though, was definitely specified, but manufacture was still permitted.

Q. There has been some discussion here of a controversy with respect to whether or not the manufacture of bobby pins would be permitted. Do you recall anything of that type?

A. It was prohibited.

Q. Do you recall when that step was taken?

A. Sometime in early 1942, as I recall it.

Q. Was there a substitute available for bobby pins that you know of?

[fol. 1586] A. Yes, plastic was a successful application to bobby pins. I guess it is used extensively now, more so than steel.

Q. Is steel used in certain types of bottle closures?

A. Yes.

Q. What types use steel?

A. Most of these crimp caps on soft drink bottles are a thin grade of steel with a non-ferrous plating on them, a surface coating, to prevent corrosion, or enamel.

Q. With respect to that particular usage, do you recall what action, if any, was taken with respect to that?

A. Yes. There was an attempt made to insure the re-use of the caps and to salvage them. There used to be baskets in the stores which you were asked to put your caps in, so they could be reused.

Q. Were there any other types of containers that had metal closures?

A. Yes, zinc caps. We worked with the Ball people out at Muncie, Indiana, on the reduction of the consumption of zinc for the caps for Ball jars, and we worked with the American Flange people who make closures for gas tanks and shipping drums, and suggested—our whole attempt was to get a material which was further down in the criticality ladder, and for that purpose we published, beginning back in 1941, lists of all types of materials which indicated Class 1 materials, which were insufficient to take care of the mili- [Fol. 1587] tary and most essential civilian needs; Class 2, which was in approximate balance, in which the supply and demand were not appreciably different; and Class 3, in which the materials were in excess of demand. We circulated those lists through publications of the War Production Board, and also through all the technical journals, and attempted to get the industry of the country to utilize more abundant materials.

Q. Do you recall, for example, whether or not gold ever appeared on any of those lists?

A. Gold appeared on all of them.

Q. Where did it appear?

A. Class 3, in which the supply exceeded the industrial demand.

Q. Did you know of any essential needs for gold at that time?

A. Yes, there were limited needs for gold for lining certain types of laboratory apparatus. There were certain chemical reactions which required a material as noble as gold to avoid corrosion in the chemical reaction.

Most of the other uses, though, that came to our attention were in the form of jewelry, and items which were prohibited from using the more critical materials.

Q. What was the magnitude, if you know, of the essential uses of gold that you have referred to?

A. The industrial uses of gold have always been a very [fol. 1588] small percentage of the total production, I should say a fraction of one per cent of the annual production.

Q. Had Western Electric, for example, ever used gold in any applications?

A. Yes. We used gold to some extent in laboratory apparatus, and the back of the diaphragm in the transmitter had a plating of gold on it. The diaphragm of the transmitter vibrates with the voice of the speaker, and the electrical connection to the rear of this thin aluminum diaphragm was gold for nobility and lack of high resistance, which was insured over a long period of time with a plating of gold.

Q. Was that still true in 1942?

A. No, sir.

Q. When had that substitution been made?

A. In the late 30's. We had used gold previously also for contacts in relays in central offices, but that had been replaced some time before by palladium.

Q. What is palladium?

A. Palladium is one of the precious metals of the platinum group, which is produced very largely as a by-product in connection with the production of nickel at the Sudbury Mines in Ontario, Canada.

Q. With respect to the alloy steels which you mentioned, what were the permitted applications of alloy steels in 1942, [fol. 1589] as you recall them?

A. They were used in one application for tools, the machining of metals, in the forming of metals, drawing. They were used in certain applications in engines, motors, particularly in applications where hot gases and corrosive gases were used in connection with internal combustion engines.

Q. Referring specifically to the tank construction program in this country, do you know whether alloy steels were used in those at all?

A. They were, yes.

Q. In what connection?

A. The treads on the tanks were made of alloy steel, and some of the knuckles and bearings and parts which got most extreme wear.

Q. Is manganese steel considered to be an alloy steel?

A. Yes, when manganese exceeds a fraction of one per cent.

Q. But if it is described as manganese steel, would you generally consider it to be one of the alloy steels?

A. I would, yes.

Q. What was the situation in this country with respect to the production of the various alloys used in alloy steel?

A. The production of alloys generally was far short of the needs. We import a great many of the alloys which are used in making alloy steel. About the only alloy material [fol. 1590] which we have in this country in adequate quantities is molybdenum, at Climax, Colorado, where we are the largest producers in the world. But nickel, which came from Canada, chromium, which was imported from abroad, and tungsten, which very largely is obtained aboard, and most of the alloying elements, had to be obtained outside this country, except for relatively small proportions in this country. Our deposits are poor and rather lean ore.

Q. Do you know whether or not any attempt was made during 1942 to develop sources of supply of those metals in this country?

A. Yes, there were. We did a great deal of prospecting and attempted to increase the production from the mines that are relatively small producers in this country.

Q. What was the supply and demand situation with respect to tin, Mr. Anderson, in 1942?

A. Tin was extremely tight. Tin came from Bolivia and from Malay. The production from the Southeastern corner of Asia, of course, was already cut off, and the Bolivian supply was insufficient for our needs. The War Production Board put into effect various conservation orders to limit the use of tin in solder and tin in coatings, and it stimulated the development of the lacquered beer can and similar applications which had been considerable users of tin in the past. [fol. 1591] Q. The can that we popularly call a tin can—what is that actually made of?

A. It is a hot-dipped coated electro-plated tin on the surface of soft steel, carbon steel.

Q. Do you recall whether or not there were restrictions placed upon the manufacture of that type of can during the war?

A. Yes, there were. These restrictions which were placed were not done without consideration of the needs of the industry, and in attempting to insure that our action would be as reasonable as possible, we enlisted the help of people from industry, and out of a source of about 125 that we had in our Conservation Division, we had men from many of the large industries which had been recruited, thanks largely to the help of Sidney Weinberg, who succeeded because of his position on the Boards of Directors of various companies in pulling out technical men so as to bring them down there and help us to insure that our action would be as intelligent as possible.

I bring that up because one of our major assistants in the Conservation Division was the Director of Metallurgy of the American Can Company, and just as in all the rest of our actions, we attempted to utilize the skill of the technical men that we had recruited from the various companies interested or affected.

[fol. 1592] Q. What substitutes were available for the so-called tin can?

A. Glass bottles, of course, are the very obvious and logical answer, and we attempted to get tin cans replaced by glass bottles for the packaging of beverages, and we had a limitation on the number of types and designs of bottles that could be used, because the manufacture of new molds took some of this tight alloy steel which was one of our major items of conservation.

Q. You refered to a lacquer-coated beer can. What do you mean by "lacquer coat"? Was that a substitute for tin?

A. Yes, that is an organic paint-like material which is used on the surface of the steel to prevent corrosion and to preserve the taste of the fluid that went in.

Q. Do you recall having given any consideration to the use of silver in solder?

A. Yes. The Handy and Harman people, the chief silver people who put out quotations on silver, had for years been pushing silver solders for certain applications, and in the shortage of tin we recommended a number of applications using silver solder in place of tin-base solder, common solder being 50 tin-50 lead, or even 60 tin-40 lead solder, and not only cut the amount of tin down but also suggested the use of silver solder in place of tin solder.

Q. Does the use of silver completely eliminate the use [fol. 1593] of tin in the solder?

A. Yes.

Q. Do you know whether that was adopted to any extent?

A. To the extent that it was economically feasible to do it.

Q. Do you know whether any attempts had been made or were in progress in 1942 to increase our tin supply?

A. Yes.

Q. What was the nature of those, if you recall?

A. We arranged for the establishment of a smelter down at Texas City, Texas, which was put up with DPC funds and largely under the sponsorship of the War Production Board, in which we imported ore and refined it in this country for the first time in history. We always had been at the mercy of the foreign refiners. In the past, tin had been largely taken from Bolivia to England where it had been refined and then shipped in to us.

We succeeded in getting a certain amount of it brought directly into this country and refined at this smelter which was established in Texas.

Q. Do you know whether or not that smelter is still in operation?

A. It was the last I knew of it.

Q. How long ago was that?

A. The last I heard about it was several years ago.

[fol. 1594] Q. What was the situation with respect to the supply and demand of lead in 1942?

A. Lead was not in as tight supply in 1941, but it began to assume shortage status in 1942. Lead was never as short as tin or a number of our alloy materials, but it got onto Section 1 of our critical list in 1942.

Q. Had any attempts been made to reduce the uses of lead?

A. Yes. One of the large consumers of lead is my own company, which has used it for years for sheathing telephone cable, and we developed a new plastic polyethylene coating for cable sheath which enabled us to reduce the consumption of lead considerably. There were a number of other applications of lead bearings where we succeeded in getting the users to use thinner bearings instead of the thick bearings that they had used in such things as journal boxes.

Q. That is in railroad applications?

A. Yes.

Q. What about the familiar toothpaste tube? What is that made of?

A. A good share of them are made of aluminum now, but they used to be lead alloy collapsible tube for toothpaste.

Q. Do you recall whether or not any restrictions were placed on those?

A. I recall consideration of it. I don't remember what [fol. 1595] the extent of the action was.

Q. Do you have the recollection which I seem to have, of having to have a used tube of toothpaste to buy a new one?

A. Yes, I remember now that we had to exchange a tube when we got a new tube.

Q. Was the material in those tubes salvable?

A. Yes.

Q. What, if anything, had been done or was in progress in 1942 to expand our supply of lead?

A. My particular interest and knowledge are concerned more with utilization than it is with production. I think I ought to state that. My knowledge of the extent of the stimulation or increase of production is limited, and I am not qualified to testify on that, although I was acquainted with the fact that an attempt was being made by the departments of the War Production Board to stimulate production.

Q. Where does your lead come from? Is that domestically produced, or does it come from foreign countries?

A. A good share of it comes from this country. We get a lot of it from up in Trail, British Columbia, and we import quite a lot from Australia. But a good share of our lead is produced in this country. The tri-state field out in Southeastern Missouri is the only producer of the chemical lead, the major one, that we used in our telephone sheath.

[fol. 1596] Q. What was the situation that existed in 1942 with respect to the supply and demand for zinc?

A. Initially, we attempted to divert demand for aluminum into zinc. It was my first job and that of my predecessor in the War Production Board to attempt to get the die-casting industry of the country, which had been using aluminum for raw material, very largely over into the production of zinc-based die castings; and attempting to sell the Ordnance

Department and the other agencies of the Government on utilization of zinc-based die castings.

Of course, one of the major uses of zinc was as an alloy with copper in cartridge brass, and in 1942 the availability of zinc had also gotten to the point where the demand exceeded the supply.

Q. Was that true of all forms of zinc? Does zinc come in different forms?

There is a reference here to zinc dust. That is what I was thinking of specifically, Mr. Anderson. What is zinc dust as distinguished from zinc? Is there a distinction?

A. Zinc dust, as I recall it, is a pigment that is used in paints and protective coatings. That was one of the considerable users of zinc dust.

Q. Was zinc in that form in as short supply as zinc generally? Are the two interchangeable?

A. It is extremely wasteful to attempt to convert zinc [fol. 1597] dust to slab zinc if you largely limited the future conversion back to slab form instead of the dust form.

Q. Is it produced in the dust form, or do you have to create the dust form? Do you know that?

A. I think that you have to create the dust form, although considerable zinc dust is collected by the Cottrell process and in the smelting operation there is recovery of zinc from the flue dust.

Q. What was the situation in 1942 with respect to the supply and demand for rubber?

A. The cutting off of our supply of rubber from large plantations in Southeast Asia made it look like we might not be able to operate our tanks and military vehicles and our airplanes because of the lack of tires for land purposes, and the rubber situation was extremely critical, of course, when the President created the Baruch Committee and gave them the job of studying the possibility of early production of synthetic rubber. The program was given a high priority on the War Production Board list, and some of these critical materials which had so many demands were channeled into the provision of equipment and facilities for the manufacture of synthetic rubber, which is a combination of styrene, butadiene, two chemicals which are largely the form of tires that we are using today, synthetic rubber.

Q. Was the synthetic rubber program in process during [fol. 1598] 1942?

A. Yes.

Q. What was the supply and demand situation with respect to mercury, if you recall?

A. Our supplies of mercury used to come very largely from Spain. We had relatively small occurrences of mercury in California, and the mercury supply was insufficient for the need. The mining of mercury in California was stimulated, as well as attempts being made to get additional quantities from abroad.

Q. Incidentally, is mercury considered to be a mineral?

A. Yes.

Q. In its classification?

A. It is a liquid mineral. It is the only mineral, the only metal, I should say, that is liquid at room temperature.

Q. In addition to some of the shortages of raw materials which have existed, can you tell us whether or not there was a shortage of facilities for fabricating raw materials in 1942?

A. Yes, very definitely. The War Production Board was engaged in a program attempting to stimulate the production of additional iron and blast furnaces and also rolling mills, and expand the facilities for both ferrous and nonferrous metal production throughout the country.

Q. With respect to steel, is there any difference between steel in its slab or ingot form and steel fabricated into a [fol. 1599] finished item with respect to the availability of the two?

A. I think I answered that question earlier, stating that the tightest form of steel was in certain thin sheets and structural shapes.

Q. What about the general availability in this country in 1942 of machine tools?

A. They were extremely tight. That was considered one of the bottlenecks of the war, the insufficient supply of machine tools for processing metals into usable form.

Q. Do you recall the issuance by the War Production Board of Limitation Order L-208, which required the closing of the gold mines?

A. I do.

Q. What connection, if any, did you have with that?

A. One of the requirements that Mr. Nelson had established was that the Conservation Division should review all conservation and limitation orders that were adopted, and give our opinion as to whether or not the action was justified and whether it would produce benefits to the country and the prosecution of the war. We gave such an opinion prior to the promulgation of Order L-208.

Q. Was that part of what has been described here as the clearance process?

A. That is right.

[fol. 1600] Q. Let me show you this document and ask you whether that is a copy of the comment which you made with respect to the proposed Limitation Order L-208?

A. That is correct.

OFFER IN EVIDENCE

Mr. Barnes: I offer this in evidence as Defendant's Exhibit 52.

(Plaintiffs' counsel examining document.)

By Mr. Rigney:

Q. Is there any other document that you prepared, Mr. Anderson, prior to the issuance of L-208, in which you expressed any views on the proposed order, or is this the only one?

A. Mr. Barnes has abstracted from the files all that he could find with my signature.

Mr. Barnes: May I say, Your Honor, that this document was taken from the Secretary's file of the War Production Board which has been made available to counsel for the plaintiffs for examination by them. I will look through it and see whether there are any other memoranda bearing Mr. Anderson's signature.

Mr. Rigney: The reason I asked that question, Your Honor, was because Mr. Anderson said he gave an opinion with respect to—I don't know the exact word he used—the advisability or desirability of the order, L-208. I don't think that this particular document conforms to the descrip-

[fol. 1601] tion that he gave in his oral testimony as to

what his written opinion was, and I wondered if he had something else in mind in addition to this.

I raise no objection to the admissibility of this particular document.

The Commissioner: It may be received.

(Said memorandum, dated 9-16-42, from Harvey A. Anderson to Dr. Marcellus H. Stow, Chief, Mining Branch, War Production Board, was marked as "Defendant's Exhibit No. 52," and was admitted in evidence and made a part of this record.)

The Witness: As I recall it, Your Honor, the document to which counsel refers is probably an endorsement on a form on which we designated our concurrence in the opinion of the other departments of the War Production Board, which I endorsed as the representative of the Conservation Division.

Mr. Rigney: I don't mean to interfere with the order of your examination.

Mr. Barnes: That is all right.

Mr. Rigney, the file contains a memorandum written by Mr. Anderson November 3, 1942, with respect to Amendment No. 1 to the Order; a memorandum of July 28, 1943, with respect to a proposed amendment to the Order. It does not contain any other memorandum relating to the original issuance of the order. The file is available for you if you want to examine it.

[fol. 1602] Mr. Rigney: Thank you.

So that I am clear as to just what the answer was that Mr. Anderson gave with respect to the opinion, could I have that answer read back, Your Honor?

The Commissioner: Yes.

(Thereupon the record was read by the reporter as follows:

"Q. What connection, if any, did you have with that?

"A. One of the requirements that Mr. Nelson had established was that the Conservation Division should review all conservation and limitation orders that were adopted, and give our opinion as to whether or not the action was justified and whether it would produce benefits to the country and

the prosecution of the war. We gave such an opinion prior to the promulgation of Order L-208.")

By Mr. Barnes:

Q. Mr. Anderson, would you describe for us generally the so-called clearance procedure that existed in the War Production Board in 1942 with respect to orders?

A. The order was prepared by the division having cognizance of the particular material or operation that was under consideration, either on its own initiative or by instructions from the Chairman's office; and in the prepara-
[fol. 1603] tion of that order, consultation was usually had with the technical people in other divisions who were considered qualified to advise, and at the conclusion of the order, the drafting of the order, a copy of it was sent around for perusal and comments or concurrence by each of the some 25 or 30 bureaus of the War Production Board. In many cases, of course, a bureau having no direct relation to the problem under consideration simply endorsed it as having seen it, but the departments which were affected were expected either to suggest changes or to express their concurrence.

Then that document showing the consideration by all of the departments was returned to the Clearance Committee, and they passed the order and sent it up for official issuance.

Q. Was the Conservation Division represented on the Clearance Committee?

A. Yes.

Q. Can you tell us whether or not you had any policy as to whether the Conservation Division would ever merely endorse one of these things to show that it had seen the order, or whether it would always offer comments?

A. The Conservation Division had the responsibility of attempting to evaluate the interrelation of various materials in our war economy to the extent that divisions having specific assigned responsibilities did not have, and therefore
[fol. 1604] our advice was sought. And it was my policy, in charge of the work of this group, to insure that they did give serious consideration to all of the orders, and we usually made suggestions that were incorporated into the draft or influenced the action on all of the orders which were adopted by the War Production Board.

Q. Turning specifically now back to gold mines, to your knowledge what critical materials were used in gold mines, materials in critical supply in 1942?

A. Outside of the human type of materials, which we were not so particularly concerned with, the gold mines used critical steels in tools, they used critical materials in hoses conveying air and water, for handling some of their liquid ore. They used mercury in reduction processes.

Q. What was the situation, for example, with respect to items such as generators and compressors?

A. They were extremely tight, and the synthetic rubber program, the aluminum and magnesium program, and the copper, zinc, and lead mine programs, all required that type of equipment and in quantity greater than they were available.

It was on a definite priority list in which the War Production Board indicated—it got to the point where they definitely allocated each machine, told the manufacturer where to ship specific machines as he completed them.

Q. What was the situation with respect to seamless steel [fol. 1605] tubing?

A. It was another tight item.

Mr. Rigney: I was wondering if this is still confined to the gold mining situation, or is he testifying generally now about that?

Mr. Barnes: I might say, Your Honor, I am reading from Defendant's Exhibit 42, and from the preceding exhibit, the number of which I don't have immediately available, which shows a list of some items that Homestake had indicated as its requirements for the year 1942.

Mr. Rigney: I was just wondering whether the witness was directing his testimony now to the gold mining requirements, or generally.

Mr. Barnes: I am asking him generally at the moment. I think the other material in the record ties this up as being material desired by at least one gold mine.

By Mr. Barnes:

Q. Do you know whether or not the types of machines used in gold mines are in use in other types of mines?

A. Compressors and hoists, and a number of items of equipment, are common to other types of mines.

Q. Would that be true, for example, of drills and other underground tools?

A. In certain types of mining, yes, they use drills. In copper mining they use drills, and also use explosives which [fol. 1606] are used in gold mining.

Q. What was the situation that existed in 1942 with respect to fabrics such as burlap?

A. Burlap was tight. It comes largely from the Philippine Islands, and all of the materials which are imported from abroad, particularly that part of Eastern Asia, were in extremely tight supply.

The Commissioner: We will recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearing.)

[fol. 1607] By Mr. Barnes:

Q. Do you recall what the situation was in 1942 with respect to items such as cotton sheeting and cotton duck, Mr. Anderson?

A. Well, long staple cotton from Egypt was extremely tight, but the cotton supply in this country, as I recall, was not acute.

Q. What about the situation with respect to graphite? From what sources does our graphite come, particularly the crucible grade of graphite?

A. The cruible grade graphite is largely imported, and it was a tight commodity, one that was controlled by the War Production conservation order.

Q. What are crucibles used for?

A. Melting metal. They are used in the refining operations, in the manufacture of products from metals.

Mr. Barnes: That is all I have on direct examination.

Cross-examination.

By Mr. Rigney:

Q. Now, Mr. Anderson, as I followed your testimony here this morning, you have endeavored to give us a general pic-

ture of what the situation was in 1942 and during the war period with respect to these various critical items that you have mentioned; is that right?

A. Correct.

[fol. 1608] Q. You have done it without reference to notes or memoranda of any sort, but based upon your own recollection and your own knowledge of what the situation was; isn't that right?

A. That is correct, that is my profession.

Q. Now, have you had any experience in your own career in mining, in the production end of mining?

A. No, sir. I have been down in gold mines in Colorado and observed it, but I have never been engaged in mining operations. But I am a member of the American Institute of Mining and Metal-urgical Engineers, and I have attended their conventions for a great many years and heard a great many papers, but not by direct employment in a mining enterprise.

Q. When was this visit to the gold mine that you mentioned?

A. In 1936 or 1937.

Q. Was that just kind of a sightseeing trip?

A. It was a friend's mine, in which a friend was interested. He conducted me through.

Q. Where was that?

A. In Colorado.

Q. Now, about these various items that you have testified to which were in short supply in 1942 and during the war years, the orders which you have testified about for the conservation of those materials or for the control of those [fol. 1609] materials, limited the material which went into the end product of the various businesses or industries dealing with them; is that not right?

A. Primarily, yes, M orders.

Q. And that would be true also generally of the L orders, would it not, the limitation orders?

A. In general, yes.

Q. I remember you mentioned specifically bicycles and bird cages.

A. Counsel mentioned it; I did not.

Q. You testified on that line with respect to those items?

A. With respect to the relativity of them, yes.

Q. There was power in the War Production Board by virtue of the statutes and the executive orders whereby the War Production Board could completely control these critical materials by allocating the supply under P orders or L orders or M orders, was there not?

A. That is right.

Q. It had complete power, in other words, to control that by these various orders?

A. That was my understanding of the status of the War Production Board, yes, sir.

Q. And by specifying the quantity of the material which could go to a particular industry or a particular business or [fol. 1610] undertaking?

A. Correct.

Q. So that if you were faced with a particular problem of that sort you could cure the ailment without killing the patient, so to speak?

A. Well, we attempted that in the automotive industry, but it got to the point where we had to shut down the manufacture of automobiles entirely for passenger cars, and you recall that for a considerable period of time, through progressive reduction in the amount of supplies permitted to the manufacturers, the manufacturer was curtailed and eventually it was completely by fiat of the War Production Board discontinued. I was in conference with Mr. Charles Wilson of the General Motors Corporation during that time in which we were attempting to work out methods to continue to produce a limited number, but it got to the point where it was felt that the exigencies of the war situation required such a large percentage of the materials and facilities which were used in automobile production that we entirely discontinued the manufacture of automobiles.

Q. But that was because the automobile finished product embodied the critical material in the end product. That was because of the constituent elements that went into the making of an automobile?

A. Yes, your statement is correct, not only materials but also machines and manpower were all in short supply and [fol. 1611] necessitated a complete closing down on the passenger automobile business.

Q. And they were given war contracts?

A. That is correct.

Q. The manufacturers of automobiles, they were converted as rapidly as possible to war production?

A. Insofar as the facilities were suitable, but there were a large number of facilities which were made inoperative, which were not adapted to the manufactury of tanks and weapons carriers and other direct military vehicles.

Q. With respect to the automobile industry, there was at no time, by a single order issued, a direction given to them to shut down their complete operation within a period of seven days or any particular time, was there?

A. It was my impression——

Q. I mean by that, it was a progressive curtailment of materials.

A. With eventual complete stop of the manufacturer.

Q. Of materials going to them.

A. The order, as I recall it, completely shut down the manufacturer by suitable restrictions on the utilization of materials, facilities and manpower.

Q. By that time the automobile industry was retooled, was it not, and converted to war production?

A. Well, the automobile industry wasn't convinced that [fol. 1612] their potential production capacity was utilized in the conversion which had taken place to that date, because there were definite cries for relief, and requests for postponement of the order at the time it came.

Q. Is it not fair to say that all of the large manufacturers of automobiles, Ford, General Motors, Chrysler and others which I do not mention, were all devoting themselves almost fully to war production by the end of 1942 or the early part of 1943?

A. They were devoting a considerable part of their facilities, but they were not devoting their total manpower or productive facilities to war production.

Q. But didn't a vast amount of our war production come from those very automobile companies?

A. I agree with you 100% that a large percentage of their potential productive capacity was converted to direct war production.

Mr. Rigney: I wonder if I could see those two memos of Mr. Anderson's of November, 1943.

Mr. Barnes: Yes, they are in this file right here (handing).

By Mr. Rigney:

Q. Did it ever come to your attention .. any time that Undersecretary Patterson was advocating in the summer or autumn of 1942 the complete close-down of the soft drink industry, Seven Up and Coca-Cola?

[fol. 1613] A. Yes.

Q. You did know that?

A. Yes, sir.

Mr. Rigney: Maybe you could find those, Mr. Barnes, if you would not mind doing it, quicker than I, so it will not take so much time.

By Mr. Rigney:

Q. That was never done, was it?

A. Not to my knowledge. It was a case of shutting off facilities, rather than by fiat closing them down, the distinction I understood you to make.

Q. Wasn't Secretary Patterson's recommendation or proposal that the industry should be shut down, the soft drink industry?

A. I don't remember the details of it. When you recall it to my mind I remember having heard about it, but I don't remember the details to the extent to which he recommended, nor to which action was taken.

Q. Does your memory serve you enough to say whether or not there was ever a complete shut-down? Do you recall about that?

A. My impression is it was not.

Q. My recollection is that it was not.

A. I concur.

Mr. Rigney: That is all.

[fols. 1614-1616] By the Commissioner:

Q. Did you have any direct connection with the issuance of this order in the form of conferences with any of the top policy people over there at WPB? That is, other than the exhibit that was introduced in evidence?

A. The Conservation Division had a designated representative who was under me who sat in the Clearance Committee when the question of advisability of issuing the order

was discussed, and it was the opinion of that representative that the necessity of the war effort justified the promulgation of the order.

Q. But you did not sit in on any conferences yourself then?

A. I don't recall it, no, sir.

[fol. 1617] Robert R. Nathan, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Barnes:

Q. What is your full name, please?

A. Robert R. Nathan.

[fol. 1618] Q. What is your present occupation, Mr. Nathan?

A. I am President of a company of consulting economists, the name of which is Robert R. Nathan Associates, Inc.

Q. Where do you do business?

A. Our offices are here in Washington, D. C., although we are engaged in work quite extensively in other parts of the country and elsewhere.

Q. What is your educational background?

A. I attended the Wharton School of Commerce and Finance at the University of Pennsylvania, and received a Bachelor of Science in Economics Degree there in 1931. I continued with graduate work at the University and received a Master of Arts Degree in the field of economics in 1933.

Later, I attended law school at Georgetown University and received an LL.B. in 1938, and also took some additional graduate courses in economics at Georgetown thereafter.

Q. Will you describe your business activities since you completed at the University of Pennsylvania?

A. Most of my work after leaving the University, for a number of years was in the field of government. At the

University I was on the staff for two years while taking graduate work. I came to Washington in the fall of 1933 and worked in the Department of Commerce for seven years except for a six-month period in 1934 during which time I was engaged as Associate Director of Research of the Penn-
[fol. 1619] sylvania State Emergency Relief Board.

In the Department of Commerce, I worked principally over those years on national income; and for the last five years, from 1935 to 1940, I was Chief of the National Income Division in the Department of Commerce, heading up the Government work in that field of national income, development of estimates, analysis of sources of income and uses of income.

Also, on a part-time basis in 1934 I served with the President's Committee on Economic Security as a consultant in setting up the Social Security Law.

In the spring of 1940, I left the Department of Commerce, first on leave of absence but then permanently after a few months, to work for the Defense Advisory Commission. My first task with the Defense Advisory Commission was in charge of military and civilian requirements.

Later, I was also Associate Director of Research and Statistics of the Office of Production Management, Associate Director of the Office of Progress Reports in the Office of Production Management.

In January of 1942, I became Chairman of the Planning Committee of the War Production Board, serving also in that period on the staff and for a while as Acting Director of the staff of the Combined Production and Resources Board.

Q. When was that?

A. That was in 1942.

[fol. 1620] Q. What was it?

A. The Combined Production and Resources Board, commonly called CPRB, was designed to coordinate the production activities of the United States, Canada, and England, so as to maximize the total production accomplishments of the Allied production effort.

I resigned from the War Production Board in March of 1943, and entered the Army. Later I came back into the Government, in 1945, as Deputy Director in charge of reconversion of the Office of War Mobilization and Reconversion;

and resigned from that position on December 31, 1945.

Since that date, the only Government service I have had has been as a consultant from time to time to, for instance, the Housing Expediter, the National Security Resources Board. I believe that is all.

Q. Mr. Nathan, going back to the period of your service with defense agencies between 1940 and 1943, could you describe in a little more detail the nature of your duties in the different positions you held?

A. From the middle of 1940, when I entered work on the Defense Advisory Commission, and through 1941 with the Office of Production Management, my principal job was in the field of research and statistics, assembling data and analyzing data on the military and civilian requirements for various kinds of materials and facilities and manpower. [fol. 1621] In the setting up of requirements, we also concerned ourselves with supply, and were very active in the whole problem of coordinating supply and requirements and very active in the whole task of the setting of military and civilian goals.

I was not concerned in that particular period with the methods of allocation or the techniques of allocation. Our principal concern, I would say, above all else, was designed to bring about the expansion in the supply of critical materials and in getting the military goal up to a high level for an all-out effort.

When I became Chairman of the Planning Committee of the War Production Board in January of 1942, my principal concern and the concern of the committee then was with the basic policies of mobilization, policies of expansion, policies of the use of materials, policies concerned with the setting of production objectives, military and civilian, policies concerned with the distribution of materials in so far as techniques were concerned, policies with respect to the overall economic impact of these various goals on which we were working. Generally, broad problems of mobilization of that nature.

Q. To whom did you report as Chairman of the Planning Committee?

A. As Chairman of the Planning Committee, I reported [fol. 1622] directly to the Chairman of the War Production Board, Donald M. Nelson.

Q. What kind of work does your present company do?

A. We engage at the present time in a wide variety of economic work. I would say perhaps it might fall into three categories.

One, we do quite a bit of work for foreign governments. We have been advisers to the French Government, to the Indonesian Government, to the Israel Government, and at the present time we are working in Burma for the Government of the Union of Burma, and in Korea for the United Nations, in the development of economic rehabilitation programs in those countries, development and bringing back to productive capacity those countries.

The second category concerns representation of business corporations. We make market studies for companies. We work for airlines, shipping companies. We have represented a great many firms with the Office of International Trade on export work; with the National Production Authority on controls, all kinds of controls over the use, availability, and expansion of materials, certificates of necessity, and the like, and directly advise business firms.

Third, we do and have done work for labor unions on problems of economic policy, wage policy, and the like.

Q. Aside from the foreign governments you mentioned, [fol. 1623] can you name some of the clients of your firm?

A. For instance, we represent Commercial Metals Company of Dallas, Texas; Killark Electric Manufacturing in St. Louis; Krom ex Corporation of Cleveland; Josam Corporation of Michigan City, Indiana; Lee Brothers of Atlanta, Georgia. We just did a job for the National Cash Register Company in Dayton, Ohio. Lykes Brothers Steamship Company; North American Air Lines; Steel Tape Corporation of Jersey City.

Those are most of them, I think.

Q. Going back to 1940, your first connection with the Defense Advisory Commission, what was the situation that existed then with respect to the supply of and demand for raw materials?

A. When the President appointed the Defense Advisory Commission in May of 1940—I forget the exact day in the month—it was at that time clear that the United States had a rather vast surplus of manpower and raw materials that were not utilized. I joined the staff of the Commission

within a week after they were appointed, and our first job was to pull together estimates of requirements and supply.

It was clear that for the immediate months ahead, there would be an adequate supply of materials and manpower for any undertaking that could be mounted with the greatest possible speed. However, when we began to project what might be required under a total mobilization program, it [fol. 1624] was clear to us—I say "to us"; to the people with whom I was working in the Bureau of Research and Statistics—that under an all-out mobilization program we would not have an adequate supply of steel, copper, aluminum, zinc, and materials of that nature.

We started out by making estimates of the requirements in what one might call an indirect way, because there were no military requirements under estimated total mobilization. There was no military program which one could reasonably or readily translate into specific requirements of raw materials. So we started with the assumption, which I think was pretty obvious, that an all-out mobilization would entail full employment, putting everybody to work, and producing the maximum that the country could produce.

At that time there were perhaps eight to ten million persons unemployed, and still sizable numbers partly employed. There were obvious potentials for increasing the size of the labor force by bringing in the marginal groups, and it was obvious also that the length of the work-week could be expanded. When we took the gross national product, the total production of the economy, and projected what that total product could be under a circumstance of full employment, it was obvious that the levels of production would be far, far greater than the levels at that time.

Then we began to translate those total levels of gross national product into our estimates of the requirements [fol. 1625] for steel, aluminum, copper, and other materials which obviously would be critical in a period of total mobilization.

As early as the mid-summer of 1940, I was one of the supporters of a document, one of the signers of a document, which urged an expansion in steel capacity. That really touched off the rather sharp fight as to whether or not we should expand basic capacity. The steel industry was not particularly anxious to expand capacity, and understand-

ably, because it had been through many years in which we had been using only 30, 40, or 50 per cent of steel capacity. While some of the leaders felt that a period of total mobilization might entail serious shortages for a short period of time, that over the longer run it would be unfortunate to expand capacity and then go back to an even larger percentage of unused capacity.

The steel battle that took place culminated in a lot of reports and the famous Gano Dunn Report. Gano Dunn was an engineer of eminence who came down and supported the steel industry's contention against expansion.

The whole significance of that battle, it seems to me, evolved around and still does evolve around the concept of what an all-out effort should be, and could be, and what had to be done to achieve an all-out effort.

As a result of the projections that were made in the [fol. 1626] middle of 1940, long before there were shortages and during a period when there were quite adequate supplies and surpluses of supplies, as a result of that effort we did achieve quite a bit of expansion of capacity relatively early in the mobilization period, which if it had been delayed would, I think, never have been achieved, because later on when the shortages became severe, every bit of material which was used to build new capacity to build more material, immediately cut deeper into the military effort. So in the latter stages, it was just necessary to go on on what you had, and not to attempt expansion.

So in that early period it was clear to many of us that under a period of total mobilization we would have very severe shortages of materials, and that obviously came true as the developments emerged, and it was fortunate that we did expand the capacity of steel, aluminum, and others, as we had done, and that stockpiles were built up.

As a war emerged, it was also clear that had even greater expansion of capacity been undertaken, we would have been even better off in terms of total mobilization.

Q. You have used the word "we", and at one point you defined that as including the people with whom you were working in the Bureau of Research and Statistics. Who were those people at that time?

A. I was head of the military and civilian requirements. [fol. 1627] Stacy May was then Director of the Bureau

of Research and Statistics. There was another fellow by the name of Dr. Bassie, who was in charge of supply figures. The three of us pretty much worked as a team, Stacy May and myself and Dr. Bassie, in preparing a number of these memoranda.

Q. You have referred at some length to the situation with respect to steel. What was the situation with respect to copper and aluminum, which were two other metals you mentioned?

A. I don't have the projections at the moment, but as I recollect, our projections on copper and aluminum were indicative of even greater scarcities than in steel, because copper is an item which the military uses in tremendous quantities, especially for ammunition purposes; and aluminum, of course, for an aircraft program which obviously was going to be a substantial and big program.

The problem with copper was that the expansible capacity was not as great as in steel, iron, or aluminum. We urged an all-out expansion of copper facilities, and also the maximization of imports of copper and stockpiling of copper, because it was obvious that in a period of total mobilization copper would be exceedingly short, as of course it turned out to be.

Q. Was anything done during that period to expand the production facilities for aluminum?

[fol. 1628] A. Very substantially. The Government made funds available for the expansion of facilities, and a little later on the principle of accelerated amortization was introduced whereby a company could come in and build a facility and write off that facility in depreciation charges in a period of five years instead of the normal period of 15 to 20 years. It is obvious that when there is an excess profits tax, as we did have, and when tax rates were high, that accelerated amortization is a very attractive incentive and an effective incentive.

Coupled between high priorities for the material needed to build the plants and the accelerated amortization and Government financing, tremendous expansion occurred in aluminum fabricating plants.

Q. Aside from the three factors you mentioned—high priorities, accelerated amortization, and Government financing—were there any other things that were done during that

period to induce expansion of the supply of raw materials?

A. I don't believe there was anything else of significance done in '40 and '41. Those were the most important factors.

Well, there were price incentives, by the way, after price controls became established. There were price differentials granted, which really amounted to a subsidy, price incen- [fol. 1629] tives to new facilities or marginal facilities for coming into the picture.

Q. Were the people in the Bureau of Research and Statistics of the Defense Advisory Commission the only people who were aware, during this period in 1940, that material supplies might be inadequate?

A. I think that the brunt of the conflict was carried in that Bureau, although as the data were developed, many allies came along and joined up. Many of the men who came from business, in the early stages of mobilization I think were rather impressed with these needs at a reasonably early stage. I know we worked with men like William L. Batt, Edward Stettinius, and Averill Harriman in those early periods, and while at first they were somewhat skeptical about these large requirements, I think in reasonable order they came around and supported the expansion. Many of the top Administration officials supported it. Finally, President Roosevelt ordered a ten million ton steel expansion, which was undertaken.

Q. When was that, approximately?

A. That directive came around the end of 1940.

Q. During this period in 1940 that you have been referring to, on the basis of your experience would you say that there was any general realization of the prospective need for controlling the flow of raw materials in the event of mobiliza- [fol. 1630] tion?

A. Yes. I think a recognition of the need for some system of directing the flow of materials came relatively early in the program. I would say also that there was a considerable amount of confusion as to the kind of system for the control of materials which might be needed. The Army-Navy Munitions Board, which had been engaged in some work of planning mobilization, had, as parts of its program, ideas put together on the distribution of materials, nothing too specific, nothing that actually was used in effect later on,

but it was rather clear before the end of 1940 that some system of distributing materials would be essential.

The techniques, as I say, were a bit fuzzy at the beginning, because there were no definite assurances as to how big the military program would be. There were no definite assurances how large the shortages would be. There were no definite assurances as to how rapidly the expansion of capacity would come along. The net result was that during that period there was mainly a concern about getting the materials that the military needed—period. That was just about all in the very early period, a recognition that a system for controlling materials would be needed, but the first concern was to be sure that the military got theirs, and that was about the extent of the first concern.

Q. You referred a moment ago to the Army Navy Muni- [fol. 1631] tions Board. What was that?

A. The Army-Navy Munitions Board was an organization made up of—I don't recall specifically, but I suspect of equal representation of the two separate departments of the Armed Forces, the Navy Department and the War Department, which was assigned the responsibility of mobilization planning. It was assigned the responsibility of assembling requirements, of surveying plants, of developing bills of materials, to estimate the materials needs, to generally prepare a mobilization program for the period of hostilities.

Q. During this period beginning in 1940, was there any change in military requirements?

A. Actually, in retrospect, it is pretty clear now that there really were no sound or solid military requirements when the crisis arose in the middle of 1940, when the President appointed the Defense Advisory Commission. The Army-Navy Munitions Board had some requirements on theoretical bases of given numbers of men in the Armed Forces, but when we pursued these requirements to try to develop realistic figures out of them and to get to the bottom of them, they unfortunately melted pretty rapidly. There just weren't any good requirements figures.

The result was that throughout 1940 and to a considerable degree in 1941, the only requirements that were available were those that were manifested by appropriations. If one [fol. 1632] looks at the appropriations schedule of the Congress in 1940 and 1941, one can readily understand the

difficulties in that period of doing any careful planning, because one week there would be an appropriation of a billion dollars, and then there wouldn't be any appropriation for three weeks, and then there would be four billion, and then a week later six hundred million, and then two weeks later a half billion, and five weeks later four billion. It just seemed to be a completely helter-skelter, make-shift approach. In essence; that is what happened.

As ideas emerged of pushing ahead on certain programs, the Armed Forces would send a budget request to the Budget Bureau and to the President and then to the Congress, and nobody raised too many questions, properly I think at that stage, and fortunately the appropriations came fairly quickly. There was nothing orderly about it, nothing well developed. There were no objectives toward which they were moving.

Q. Do you recall something that was called the Victory Program?

A. Yes, I recall the Victory Program very well. The Victory Program was developed in the latter half of 1941, and it was the title given to the first set of over-all total requirements which precipitated a really total mobilization.

Q. Did you have anything to do with the development of those requirements?

[fol. 1633] A. Yes, I did most of the statistical and analytical work in the development of the Victory Program. The Victory Program was not anything highly precise or based on absolutely precise background. It actually was a set of estimates which President Roosevelt announced shortly after Pearl Harbor in which he set goals for the critical items for 1942 and 1943. He said, "We want 50,000 airplanes in '42, and 100,000 in 1943. We want 4 million tons of merchant shipping in 1942, and 8 million in 1943." I am not quoting the actual figures, but this is just an illustration. "We want 45,000 tanks in 1942 and 75,000 in 1943." He set very specific goals for our total productive effort in 1942 and 1943.

Those goals were based on a set of requirements which were received by the Office of Production Management in 1941, starting in the mid-summer, from the Army, the Navy, the Maritime Commission, and Lend-Lease, which represented the foreign claimants. Out of those total require-

ments, which were not timed, we converted them into strategic materials such as copper, aluminum, and steel. We converted them into dollar figures. We related those requirements to our total estimated supply less essential civilian. We related the dollar figures to our projections of gross national product, and then we prepared for the President these estimates, indicating what we thought could be [fol. 1634] accomplished under an all-out effort in 1942 and 1943. Those figures were the Victory Program.

Q. In formulating the Victory Program, what assumptions did you make with respect to the non-military aspects of our production?

A. In essence, the military program in every concept was an all-out program. Therefore, our assumptions were that the civilian economy had to be and would be reduced to the barest minimum.

For instance, if I may illustrate, we analyzed the experience in other countries as best as we could get the data, and it was our conclusion that no economy had for any period of time ever mobilized more than 50 per cent of its total production for direct military purposes. I think the range was somewhere in between 40 and 50 per cent, or 40 and a little below 50 per cent. That means that in a period of total mobilization, at least half of the total output must go for maintaining the civilian economy and indirect military, such as the essential industries.

When I say "military program" I mean weapons, guns, tanks, ammunition, and food for the Armed Forces, the men in uniform. But the so-called supporting economy, consumption for the working population, the maintenance for basic industries, maintenance and repair—those require at least half the total output.

[fol. 1635] We also tried to develop and actually we did develop—I wouldn't say they were terribly sound at that time—minimal requirements for civilian materials for the civilian economy, because we knew what the total supplies would probably be, we had a projection of supplies, we tried to figure the minimum that could be left for the civilian economy so we could then anticipate how much was available or would be available for military so we could then translate that into these military goals. But certainly the underlying consideration of the Victory Program was an

all-out effort, the counterpart of which means minimizing the civilian program.

Q. In formulating that program, did you give any consideration to the essentiality of civilian industries or non-military activities?

A. Certainly we had to give consideration to degrees of essentiality of end products. It was clear that if the civilian economy were permitted to operate unlimitedly and did operate to an unlimited extent, the military would have relatively little available, because the buying power of the consumers would obviously increase during the war period. There was a question whether taxes would ever take enough buying power away so as to bring total demand away from what was available for civilians. So in essence, we had to make certain assumptions about what had to happen to the civilian economy; and we certainly did assume, without a [fol. 1636] specific schedule of specific items, that the less essential and the non-essential elements in the civilian economy would be drastically curtailed or eliminated.

Q. Am I correct, then, in understanding that you had not applied that thought to any specific industry or industries?

A. No, we did not do it industry by industry. We worked on this Victory Program over a relatively limited period of time. The available data were not too precise, although as early as 1940 we were working on statistics which showed the end use pattern of certain critical materials.

For instance, when we started out, like with copper, we started out saying what was the consumption of copper in the United States in 1939; how much of that went into, say, electricity for the homes.

Some of these data were not available. Some we used estimates; some guesses. How much copper would go to the decorative items, how much would go into certain types of industrial use, how much in that period went into munitions.

So we tried to get a breakdown at the very earliest stages of the end uses toward which each material was being consumed, and the net result was that we were able to make assumptions at a relatively early stage of how deep the cuts would be in the civilian use of these materials.

Q. How did the totals that you had developed through [fol. 1637] this Victory Program compare with existing

Army procurement policies as they had developed up to the end of 1941, say?

A. The requirements in the Victory Program were phenomenally larger than the then existing programs of the Armed Forces, either based on specific projections which they had submitted or on appropriations.

For instance, the size of the aircraft program was away beyond anything the Air Corps had received appropriations for, and away beyond what they had indicated they were going to procure.

Of course, throughout 1941, at least for the first 11 months and 7 days of 1941, there wasn't a war in which the United States was participating, and when the military were asked questions about how much they needed, what their requirements were, they would often say, "Tell us what the strategic consequences are going to be or what the outlook is, and we will in turn then give you requirements based on some assumptions." So they didn't have an all-out basis for setting up this total program of total mobilization.

The Victory Program was submitted to the President, as I recall, just three or four or five days before Pearl Harbor, and by the time it got chewed over in the White House—Lord Beaverbrook was there at the time, I recall, and I think they even stepped up some of our figures a little bit under his enthusiasm. By that time the war was on, Pearl [fol. 1638] Harbor had occurred, and the figures then were accepted readily by the Armed Forces, and the big push started then in production. The President laid down these goals, and the Armed Forces immediately got appropriations, and those objectives were accepted.

Q. After the Victory Program was adopted or announced by the President—I suppose "announced" would be a better phrase—were there any other programming problems that existed with respect to military requirements?

A. Yes, in a sense the Victory Program was the first big step forward in the whole programming task, and from then on the job continued to be quite serious for some time. At this point I would say that our concept of programming then—I would like to be fairly precise in the way I use the word "programming"—our concept of programming related primarily not to how materials were distributed, which I call the distribution of materials, but mainly to laying out

a pattern of demand and supply which bore reasonable relations to each other. That was our thought. When we set up the Victory Program, we had the idea of setting out a group of requirements which would maximize the military production of this country, the United States. In other words what is the biggest amount that could be accomplished? How big goals should be set so that an all-out effort would be made and those goals might also be reached? [fol. 1639] How big a demand should we put forward, was our thought, which would induce the greatest effort and still be within the realms of achievement?

The Victory Program of necessity had to be confined to certain items. You couldn't very well have a program spelling out 500,000 items and going down to every little caliber of shell and every little piece of equipment and every type of radar equipment, and so forth. It had to be in the big lead items. So the Victory Program was principally in aircraft, light, medium and heavy bombers, trainers, fighters, and so forth.

Mr. Barnett: I don't like to interrupt, but as one participating in the purchase of this transcript, I am wondering if this is all material to the issues here. If we are going through each program, we are likely to be here indefinitely, and the transcript will run up to thousands of pages. I don't see where it is material.

The Commissioner: The exigencies of the situation were one of the factors that the War Production Board had before them when this gold order was issued.

Mr. Barnett: It seems to me that it is going beyond the description of that situation, Your Honor. I will submit the objection, which I anticipate will be treated like the other one.

The Commissioner: Overruled.

[fol. 1640] Mr. Barnes: Would you read the last of Mr. Nathan's answer so he can pick it up?

(Thereupon, the last portion of the answer was read by the reporter as follows:

"You couldn't very well have a program spelling out 500,000 items and going down to every little caliber of shell and every little piece of equipment and every type of radar equipment, and so forth. It had to be in the big lead

items. So the Victory Program was principally in aircraft, light, medium and heavy bombers, trainers, fighters, and so forth.")

The Witness: And in the Army and Navy portions, it was also confined only to the lead items. Shortly after the President announced these goals, the military supply arms then came forward with bigger requirements of all the other parts to balance out this program, and as new items came in, their requirements shot away ahead even of the President's goal.

That happened throughout the spring of 1942 at a time when the materials were severely critical. We were then concerned, in the Planning Committee—we had already had the Planning Committee set up—we were then concerned that these goals were too big. So we were then concerned with programming, the programming problem in reverse, that suddenly the requirements of the Armed Forces might [fol. 1641] be bigger than the economy could conceivably achieve, so we still had this programming problem with us.

By Mr. Barnes:

Q. Was it necessary at any point to cut back the military requirements or the military purchasing programs?

A. As a matter of fact, the biggest fight——

Mr. Barnett: Your Honor, can't that be answered "yes" or "no." As I understand, this witness was around 28 or 29 at the time he is testifying about. Is that correct?

The Witness: No, I was 33.

Mr. Barnett: It would appear that these opinions and conclusions of his are just personal to him. The problem presented to us is how we are going to cross-examine on this. I even forget the questions after a time. I ask Your Honor, how can you cross-examine on what he is talking about, at least intelligently?

The Commissioner: Your first question was, Can the question not be answered "yes" or "no." It could be. If an explanation is necessary to expand upon the "yes" or "no" answer, that may be done. If the witness goes beyond the question, then go ahead and make any objection you want to.

Mr. Barnett: He talks too fast. By the time you listen

to him. We have been at it now 50 minutes, and I don't think there have been two long, deep breaths taken by the witness. We are just up to 1940, Your Honor.

[fol. 1642] Mr. Barnes: We are up to 1942. We started in 1940. You are away behind.

Mr. Barnett: That shows you how fast he is talking.

The Commissioner: Let's have that question.

(Thereupon, the question was read by the reporter.)

The Commissioner: I think that can be answered "yes" or "no."

The Witness: Yes.

By Mr. Barnes:

Q. When did that occur, approximately?

A. In the second half of 1942, the military requirements and procurement program was cut back.

Q. What means were used to do that?

A. The War Production Board decided that a re-evaluation of the program was necessary because of its successive content; that it was too large for the available supply of materials, and with great reluctance the Armed Forces did cut back their goals.

Q. What part did you and the Planning Committee play in the studies leading up to this decision?

A. The Planning Committee, of which I was Chairman, carried the work on feasibility.

Q. What do you mean by "feasibility"?

A. Feasibility refers to the setting of goals which are accomplishable, that can be achieved and are feasible. We [fol. 1643] were the only unit in the whole War Production Board which conducted these studies of the feasibility of the goals or objectives.

As the official documents of the War Production Board indicate, it was the work of the Planning Committee which brought on the decisions of the War Production Board that the total goals had to bear some relationship to total supplies, and as a result of our efforts the War Production Board decided that the goals were too big. And, as a matter of fact, it was at the same meeting of the War Production Board on October 6, 1942, that I personally presented the

feasibility program to the Board, and this program was generally accepted; at that same meeting the Gold Order was also adopted by the Board.

Q. Why did you feel that it was important to achieve what I think you described as a reasonable degree of balance between demand and supply in relation to the resources available?

Mr. Rigney: If Your Honor please, I think it would be helpful if the witness would try not to be too discoursive in his answers and, as we have been doing the last few minutes, if Mr. Barnes would put more frequent questions, we then will be able to follow the continuity of the testimony a little easier.

The Commissioner: Yes, I think that is a valid observation.

[fol. 1644] The Witness: May I have the question, sir?

(Thereupon, the pending question was read by the reporter.)

The Witness: We were convinced that if the requirements were far beyond what could be accomplished, then we would end up, that is, the Government, the country, would end up with a lot of components rather than finished items, and a lot of facilities which couldn't be utilized.

If I may illustrate, as I recall, at one time our total civilian requirements, essential minimum civilian requirements, plus the military program, would have required in 1943 about 120 million tons of steel, when the total capacity was only 90 million tons. That obviously would result in chaos.

The Commissioner: When you use the pronoun "we," I wish you would relate it to the people involved. You have heretofore referred to two other individuals, but I thought there might be a possibility of your using it to include additional ones.

The Witness: Yes, Your Honor. As a matter of fact, from January 1942 on, when I use "we," I think I am using it referring to the three members of the Planning Committee of the War Production Board of which I was Chairman. The other two members were Thomas Blaisdell, Jr., and Fred Searls.

By Mr. Rigney:

Q. I ask you, Mr. Nathan, whenever you can, to fix the [fol. 1645] particular time period or month, if you can, as you move from one topic or event to another.

A. Fine.

By Mr. Barnes:

Q. Is that the same Mr. Searls who is President of the Newmont Mines Company?

A. Yes.

Q. Over how long a period of time did this feasibility study continue, Mr. Nathan?

A. From probably February or March 1942, through the end of the year 1942.

Q. Can you take one material or one end product, whichever would be easier, and illustrate for us in general the method you employed in making the studies?

A. The method was pretty much the same for the key materials we used. We used three materials, aluminum, copper and steel. We translated, as best we could, the military requirements into the raw material needs, introduced appropriate lead factors, included then the estimates of essential civilian needs, minimum civilian needs, included also export programs prepared by the Board of Economic Warfare, and then related these requirements to total supply.

Q. You used the phrase "lead factor." What do you mean by that?

A. For instance, in ammunition, the copper must be [fol. 1646] produced a certain number of weeks or months ahead of the time when the actual bullets come out of the ordnance plant, or the aluminum ingot must be made a certain period of time ahead of when the aircraft actually leaves the assembly line in the aircraft plant.

Q. In setting up this program, what was your source of supply figures?

A. The War Production Board itself had a staff in the various industry and commodity divisions and in the Bureau of Research and Statistics, and the staff worked jointly and developed estimates of supply.

Q. Do I understand that this study on the feasibility pro-

gram continued from March to the early part of October 1942?

A. It continued even beyond October. It was presented to the War Production Board on October 6, but the work continued thereafter.

Q. Did you, in connection with that, consult with the military at all?

A. Frequently, on reviewing their requirements, chaing ing requirements.

Q. What was the end result of this study, particularly with respect to expansion of facilities for fabricating military items?

A. Cancellation of many facilfty contracts, some of which even had been under way.

[fol. 1647] Q. What effect did that have on the military procurement programs?

A. It coincided with curtailment of procurement, contract work cutback.

By Mr. Rigney:

Q. When was that, would you say?

A. The last two or three months of 1942. Actually, if I may, coincident with the Planning Committee's work on feasibility there was also a Committee on Facilities, of which I was a member, with a Colonel Phillips of the Army-Navy Munitions Board, and I forget the Commander's name, also from the Army-Navy Munitions Board, and the three of us worked as a committee all during, I would say, from the spring of 1942 on, reviewing whether the facilities program was too big. We were of the opinion, in a report which could be documented from the War Production records, that the facilities program was much too big; that they were just building too many plants that could not be used because there wasn't enough materials. The first cancellation of facilities started in the fall of 1942.

By Mr. Barnes:

Q. Did you, in connection with your study of this feasibility program, give any consideration to the possibility of developing a system for the distribution of materials that would obviate the necessity of bringing supply and demand [fol. 1648] into balance?

The Commissioner: Didn't the witness say that was out of his bailiwick?

The Witness: That is, the feasibility analysis, as such, did not concern itself with the method of distributing materials.

By Mr. Barnes:

Q. I say, did you in connection with making that analysis give any consideration to the possibility of having some system of distribution without the necessity of balancing supply and demand?

A. Yes, and we were convinced in our minds, the Planning Committee, that no system for the distribution of materials could be precise enough and tight enough to work effectively if the total demand were way, way in excess of total supply. In other words, we felt that if total demand were brought down reasonably near total supply, then a system for the distribution of materials would work effectively, but it could not work effectively if demand continued way, way out of line with supply.

Q. Mr. Nathan, I think you stated that in the earlier period you had no concern with the mechanisms worked out for the distribution of materials?

A. In 1940 and '41, that was true, but not in 1942. As a matter of fact, in 1942 I was also Chairman of an ad hoc [fol. 1649] committee in the War Production Board called the Committee for the Control of the Distribution of Materials. I was Chairman of that committee. I don't remember the exact dates, but it lasted for some six months, around March, say, to September of 1942.

Q. Did you, in connection with the work of that committee, give any consideration to the prior experience of the War Production Board and predecessor agencies with respect to the distribution of materials?

A. Yes, we studied every procedure, device and technique that had been adopted.

Q. What were the general concepts and objectives that you found underlying the original priorities program developed by the War Production Board and its predecessor agencies?

A. The first purpose——

Mr. Rigney: Your Honor, I hestiate to interrupt, but it seems to me that that question is objectionable, asking him what concepts were. It is vague. I don't see how it can be answered without operations of the witness' mind apart from the facts.

Mr. Barnes: I would hesitate to put a witness on the stand whose mind wouldn't operate while he was on the stand, Mr. Rigney.

The Commissioner: Sustained.

[fol. 1650] By Mr. Barnes:

Q. Mr. Nathan, will you describe the original priorities program in the War Production Board?

A. The original priorities program was a system of giving ratings, which ratings varied in accordance with the essentiality of the item, with the highest rating for the most urgent items, and lower ratings for the less urgent items.

Q. Can you tell us whether or not, in your opinion, this program was a success?

Mr. Rigney: There again, it is his opinion.

The Commissioner: Sustained.

By Mr. Barnes:

Q. What had been the result of the operation of that program that you just described?

Mr. Rigney: I think the same objection would apply there, Your Honor.

The Commissioner: I am going to let him testify how that program operated. I think if the question were rephrased in that direction, the objection would be removed. I am going to sustain the objection to the question as asked, and suggest to counsel that the question be rephrased.

By Mr. Barnes:

Q. Mr. Nathan, how did that original program that you have just described operate?

[fol. 1651] A. It operated through committees which assigned these various ratings to different categories of items, and in large measure the military items were rated by the

military departments. For instance, aircraft, say, became A-1, and something less essential became A-2, and the like.

Q. In the assignment of these priority ratings, was any consideration given to the relationship between supply and demand of the materials involved?

A. No, sir.

Q. What was the result of that on the operation of the program?

A. The result was that in time, as demand increased relative to supply, the priorities rating system became inoperative, because of the inflation of the ratings.

Q. What do you mean by "inflation of ratings"?

A. If people couldn't get supplies, they protested and got higher ratings. Pretty soon, everybody began to squeeze into the highest rating, and then the rating wasn't of any use.

Q. In addition to this system of assigning priorities, were any other means used to control the flow of materials during the period prior to the middle of 1942, let us say?

A. There were directives. If an individual couldn't get his essential materials through ratings, he came in and asked for a directive, which meant that the OPM, later the [fol. 1652] War Production Board, directed a supplier to supply that individual.

Then there were "M" orders and "L" orders, Conservation and Limitation orders. The "M" orders served both to relate the distribution of materials to the priorities system, to bring the claimants in line with the suppliers, and also to limit the uses of many materials to specific purposes or from specific purposes.

Also, there were the "L" orders or Limitation orders, which denied the availability of these materials for certain designated end purposes.

Q. Were these Limitation orders in general use by the War Production Board during World War II?

A. Very considerably, yes.

Q. What function did they serve?

A. They served to reduce demand for materials.

Q. Do you recall, for example, a Limitation order related to the production of civilian automobiles?

A. Yes, sir.

Q. Can you give us some of the background of that order?

Mr. Rigney: Your Honor, I don't know, but it seems to me that is objectionable. If he wants to interrogate him with respect to the order and ask him specific questions concerning that, that would be the way to proceed, I should [fol. 1653] think.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Mr. Nathan: do you know of a program or plan for the distribution of materials which was called the Controlled Materials Plan?

A. Yes, sir.

Q. When was that introduced?

A. Early in 1943.

Q. How was it developed?

A. It was developed——

Mr. Rigney: Just a minute, Mr. Nathan.

That is again the type of question to which I object, Your Honor, because I think the witness quite properly, in response to that kind of question, absent an objection, would feel that he is entitled to answer it in a narrative and discoursive sort of way which presents the difficulty we have raised before. I wish counsel could avoid that.

Mr. Barnes: Your Honor, there is a very difficult problem here to avoid leading. On a subject of this type, there has to be a certain amount of latitude given to the witness. I will withdraw that question, however, and ask a preliminary question.

By Mr. Barnes:

Q. Did you have anything to do, yourself, with the devel- [fol. 1654] opment of the Controlled Materials Plan?

A. With the background for it, yes.

Q. Through what medium?

A. Through this Committee for the Control of the Flow of Materials, of which I was Chairman.

Q. Will you explain the work of that committee in connection with the control of the flow of materials?

A. This committee worked in the middle of 1942 when it

was clear that the priorities system was falling down and a new system had been proposed called PRP, Production Requirements Plan, which was not very satisfactory. We were trying to work out a plan which seemed to be supported generally for a vertical system of distributing materials, namely, by allocating materials to end uses and letting that allocation system take care of distributing the materials in relation to an end use, rather than distributing it to every user of materials, no matter what the end use was.

If I may illustrate, if you put materials, let us say, into every engine company, you don't know whether those engines are for marine purposes, necessarily, or automobiles, or shore use, or refrigerators. Perhaps that is not a good illustration, but conceivably when you feed in materials to each plant that uses materials, you have no tie-up to the end purpose for which those materials will be used.

So the desired objective was to try to feed the materials [fol. 1655] in in relation to end purposes. In that way, you could really control the use of materials for a designed purpose or designed end use.

We discussed this approach throughout the summer and early fall of 1942. The specific form of the Controlled Materials Plan, which is really a vertical plan and an end-use allocations system, the specifics did not emerge until, I think, October, when Mr. Eberstadt came over from the Army-Navy Munitions Board and set up a separate committee which developed the details of the CMP.

Q. By October, you refer to October 1942?

A. 1942, yes, sir.

Q. Was the Controlled Materials Plan the final mechanism used by the War Production Board for the balance of the war for the distribution of materials?

A. Yes.

By the Commissioner:

Q. All materials?

A. The key materials, actually. The Controlled Materials Plan never did apply to all materials; just to the key materials, the most critical ones.

By Mr. Barnes:

Q. Was it necessary to have Limitation orders under the Controlled Materials Plan or in conjunction with it?

A. Yes, sir.

[fol. 1656] Q. Why?

A. The Controlled Materials Plan, in my judgment, was the best plan for the distribution of materials that was developed. I think that evidence of its applicability and propriety is manifested by the fact that it is used in the present mobilization period also; with slight deviations, that the Controlled Materials Plan is now also being used in the Korean mobilization period. However, effective as it is, it still, in my judgment, would not have worked effectively had the demand been tremendously excessive relative to the supply of materials. I don't think it could have worked very effectively. That is why I think these other orders were necessary along with it.

Q. In the course of the studies made by this committee of the distribution of materials, did you give consideration to the place of Limitation orders in the distribution scheme?

A. Not in that committee, no. We were then concerned exclusively with the techniques for distributing materials.

Q. Do you know whether or not the function of Limitation orders in connection with distribution was given consideration by that committee?

A. Yes, it was discussed very widely in the War Production Board, in many, many meetings, by many groups and individuals, the importance of curtailing demand. As a matter of fact, the key to the proposals of the Planning [fol. 1657] Committee was geared to this whole thought of getting demand somewhere near the relationship with supply, somewhere near the level of supply.

Q. Did the implementation of that work of the Planning Committee have anything to do with the issuance or continuance of Limitation orders?

A. I believe it did. We of the Planning Committee worked very closely with the Chairman of the War Production Board, and we also supported not only the importance of a feasible military program, that is, keeping the military program within the realms of achievability, but also of keeping the civilian requirements down near what was accepted

generally as minimum civilian requirements through the use of "L" orders.

The Commissioner: We will recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearing.)

[fol. 1658] Mr. Rigney: I am pleased to say, Your Honor, that we have obtained the appendices which were missing to Plaintiffs' Exhibit No. 1, and they are now attached. I submitted them to Mr. Barnes during the recess, and I think the exhibit is now in complete order.

Mr. Barnes: In view of that, I withdraw the motion I made to strike Plaintiffs' Exhibit No. 1.

The Commissioner: Very well.

By Mr. Barnes:

Q. Mr. Nathan, you referred to the controlled materials plan as being the vertical system for the distribution of materials. Would you explain a little bit more fully just what that means and how it operated?

A. There were, first, claimant agencies. For instance, the Army was a claimant agency, the Air Corps a claimant agency, the Marine Corps, the Navy, the Maritime, Lend Lease, the Office of Civilian Supply. They came before a requirements committee and submitted their needs for a given quarter. There was considerable debate as to whether these needs were just, whether they were reasonably related to end purposes. And then these claimant agencies would be allocated given amounts of steel, of aluminum, of copper. Then they would distribute tickets to their suppliers, who were supplying the Armed Forces with contracts, and they, in turn, then would be able to buy materials with these tickets and pass them down.

[fol. 1659] The claimant agencies for the civilian requirements functioned similarly by giving these tickets or claims to people who produced essential civilian items and they passed down, and in that way the materials were claimed in relation to given end programs.

Q. You have used the phrase "civilian requirements" and "essential civilian requirements." What did that include, in general?

A. Well, for instance, essential civilian requirements would include the power industry, the railroads, the telephone and telegraph, clothing industry, food processing industry, even service industries that were essential such as housing in defense areas, service industries such as hotels and restaurants. It included the whole category of the civilian economy which had to continue to operate in order to support the military production program.

Q. In your opinion, could the controlled materials plan or any similar system for the distribution of materials have operated successfully if, for example, there had not been an order prohibiting the manufacture of automobiles?

A. In my opinion, the controlled materials plan would not have operated effectively had there not been limitation orders such as the automobile order.

Q. Why not?

A. The automobile industry we all understand to be a [fol. 1660] very large user of steel and alloys and copper and many other materials. Had there been no direct restriction on the production of automobiles that industry would have come in as a claimant and it would have exerted its utmost pressure, properly, to get as much materials as it could and get the highest priority it could. And as we experienced throughout the World War II period, each industry—and again I say properly—regarded its product as highly essential, for morale purposes, if not for directly supporting the essential operations of the economy. And the pressures become so great for higher priorities, for higher allocations that it is almost impossible to make a distribution of a limited supply when the demand is very, very much in excess of the supply.

I think the priorities system would not have broken down as early as it did had the total requirements been brought down closer to total demand earlier in the war period.

Q. We have used the automobile industry as an example. In your opinion, would the same thing have been true with respect to other industries whose production was curtailed or eliminated during the war?

Mr. Rigney: I think he ought to specify the industry. I object to the generality of the question.

The Commissioner: Read it, please.

(The pending question was read by the reporter.)

The Commissioner: Sustained.

[fol. 1661] Mr. Barnes: I was wondering if I could ask a question in reference to the answer before. The witness has used the word "pressure". I was wondering if we could get an explanation of how he meant that. Does he mean an illegal pressure of some type?

The Commissioner: You may ask him that.

The Witness: Nothing illegal in pressure. For instance, when the automobile curtailment order was being considered, the industry representatives came to Washington and the War Production Board had hearings, and the OPM before the War Production Board. And the industry urged against the curtailment of automobile production on the grounds of essentiality, that workers had to get to the war plants, the farmers had to get to the city, and the workers had to move around. They objected also on the ground that they had sizeable inventories and they wanted to keep producing to run down their inventories of components. They objected also on the grounds that their equipment was not appropriate for war orders and they did not have big war orders, they couldn't convert, that it would create a lot of unemployment and chaos. There is nothing illegitimate about that pressure. And I said, I think, properly, every industry regards its own product as highly essential.

By Mr. Barnett:

Q. In other words, it was an argument on their behalf?

A. A strong argument, that is right.

[fol. 1662] Q. The same as the gold people were arguing on their behalf?

A. That is right.

Q. With a different result?

A. Well, the automobile industry was closed down also, both were closed down.

Mr. Barnett: Well, that is a question.

The Commissioner: You can take that up on cross-examination.

You used another word in reply to a question, Mr. Nathan, and I would like to have you state what you meant when you

used the words "total requirements". I am going to suggest that you read that answer back.

Mr. Rigney: I think he meant to say supply.

The Commissioner: I want you to read the answer that was given.

(Whereupon, the record was read by the reporter as follows:

"The automobile industry we all understand to be a very large user of steel and alloys and copper and many other materials. Had there been no direct restriction on the production of automobiles that industry would have come in as a claimant and it would have exerted its utmost pressure, properly, to get as much materials as it could and get the highest priority it could. And as we experienced throughout the World War II period, each industry—and again [fol. 1663] I say properly—regarded its product as highly essential, for morale purposes, if not for directly supporting the essential operations of the economy. And the pressures become so great for higher priorities for higher allocations that it is almost impossible to make a distribution of a limited supply when the demand is very, very much in excess of the supply.

"I think the priorities system would not have broken down as early as it did had the total requirements been brought down closer to total demand earlier in the war period.")

The Witness: The last word "demand" should really be "supply", in other words, "had total requirements been brought down nearer to total supply".

The Commissioner: All right.

By Mr. Barnes:

Q. Mr. Nathan, referring back to the automotive industry, do you recall what in fact happened to their manufacturing facilities after they were prohibited from manufacturing automobiles?

A. Yes. The automotive industry, when it objected to the limitation order on the production of passenger cars, said that most of its facilities were special purpose tools and special purpose equipment, and could not be used for war

purposes. And they actually found after passenger cars had [fol. 1664] been curtailed that most of its facilities were usable. And there was—again I haven't the reference—a hearing later in the war period when it was indicated that the overwhelming portion of the machinery and the tools of the automobile industry actually was converted to war production.

Q. Would the same situation have prevailed with respect to domestic mechanical refrigerators, had their production been prohibited by the War Production Board as were automobiles?

A. I would say definitely, yes.

Q. Would the same thing have been true with respect to domestic laundry equipment?

Mr. Rigney: I do not quite understand the meaning of the question as put.

The Commissioner: I don't either.

Mr. Rigney: I would like to have it clarified, and that goes for the previous question and answer. When he says "would the same thing" I do not know what he means.

By Mr. Barnes:

Q. Mr. Nathan, we used as an example in our discussion a moment ago, the automobile industry. I am asking you whether your answer would be the same if for the automobile industry we were substituting the manufacturers of domestic mechanical refrigerators.

The Commissioner: For what purposes are you relating to the industry? He just finished testifying about the [fol. 1665] machine tools that were converted. Is it the machine tools in those industries or what?

Mr. Barnes: Would the reporter go back and read the first question I asked after the recess, please?

(Whereupon, the record was read by the reporter as follows:

"In your opinion, could the controlled materials plan or any similar system for the distribution of materials have operated successfully if, for example, there had not been an order prohibiting the manufacture of automobiles?")

Mr. Barnes: I will withdraw the question, and ask:

By Mr. Barnes:

Q. In your opinion, could the controlled materials plan or any similar system for the distribution of materials have operated successfully if there had not been an order prohibiting the manufacture of domestic refrigerators?

A. Certainly less effectively.

Q. Would the difference in this and the automobile industry be one of degree or one of substance?

A. Merely one of degree.

Q. Could the controlled materials plan or any other similar plan for the distribution of materials have operated successfully had there not been an order prohibiting the manufacture of domestic laundry equipment?

A. I would say the same answer, no, but certainly less effectively. Again, it is a matter of degree, how much [fol. 1666] material each one of these products used.

Q. Are you familiar with the fact that there were limitation orders issued by the War Production Board which curtailed or prohibited the manufacture of other end products?

A. Yes. There were limitation orders which included a tremendous variety of consumer-type end products.

Q. In your opinion, could the controlled materials plan or any similar plan for the distribution of materials have operated successfully had it not been for those L limitation orders?

A. I personally believe it could not have worked had it not been for the L orders. I think they were in essence a very important, essential part of the whole distribution system.

By the Commissioner:

Q. Well, now, preference ratings were used at the same time the CMP plan was in operation, were they not?

A. That is right, sir.

Q. Did preference ratings apply to the same materials that the CMP plan covered?

A. They often used them for timing only, but the preference ratings were used mostly for those materials which were not included under CMP. They continued the priority system for the non-controlled materials.

Mr. Barnes: Could I have that question and answer read back, please?

[fol. 1667] (The record was read by the reporter.)

By Mr. Barnes:

Q. Which were the so-called controlled materials, Mr. Nathan?

A. Steel and aluminum and copper were controlled materials.

Q. In what way did the vertical distribution of those, as you have described it, control other critical materials?

A. Well, there are items which use other materials but do not use aluminum, steel and copper, but by and large those items are not of great importance. Almost all the big users of any materials or any alloys will certainly use either copper or aluminum or steel or a combination. So that with controls on those items—and there is a limitation on how much is available of th e key items—of necessity, the demand for the other materials is diminished also.

Q. Mr. Nathan, to your knowledge, was any consideration given in the War Production Board to what has been referred to here as the concentration of production?

A. Yes, sir; quite a bit of attention was given to that question.

Q. To begin with, to be sure we are talking about the same thing, what do you mean by concentration of production?

A. When the production of a given item or of a given industry is severely curtailed to a point where it is not [fol. 1668] economic from the overall point of view or from the individual supplier's point of view to continue this limited production in each plant, then the production might be concentrated in one or two or a limited number of plants, and the rest will not produce at all. That is my understanding of the concept of concentration in this context.

Q. And to your knowledge, what consideration of that problem was given in the War Production Board?

A. It was studied and discussed over an extended period of time, and, as a matter of fact, the Planning Committee itself studied the matter and made recommendations to the War Production Board on this matter.

Q. To what extent, to your knowledge, was concentration of production ever employed during the period of the war?

A. To an insignificant extent. It never really got going and never really was effective.

Q. What was the reason for that, if you know?

A. Well, in my judgment the main reason was the fact that on many items where the matter was considered the production was totally wiped out, after talking about cutting it down to lower levels. Concentration has significance only when production is severely curtailed. When production of a given item is terminated concentration has no significance. I would say that would be the main reason.

The second reason, in my judgment, was the complexity [fol. 1669] of undertaking it in a complicated economy such as ours and the difficulty of trying to work out a system of proper contribution, proper compensation, let us say, among the several producers who would be eliminated.

Q. On this question of distribution of materials, you have described the controlled materials plan and have indicated that you felt that the L orders were necessary in connection with its successful operation. Assuming that we had not had a controlled materials plan but had used some other mechanism for the distribution of materials, is it still your opinion that limitation orders would have been necessary?

Mr. Rigney: I think that is objectionable because of the vagueness of the question, assuming we had used some other plan. It does not give the witness what he needs in order to give an intelligent, significant answer, it seems to me.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Did the requirements that were submitted by companies that were claimant agencies filing for CMP allocations come to your attention at all?

A. No, sir.

Q. In connection with the study that was made of the distribution of materials, were other means for distributing materials, other than the system that eventually became known as CMP, discussed and considered?

[fol. 1670] A. Yes. In the Committee on the control of the flow of materials which I cared we considered the

straight priority ratings, and we considered the production requirements plan, commonly known as PRP.

The Commissioner: I think timing would help us there.

The Witness: This committee, in the spring and summer of 1942, considered these various plans, your Honor. We recommended in the summer, the early summer of 1942, that the PRP system be introduced and used for the third and fourth quarters, and it was. That was a horizontal system, not a vertical. It was getting each user of materials to apply direct. But we also had before us as a committee, in the summer of 1942, a wide variety of proposals. The steel industry came up with a proposal, and the automobile industry, and in the Government many units came up with suggestions for distribution. And it was finally decided—we recommended in favor of the vertical system, as I said before, the details of which, however, were not worked out until after this committee had finished its work and it was developed by one of Mr. Eberstadt's committees.

By Mr. Barnes:

Q. What was the basic difference between the production requirements plan and CMP?

A. The production requirements plan, as its title indicates, related to the raw material requirements for production by every producer without any tie-in as to where that [fol. 1671] product which he manufactured would end up in terms of its end product. So that it flowed in horizontally into every fabricator and every stage of fabrication.

The controlled materials plan, on the contrary, was constantly related to a set of end products, and quantities of end products, so that when a claimant agency came in under the controlled materials plan for materials its request was always related to a given level of output of that item, whether it be a military item or indirect military like railroads or power, or straight civilian items. So that the technique under CMP was always one of gearing the pouring in of materials to some end objective of given quantities of end items.

Q. Was there, in connection with PRP, something which was called the end products code?

A. Yes.

Q. What was that?

A. Well, the people who set up the PRP thought that they might, through this horizontal flow, be able to limit the flow of materials to a processor in some relation to end products, but since, say, a man who, let us say, made steel wire out of bar wouldn't know definitely the end uses toward which that wire went he would work out approximations in some categories, and he would submit these categories by code numbers. But it was pretty clear that these were so general that they were relatively meaningless, and that the [fol. 1672] system in essence destroyed the ability of gearing the flow of materials to specific end products.

Q. Did you at any time analyze the total requirements submitted under CMP when you were in the course of studying supply and demand relationships?

A. No, I did not, because CMP really came in effectively after I had left the Board.

By the Commissioner:

Q. How long did this PRP last?

A. Two quarters, just two quarters.

Q. Of what year?

A. The last two quarters of 1942.

Q. When did CMP start?

A. The first of '43. I think, as a matter of fact, as I recall, the first quarter of '43. It was sort of a practice quarter. CMP became quite effective around the middle of '43, and really tightend up and got over its rough spots.

By Mr. Barnes:

Q. In your opinion, are limitation orders which curtail or prohibit the production of end items necessary in the control of materials in a war economy?

A. Without question, totally dedicated to the principle that without limiting production, military and civilian, to what we might call reasonably feasible goals, no system of controlled materials is likely to be effective.

[fol. 1673] Q. Why is that?

A. Because the aggregate demands and the urgency of each claimant for his own product, without any limitation of that product, will make the problem of apportionment

utterly impossible, and I think it would also retard conversion.

Q. Now, referring to one limitation order, Mr. Nathan, are you familiar with L-208?

A. I am, sir.

Q. Will you explain the basis of your familiarity with that order?

A. I remember discussions of L-208 when I was in the War Production Board, but those memories are not very precise, and my familiarity with the order is based much more on investigations which I have conducted recently into the whole background of the L-208 order from official records.

Q. Have you undertaken that investigation at our request in an attempt to, among other things, secure a measure of the quantity of materials used by the gold mines?

A. Yes, sir.

Q. Will you describe generally the type of study or analysis which you have given to this problem?

A. We have—I and my associates—have reviewed every available record we could locate in the archieves and in other agencies with respect to L-208's issuance and implementation, and also with respect to the discussions concerning the [fol. 1674] gold industry for at least a year prior to the issuance of L-208.

Q. Mr. Nathan, do you recall whether you personnaly had anything to do with this order in your capacity as Chairman of the Planning Committee or in your previous position in the Bureau of Research and Statistics?

A. I do not recall any direct participation in it. I have a recollection of some discussions, but I have no recollection of having any direct responsibility in the area or of having worked specifically on that matter.

Q. To you knowledge, Mr. Nathan, what are the uses of gold?

A. Gold, I would say, breaks down into three principal categories: one is monetary, two is ornamental—perhaps I had better say four categories—two is ornamental, three is industrial, and four is—for a better word—hoarding, say, as I experienced quite closely in my recent trips to the Far East.

Q. Would you characterize gold as an essential product in the United States in 1942?

A. For certain purposes, such as indentures and some laboratory purposes it was essential.

Q. Do you have any means of measuring the quantity or relative volume of those essential uses?

A. I have seen figures in the Minerals Yearbook which indicate the total of industrial uses which are quite infinitesi-
[fol. 1675] mal compared with our total supply of gold in the United States.

Q. To your knowledge, was gold ever an essential product in our economy?

A. I was quite startled in reading some——

Mr. Rigney: I object to that, if your Honor please, his referring now to something that he read. I do not think he should tell us about something that——

The Commissioner: I think this question should be limited to time, too.

Mr. Rigney: Yes. I assumed he was making it all-inclusive, I don't know.

The Commissioner: I think it should be related to the time. I will put it that way.

Mr. Barnes: I used the word "ever", your Honor. I was not limiting it to time intentionally.

The Commissioner: I wanted to be sure that was understood.

Mr. Barnes: I limited it to time only in referring to the economy of the United States. I said "our economy".

Mr. Rigney: I will object now on the grounds that it is immaterial and irrelevant then.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Limiting ourselves to the period subsequent to 1930, can you tell me whether gold was ever an essential product in the economy of the United States?

[fol. 1676] Mr. Rigney: I think that is objectionable too as irrelevant and immaterial, and outside of the scope of the issues in this case.

The Commissioner: I will overrule that one.

The Witness: Except for the limited quantities needed for

these few industrial purposes, it would hardly be classified, in my judgment, as an essential commodity—certainly not for monetary purposes since 1933.

By Mr. Barnes:

Q. What was the situation with respect to monetary value of gold in 1942?

A. There was a law whereby the Government agreed to buy gold at $35 an ounce refined, whenever it was available. The United States had a gold stock valued at that price in excess of $20 billion dollars. We did not have a gold exchange standard, and this was merely a reserve, and our issuance of currency was then related to the size of this reserve.

Q. In your opinion, would the continued production of gold have been required in 1942 for any monetary function of the United States?

A. In the United States, no.

Q. Would its continued production have been required in order to settle international trade balances?

A. By no means.

Q. Was any gold used, to your knowledge, in settlement [fol. 1677] of international trade balances during the years subsequent to 1942?

A. In 1943 and 1944 we exported gold to other countries for compensation for commodities purchased in excess of exports.

Q. How substantial was that exportation?

A. In one of those years it reached a total of between $800 and $900 million, or about 4% of our total reserve.

Q. In your opinion, could the curtailment of gold production have any adverse effect on the economy of the country as a whole in 1942?

A. None.

Q. Why not?

A. Well, you say the economy as a whole. Certainly the cessation of the production of gold could not have had any significant monetary impact, and therefore the only impact could have been in terms of the producing industry itself, and any secondary or tertiary ramification out of that impact.

Q. On the basis of your study, can you tell me whether or not the gold mining industry used raw materials?

Mr. Rigney: Do you refer to the specific study that you questioned him about a minute ago or his general studies?

Mr. Barnes: Yes.

Mr. Rigney: His investigation as a consultant to the Department of Justice?

Mr. Barnes: That is right.

[fol. 1678] Mr. Barnett: We would like to know if he has ever been to a gold mine, or is he testifying from certain records and books or pamphlets that came to his attention. We would object on the grounds that a proper foundation for answering of the question has not been laid.

Mr. Barnes: If counsel wishes to examine the witness on his qualifications at this time I have no objection, your Honor.

The Commissioner: Well, I am going to overrule the objection and permit any preliminary questions that you might want to make.

By Mr. Barnett:

Q. Mr. Nathan, have you ever been in a gold mine?

A. No, sir.

Q. Have you ever visited a gold mine community?

A. No, sir.

Q. What is the basis of the evidence you are about to give? Reading books and pamphlets?

A. Official government documents, such as the census.

Q. Of what year?

A. 1939.

Q. Is that the only one that you read?

A. I have read a Minerals Yearbook also for subsequent years.

[fol. 1679] Q. In the census, does that give you any idea as to the production of gold?

A. Yes, sir.

Q. Whereabouts? Is that the census you are looking at now?

A. Yes. This is the census of mineral industries of 1939, Volume 4, published by the United States Bureau of Census, and this volume indicates production by various categories

of mines, mining industries, and one of the industries is the gold mining industry, and for the gold mining industry it gives the amount of production and also gives the amount of gold production for other than gold mining industries, like the copper mining industry.

Q. For what year is that?

A. 1939, and it also gives figures for previous years, 1929.

Q. Is that the year you referred to when in 1941 you made the recommendations that you have testified to?

A. Which recommendations?

Q. You testified as to the amount of material consumed by the gold mines.

A. No, I haven't yet.

Q. That you intended to testify to.

A. Yes, sir.

Q. And that is the latest document?

[fol. 1680] A. That is right, sir.

Q. Do you know what the situation was in 1941?

A. Unfortunately, the forms in the War Production Board which might have given that information appear to have completely disappeared, so that documents for 1941 and statistics for 1941 are not available.

Mr. Barnett: We submit the objection, your Honor.

The Commissioner: Let us have the question again.

(The question was read by the reporter as follows: "On the basis of your study, can you tell me whether or not the gold mining industry used raw materials?")

The Commissioner: Overruled.

The Witness: On the basis of available official evidence in 1939, the gold mining industry used raw materials.

By Mr. Barnes:

Q. Did it use machinery and equipment?

A. In 1939——

Mr. Pittman: At what time, your Honor? May counsel keep his dates on the record?

Mr. Barnes: The witness stated in each case 1939, your Honor.

The Commissioner: Yes.

The Witness: In 1939, yes.

By Mr. Barnes:

Q. In 1939, did it use fuel?

[fol. 1681] A. Yes, sir.

Q. Did it purchase electric energy?

A. Yes, sir.

Q. Have you been able to locate, Mr. Nathan, any statistical information which would indicate the relative importance of the gold mining industry in or shortly before 1942, either in terms of production or employment or of its use of materials?

Mr. Rigney: Relative to what? I object to the question on form.

The Commissioner: Sustained.

Mr. Barnes: I will strike out the word "relative" and ask the same question.

The Commissioner: Let us have it read, please.

(The pending question was read by the reporter.)

The Commissioner: Read it again.

(The pending question was read by the reporter.)

Mr. Pittman: I submit, your Honor, that the witness has already testified that his knowledge is limited to the book dated 1939, and this is prior to 1942, and I think the witness has answered the question.

The Commissioner: That one is overruled.

Mr. Rigney: I renew my former objection, and that is this: "The importance of the industry". I don't know what that means. There is no standard by which we can under-[fol. 1682] stand what the questioner means or what the witness may have in his mind as he answers the question.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Mr. Nathan, have you located any statistical information which indicates the amount of production by, employment in, or use of materials by gold mines in 1942 or shortly before that date?

Mr. Rigney: I will have to have that one read, your Honor.

(The pending question was read by the reporter.)

Mr. Rigney: The question is obviously too compligated to permit a meaningful answer. I think counsel should break it down and take it one at a time and we will see how we get along that way. I do not think it is a proper question and I object to it as to form at this point.

The Commissioner: Well, I think that the question is certainly a compound question. It is hard to follow the question, and it would obviously be hard to follow the answer in relation to the question. I am therefore going to sustain the objection.

By Mr. Barnes:

Q. Mr. Nathan, have you located any statistics which show the amount of production by gold mines in 1942 or shortly before that date?

[fol. 1683] A. Yes, sir; for 1939.

Q. Have you located any statistics which show the level of employment in gold mines in 1942 or shortly before that date?

A. Yes, sir.

Q. And for what period is that?

A. For 1939.

Mr. Pittman: That is not shortly before, that is three years before.

Mr. Barnes: Your Honor, I would like to point out in view of that comment that counsel for the plaintiffs have characterized as new items of major improvements on their property made in the middle '30s prior to 1939. If those were new in 1942 these statistics were collected shortly before 1942.

The Commissioner: I think I am going to suggest that if counsel have an objection to state, state it as an objection and withhold other comments, because that is the only way I can sensibly rule upon anything that comes up.

Mr. Barnes: I took that only as a comment and was making a return comment, your Honor.

The Commissioner: My suggestion will avoid that and save time.

By Mr. Barnes:

Q. Mr. Nathan, have you been able to locate any statis-
[fol. 1684] tical information as to the use of materials by gold mines in 1942 or shortly before that date?

Mr. Barnett: I make the objection that the words "shortly before" are apt to mean one, two or three years. If there could be a shorter period I would withdraw the objection, but without a definite date I will object, because of its uncertainty.

Mr. Barnes: The pattern of my examination has showed that in each case I have asked the witness when he answered the question "as of what date" and I intend to do that again.

The Commissioner: Overruled.

The Witness: Yes, for 1939.

By Mr. Barnes:

Q. And from what source was that?

A. The United States Bureau of Census, Census on Mineral Industries.

Q. Is that an official government publication?

A. That is an official government publication.

Q. Have you made a study of it?

A. Yes, sir.

Q. By whom was it conducted?

A. The Bureau of the Census, the United States Depart-
ment of Commerce.

Q. Do you know whether the information contained in that census is generally accepted as reliable among the non-
[fol. 1685] ferrous metal mining industries in the United States?

Mr. Rigney: I object to that question on the ground the witness is incompetent to answer it, and also on the ground that it is irrelevant and immaterial.

Mr. Barnes: Your Honor, I think in the listing of the witness' clients he listed non-ferrous metal clients.

The Commissioner: Overruled.

Mr. Rigney: I do not see how it could be binding upon us whether somebody accepted this particular book or not. Why would that make it binding upon us? And it would be hearsay, also as a basis.

The Commissioner: I am going to overrule it.

Mr. Rigney: He is not dealing now with custom or something of that sort, he is not testifying to a prevailing custom in a trade. I could understand something like that, but as to whether somebody in a particular industry accepted some publication or not, I think it is hearsay and objectionable.

The Commissioner: Your objection is overruled.

Mr. Barnett: The other objection is the remoteness of the document. In 1939 we all know what condition prevailed in America, and in 1941 we had a war situation. If the basis of this evidence is the number of men and materials used in 1939 it certainly cannot be projected as being of the same value in 1942.

The Commissioner: That objection goes to the weight.

[fol. 1686] Mr. Barnett: That may be.

Mr. Barnes: Will you read the question back, Mr. Reporter?

(The question was read by the reporter as follows: "Do you know whether the information contained in that census is generally accepted as reliable among the non-ferrous metal mining industries in the United States?")

The Witness: I believe it definitely is accepted. My only contact with them was when I was working on the national income field, we worked rather closely with the industry gathering data for inter-census years, and I never ran into an exception where anyone questioned the use of census figures as the base period.

Mr. Barnes: Would you mark this Defendant's Exhibit 53 for identification?

(Said document was marked for identification as Defendant's Exhibit No. 53.)

By Mr. Barnes:

Q. Mr. Nathan, directing your attention to this document which has been marked Defendant's Exhibit 53 for identification, will you tell me what it is?

A. This document is taken from a table in a publication entitled "Mineral Industries, 1939, Volume One, General Summary and Industry Statistics, 16th Census of the United States, Bureau of the Census, United States Department of

Commerce", data taken from Table 1, pages 18 and 19 of that official document.

[fol. 1687] Q. Referring first to the various columns that appear in that exhibit, will you tell us what they are?

A. This tabulation—

The Commissioner: Have you a copy?

(Document handed to the Court.)

Mr. Rigney: I have a preliminary question, if I may.

Mr. Barnes: May I say that we did not anticipate that we would proceed quite this rapidly. We will have photostats of this and other exhibits available in the morning to supply to counsel. Unfortunately, our Photostat Department is also somewhat slow and they are not available, but they will be in the morning.

The Commissioner: This can be off the record.

(Here followed discussion off the record.)

Mr. Rigney: I want to ask a preliminary question about this particular exhibit before we proceed further.

The Commissioner: Yes.

By Mr. Rigney:

Q. Mr. Nathan, this exhibit which is denominated "Table One" and marked Defendant's Exhibit No. 53 for identification, is this a chart which you have prepared or which was prepared under your supervision from this book or is it a reproduction—

A. It was prepared under my supervision, and I have checked it from an enlarged table in the book.

[fols. 1688-1689] Q. I see, but all of the material, all of the figures which are set forth here, all of the topics which are listed here, are merely taken from the book?

A. That is correct.

Q. So that this is a compilation of material taken out of the book?

A. That is correct, yes, sir.

By Mr. Barnes:

Q. There has been no change in any figures or interpolations by you or by your staff, has there?

A. No.

Mr. Rigney: I did not mean to imply there had been any change in the figures. I wanted to find out the nature of the exhibit.

By Mr. Barnes:

Q. Would you describe what the column headings are across the page, Mr. Nathan, on this exhibit?

A. This table summarizes the number of mines, the value of products, the purchases of supplies and materials, the purchases of fuel, the purchases of electric energy, the cost of machinery, both new and used, and also the cost of buildings for different classifications of metallic mines in 1939.

[fol. 1690] By Mr. Barnes:

Q. Mr. Nathan, yesterday the Commissioner asked you a question relating to whether or not preference ratings were used at the same time the CMP plan was in operation, and you answered that they were. And then to a subsequent question asked, as to whether they applied to the same [fol. 1691] materials the CMP plan covered you said they did but they often used them for timing only. What did you mean when you referred to timing there?

A. Principally for timing within the quarter, in other words, on the CMP materials allocated on a quarterly basis they were merely used for time preference within the quarter. But I went on to say then that priorities were primarily used for the non-CMP materials, but the timing was only within the quarter for CMP materials.

Q. Referring to the question of the limitation orders that we were discussing yesterday, aside from the aid that they furnished in the general distribution of materials, did they serve any other function in the war program?

A. They served to facilitate or expedite the availability of productive machinery and equipment for military production, and for essential military-supporting production.

Q. When you refer to the availability are you referring to what is sometimes called conversion?

A. That is right, the conversion of existing machinery for military or military-supported production.

Q. Mr. Nathan, in reviewing the list of some of the L orders that were issued by the War Production Board, I

noted that they had issued orders relating to items such as fishing tackle and golf clubs? Those are relatively insignificant users of material, are they not?

[fol. 1692] A. Yes, those are limited users of raw materials, and the L orders went up and down the line for major users such as automobiles down to quite remote items which are relatively insignificant in terms of the quantity of the critical materials which were used.

Q. Would limitation orders of that type still fit into the general pattern that you were discussing yesterday as to the needs of limitation orders in a general scheme for the distribution of materials?

A. Very much so, because while an individual product or an individual industry might be a small user of materials, the aggregate of the small users adds up to a very substantial quantity.

Q. Now, is it true that some of the termination of end products that we have been referring to as having been done by limitation orders was also done by the so called conversion or M series orders?

A. The M orders were used very widely to eliminate production. There the technique was one of not an outright statement such as "Passenger cars cannot be produced" or "Gold mines must be closed"; there the approach was one of saying that "This specific material must not be used for this particular purpose or end product". And in most instances that had precisely the same effect as an L order prohibiting production, because in a great number of cases, [fol. 1693] I would say perhaps the overwhelming number, substitution of a completely different material was practically impossible. So that the restriction of the use of the material for given purposes had the same net effect in most cases of a direct limitation on production as such.

Q. Now, I have here before me a copy of M 9-c. I have the copy that was in the Code of Federal Regulations of 1941, supplement. I am referring to List A that appears starting at page 2910.

Was that one of the orders that operated as you have just been describing it?

A. Yes. I have looked over that. That was one of the M orders, or so-called conservion orders, which prohibited the use of copper for specific end purposes and end products.

Q. I notice, for example, among the items listed there are such things as letter boxes, mail chutes, dress ornaments. Were those, to your knowledge, large users of copper?

A. Well, I don't know the specific amounts used in each one of those items, but in going over this and other orders I was very much impressed with the number of items which are very small users of materials.

Mr. Rigney: If your Honor please, I move to strike his observation that he was very much impressed.

The Commissioner: It may be stricken.

By Mr. Barnes:

[fol. 1694] Q. Can you tell me whether or not there were included in these orders end products that were small users of material, as well as those that were large users of materials?

A. Yes. The M orders did include lots of small items, for instance, like metal fittings on bookcases or file cabinets, little types; distinctive types of jewelry, and it went down to quite a specific list. At the time the problem was one of going to literally endless lists of end items and included in those large and small.

By Mr. Rigney:

Q. That was confining it now to this particular order, M-9-c?

A. M-9-c.

Q. Did that relate exclusively to copper?

A. That related exclusively to copper. There were other orders that related to other types of materials, aluminum orders, and so forth.

Mr. Rigney: I was just asking about this one.

By Mr. Barnes:

Q. There have been references here to one of the M-1 orders which related to aluminum and to an order called M-1-G relating to iron and steel. Do you know whether those similarly prohibited the use of those metals in certain specified end products?

A. Both of those orders included long lists of items.

[fol. 1697] Q. Do you know whether or not the list there included, as it did in the copper order, small as well as large users?

A. It did include small items that were very limited users of materials as well as very large users of materials.

Q. And why, in the case of these small users, were they included?

Mr. Rigney: I think that is objectionable, your Honor.

The Commissioner: Sustained.

By Mr. Barnes:

Q. Mr. Nathan, going back to Table I, which I believe you were discussing yesterday, do you have a copy of that there before you?

A. I do.

Q. Does the Census of Mineral Industries indicate the definition which is used for "Gold Mine"?

A. Yes, the Census volume to which I referred yesterday afternoon indicates very clearly that——

Mr. Rigney: I object, if your Honor please, to his characterizing it.

The Witness: I am sorry. ——indicates the classification of these data. The Census classifies mines by major product as the product which provides the principal value in the output of the mine. Therefore, data on industries as revealed in our Table I, taken from the Census, are industry data, not commodity data. In other words, not all gold production will be [fol. 1696] included in the gold mining industry, nor is the gold mining industry confined exclusively to gold production, because if a mine which produces predominantly gold produces other commodities that will likewise be included in the gold mining industry.

By the Commissioner:

Q. Does that include in it dredging operations?

A. Placer gold?

Q. Yes.

A. That is included, it includes both lode gold and placer gold.

Mr. Rigney: Could we have the page?

The Witness: The discussion of this particular classification problem is on pages 5 and 6 of this Volume I, Mineral Industries, 1939.

By Mr. Barnes:

Q. Does that indicate the extent to which the mines which the Census classifies as gold mines produce the total gold in the United States?

A. Yes. On page 5 of this volume the figures show that 84.8% of all the gold production in the United States in 1939 was accounted for by gold mines, that is, those mines whose products were principally gold. 84.8% of the total gold production in the United States was included in that category.

Q. Now, do the figures which you have set down opposite the heading "Gold Mines" relate to only materials, for [fol. 1697] example, and supplies used in the gold production in those mines?

A. No. These figures represent the total supplies, for instance, the total production, total fuel, et cetera, used by these gold mining companies, that is, the total supplies used by the gold-mining industry, whether they were producing gold or by-products or related products.

Q. Is it possible from the information available there to determine how important the gold production of these gold mines is, as representing their total income, for example?

A. Yes, it is. If I may refer to Table 4 on page 347 of this report, there is a set of figures on the total production of these gold mines. Now, it shows the production of these gold-mines of gold, of silver, of copper, of lead, of zinc, only in physical quantities, not in value. Only the total value is shown as $114 million, approximately, but the value of each type of product is not shown. But it is clear that the overwhelming portion of this $114 million is gold.

Mr. Rigney: I move to strike his characterization of it that it is clear.

The Commissioner: Overruled.

By Mr. Barnes:

Q. How many ounces of gold are shown there as the production of the mines that produced gold?

A. 3,280,000 ounces. That is in round figures. It is actually 3,280,279.93 ounces, fine ounces of gold were produced [fol. 1698] by these gold mines.

By the Commissioner:

Q. What is the total of all of the products there?
A. $114 million.

By Mr. Barnes:

Q. One hundred fourteen million how much?
A. $114,089,844 is the value of total production of these mines.
Q. Do you know what the price of gold was in 1939?
A. $35 a fine ounce.
Q. If my mathematics are correct, and I multiplied $3,280,000 by 35, I get approximately $114 million.
A. Yes.

The Commissioner: Let us get that straight. You said $3 million.

By Mr. Barnes:

Q. You multiply 3,280,000 ounces by $35 an ounce.
A. Yes, it comes very close. On the other values, I can indicate the figures of the quantities of other items produced here, if you would like.
Q. Could you do that?
A. Silver is approximately 7 million ounces.
Q. Do you know what the price of silver was in 1939?
A. 64c an ounce. I can get that in a second, the exact figure.

[fol. 1699] By the Commissioner:

Q. While you are checking on those figures, as I understand it, these figures do not include such a producer as has been referred to as the largest producer, which is a copper mine?

Mr. Barnes: The largest producer is Homestake, your Honor.

By the Commissioner:

Q. The second largest, I guess I meant.

A. That is correct, sir. This includes only those mines whose principal product was gold, and they account for 84.8% of the total in gold production in the United States in 1939.

According to the Minerals Yearbook, United States Department of the Interior, Bureau of Mines——

Mr. Rigney: What year?

The Witness: This is the 1941 Yearbook, page 54. ——the Government price for newly mined domestic silver was maintained through 1938 and to January 30, 1939 at 64¢ plus, 64.646464, it comes out, per fine ounce. The act of Congress approved July 6, 1939 fixed the price of domestic silver mined after July 1, 1939 at 71.1 plus cents per ounce. The annual average prices used for domestic silver from 1932 to 1939 are given year by year, and the average figure for 1939 is 67.87 plus cents per ounce, fine ounce of silver.

By Mr. Barnes:

Q. What about the other metals that were produced by [fol. 1700] this group that were classified as gold mines by the Census?

A. Those mines produced copper to the extent of 5,978,207 pounds.

Q. Was the price of copper approximately 12¢ a pound?

A. It was about 12¢ a pound in 1939, which would be about $600,000-odd worth of copper produced in these mines. Lead is 20,925,993.

Q. Was the price of lead then in the neighborhood of 5¢ a pound?

A. About 5¢ a pound. It would be about a million dollars worth of lead in these mines.

Zinc was 3,295,133.

Q. Do you recall what the price of zinc was then?

A. I could provide that in a minute.

According to this 1941 Minerals Yearbook, on page 144, the 1939 price of prime western zinc, average for the year, was 5.12¢ per pound, and 3 million pounds would be about $150,000 or something like that.

Q. Now, Mr. Nathan, what types of mines in 1939 produced the other 15.2% of our total gold production?

A. Some were copper mines, some were primarily silver mines, some were lead and zinc. I could tell the copper ore mines' production just as an illustration.

At page 384 of this Volume I, Mineral Industries, it shows that in 1939 those mines which were defined as copper mines, [fol. 1701] that is their principal valued product was copper, produced 429,517.9 ounces of gold, which would account for about 90% of the difference between what the gold mines produced and the total gold production in the United States.

Q. Have you, in preparing Table I, made any attempt to include the materials used by mines other than those classified by the Census as gold mines?

A. No. These figures are taken directly from the Census and are confined to the category of mines which are defined by the Census itself as gold mines.

Q. Now, referring to Table I, Defendant's Exhibit 53 for identification, what does the figure $114 million, roughly, in the column headed "Value of Product" mean?

A. That means the value of all of the products produced by those mines within the year of 1939, whether it be gold, silver, lead, zinc, copper, or anything else.

Q. Now, going over into the next column headed "Materials and Supplies", and still opposite the heading "Gold Total" the figure is $17,369,000. Do you know what that means?

A. That means that the gold mining industry, or gold mines included by the Census, purchased in the form of raw materials or tangible items for production purposes $17,369,000 worth of products, commodities and raw materials for their production activities.

Q. Would those be the types of materials that during the [fol. 1702] war were sometimes referred to as MRO materials, maintenance repair and operating supplies?

A. Maintenance repair and operating supplies would be included in that category.

Q. Would it include any capital items too?

A. No. New plant — well, it is not supposed to, I should say.

Q. Do you personally have any knowledge of the composition of that figure?

A. I personally do not have any knowledge of the make-up of that figure, as to what portion might represent different kinds of raw materials.

Q. Has your research furnished you with any information as to the kinds of materials that might be included in those figures?

Mr. Rigney: If your Honor please, I had intended to raise an objection, several objections to the admissibility of this document when it is offered. Now, by the manner in which counsel is proceeding, I am afraid unless I state that now, he will have, in effect, gotten the contents of the document into evidence without my having had a chance to raise my objection. I would like to ask Mr. Nathan two or three preliminary questions. First, I would like to inquire of counsel for the Government——

The Commissioner: Let us stop a minute. I think in view [fol. 1703] of your observation so far that the document should be offered since testimony is being adduced concerning it, so that we can confine the testimony to documents which are in evidence.

Mr. Barnes: Your Honor, I offer at this time in evidence Defendant's Exhibit No. 53 for identification.

The Commissioner: All right.

Mr. Rigney: May I have a statement from counsel as to the purpose of the offer, the purpose of the document, and what he expects to use it for?

Mr. Barnes: Your Honor, referring to 1942, this is the most recent official tabulation that we have been able to find of the supplies and materials used by gold mines. A comparison of some of the total figures here with those used in memoranda of officials of the War Production Board, which are already in evidence, will show your Honor that these figures were used by the officials of the War Production Board, some of the total figures that are represented here, or at least figures drawn from identical sources. The similarity of figures that appear in the WPB's concurrent memoranda is so marked to the figures that are presented in the 1939 census of Mineral Industries as to indicate that these figures were known to and relied upon by the officials of the War Production Board at the time of the issuance of Limitation Order L-208.

For that reason we are offering this information here as the best available information as to the use of materials by [fol. 1704] gold mines, the prospective use of materials by gold mines that was curtailed by Limitation Order L-208. We are perfectly aware of the fact that unquestionably there would have been some diminution of this usage by virtue of priority restrictions between 1939 and 1942. There is nothing available to us that allows us to measure that diminution at the present time.

The Commissioner: Is that all?

Mr. Barnes: That is all.

Mr. Rigney: Could I ask if you expect to have the witness project, on the basis of this exhibit, estimates of uses of materials by gold mines subsequent to October 8, 1942? I mean, is this going to be used as a base upon which you expect to elicit testimony from him as to what his estimates might have been of the gold mine uses of critical materials?

Mr. Barnes: No.

Mr. Rigney: Could I have just a moment, your Honor?

(Plaintiffs' counsel conferring.)

Mr. Rigney: If I may just address three or four brief questions to the witness upon which I expect to predicate an objection, your Honor, I would like to.

The Commissioner: Very well.

By Mr. Rigney:

Q. Mr. Nathan, the figures which are contained in this census report for 1939, that you have been referring to, those are gathered, are they not, on a self-reporting basis?

[fol. 1705] A. The Census sends out specific forms and sometimes follows up with personal visits when there are questions about the forms.

Q. But, for the most part, would you agree that these data contained in the 1939 Census are data which have been gathered on a self-reporting basis for the most part?

A. Yes. They have to report, but they report it themselves. It is compulsory.

Q. You will agree, sir, will you not, that there was a substantial decline in gold production in the period from 1940 to 1942?

A. In 1941 to 1942, yes, sir. We have an exhibit which will be entered shortly on actual production by years. My indication is that '41 was higher than '39.

Q. I was asking about 1940 as compared to 1942. Showing you Appendix G to Plaintiffs' Exhibit No. 1, that reflects, does it not, in 1940 for the United States a production of 5,919,928 fine ounces?

A. Yes.

Q. And in 1942 in the United States 3,457,110 fine ounces?

A. Yes, sir.

Q. So that would you agree that there was that substantial reduction of approximately 27%, I believe, in that two-year period from 1940 to 1942?

A. In those two years, yes, sir.

[fol. 1706] Q. Wouldn't you further agree that the only pertinent use figures with respect to materials used by gold mines by which you could measure savings as a result of Order L-208 would be those for the month immediately preceding October, 1942?

A. I wonder if I could have that question again.

Mr. Rigney: Would you read it back, please?

(The pending question was read by the reporter.)

The Witness: If one wanted to get the precise decline in materials used from the month preceding L-208 to a month some time after all the mines were closed, I would say definitely, yes, that the comparison for, say, September or October or November before the sixty days were up as compared with a year later would be the specific figure of the decline that took place. But we must remember that for some months already prior to L-208 there were certain problems in the air which precipitated a partial decline, and I don't know specifically how much effort the mines made to try to continue their flow of supplies at previous rates, whether they were or were not successful in an anticipation of the order which was being discussed at the time, and other matters. But I would think that there would be other considerations than just the one month prior to the closing, which would be significant if the data for that one month were not available.

Q. But you would say that by all odds the most significant figures and comparison which could be made would be for

[fol. 1707] that period immediately preceding the issuance of L-208 as against the months thereafter?

A. Yes. It would be highly significant to have that specific figure of the uses immediately preceding L-208, and the period after they were closed, and it would also be significant to have some months to see what was going on.

Q. Now, directing your attention to this Table I, which is Defendant's Exhibit No. 53 for identification, where you see the number of lode mines as 841——

A. Yes, sir.

Q. —you would not be able to say how many of those were subject to closure, and were actually closed under L-208, would you?

A. No, sir.

Q. Nor would you be able to say how many of them were exempt under the provision in L 208 that mines producing less than 1200 tons annually were exempt from the order?

A. No. The specific application of the order to these mines is not identifiable.

Q. There has been testimony here earlier in this case from a Government witness, Mr. Nathan, in which he stated that at the October 1, 1942 meeting, at which this matter of this order was under discussion, he then estimated that the number of mines which would be affected by the order would be approximately 20. That is at page 1479 of the transcript.

[fol. 1708] Would the state of your knowledge permit you to say whether or not that was a reasonably accurate statement?

A. I would have no basis for judging that figure, but it would sound exceedingly low.

Mr. Barnes: May I point out that counsel has not reflected the testimony of Mr. Lipkowitz. Mr. Lipkowitz was asked as to the number of these Form 732s that he had, and he said, "The ones I had at the meeting were of mines which I considered would be affected by this order." And you then asked the question, "How many were they?" And he said, "I would say probably no more than 20."

That referred to the number of Form 732s that he had, not the number of mines to be affected by the order. I think

that is very clear from the testimony. I resent action of that type on the part of counsel.

Mr. Rigney: If you look at page 1479 the witness testified with respect to these forms, these 732s, and he was asked by the Commissioner: "You have testified that you had a number of them at this meeting."—That is the form—and he answered, "Yes, but the ones I had at the meeting were of mines which I considered would be affected by this order."

"How many were they?"

"I would say probably no more than 20."

So that would seem to dispose of the point.

The Commissioner: I do not think so at all.

[fol. 1709] Mr. Rigney: I would gather from the testimony, Your Honor, of the witness Lipkowitz that what he is saying in the portion that I just referred to was that he went to this meeting with the Forms 732 of the mines which he anticipated would be closed down by the order.

The Commissioner: But I think you are stretching it quite a bit. You conclude that he had a form for each of the mines that might have been affected.

Mr. Barnes: He was referring to the fact that he had 20 forms with many of the mines which he felt would be affected by the order.

Mr. Rigney: I would interpret the testimony to mean that he took to the meeting these Forms 732 for such mines as he anticipated would be closed down by the order.

The Commissioner: How can you conclude in your interpretation that he had a form for every such mine?

Mr. Rigney: Because that is what he said.

The Commissioner: I do not see it at all.

Mr. Rigney: I think it is arguable and we will not pursue it.

The Commissioner: Yes.

Mr. Rigney: If Your Honor please, I do object to the admissibility of Defendant's Exhibit 53 on the ground that it is so remote not only in point of time but because of the changed conditions that testimony indicates existed between [fol. 1710] the year 1939 and conditions in the autumn of 1942 and thereafter that it furnishes no reliable basis upon which conclusions could be drawn.

The Commissioner: Are you finished?

Mr. Rigney: And it includes figures of mines not affected by the order, gold and silver mines not affected by the order.

The Commissioner: It may be received, and I want to state in admitting this document that I admitted over the strenuous objection of Government counsel testimony by plaintiffs' witnesses with respect to the time during which plaintiffs' mines could have operated with the materials that they had in their inventories.

Mr. Rigney: Very well, Your Honor. I think that we have indicated sufficiently.

The Commissioner: Yes.

(Said document, Table I, Comparative Statistics for Metal Mining in the United States by type of metal ore, 1933, marked "Defendant's Exhibit No. 53", admitted in evidence and made a part of this record.)

By Mr. Barnes:

Q. Mr. Nathan, plaintiffs' counsel read to you from Special Study No. 9 at page 71 certain figures which compared gold production in 1941 with that in 1942. Would you look at that again and tell me whether the two figures that were read to you, the figure of 5,856,000 ounces in 1941 is com- [fol. 1711] parable with the figure of 2,457,000 ounces in 1942?

Mr. Rigney: You said page 71. Did you mean 75?

The Witness: The reference was page 75.

Mr. Rigney: I was reading from 75, not 71.

Mr. Barnes: All right.

By Mr. Barnes:

Q. Referring back then to the table which appears on page 71, can you tell me whether it indicates that those figures are comparable or not comparable figures?

A. The two figures, for '40 and '42 on page 75 are comparable. On page 71 the same figures are broken down by sources and indicate that the definition United States included Alaska, the Philippine Islands and Puerto Rico, which are broken down in the previous table.

Q. In other words, is it correct that by looking at page

71 we see that the 1940 figure includes something in excess of 1 million ounces produced in the Philippine Islands and Puerto Rico that is not included in the 1942 figure?

A. Yes. The Philippine Islands and Puerto Rico are specifically excluded in 1942, and it could be easily recomputed, that is, the comparable figures between 1940 and 1942, by excluding the Philippine Islands and Puerto Rico. If just the Philippine Islands and Puerto Rico were excluded for both periods the result would be roughly 4,860,000 ounces for 1940 and 3,457,000 ounces for 1942.

[fol. 1712] Q. Now, referring particularly to the column headed "Supplies and Materials" on Defendant's Exhibit 53, Mr. Nathan, has your research indicated the types of materials that were included in that total?

A. Some indication has arisen out of our research, yes, although not a complete and total breakdown of these figures, yes, sir.

Q. And what information have you been able to develop in that connection?

A. We found evidence of testimony before a Senate Subcommittee by Dr. Wilbur Nelson, Administrator of the Mining Branch, in May of 1942.

Q. I am handing you a document entitled "Hearings Before a Sub-committee of the Special Committee on the Investigation of Silver, United States Senate, Pursuant to Senate Resolution 187", covering the period May 5, 6, 8 and 28 of 1942. Is the testimony to which you refer in there?

A. The testimony is here. There is a paragraph, Your Honor, I would like to read.

Mr. Rigney: I don't know, Your Honor, about reading from these books of this sort. It may be wholly inadmissible, what he proposes to read. It is difficult, and I do not want to attempt to restrict him unduly in his testimony here, and that is not my purpose, and I do not think I have tried to do so, but I do not know whether this is admissible or not, [fol. 1713] and it would be too late to say so after he has read from something.

The Commissioner: From the testimony so far, it sounds to me as though this is the same sort of thing as to which Government counsel has objected to in offers by the plain-

tiff. Did I understand that this is a hearing before one of the congressional committees?

The Witness: A Senate committee, sir.

Mr. Barnes: May I state, Your Honor, I will withdraw that question in any event. The testimony to which Mr. Nathan refers was read during Dr. Nelson's cross-examination and is already in the record.

By Mr. Barnes:

Q. May I ask you, Mr. Nathan, whether the material to which you refer appears on page 531, starting with the words "for instance, here are machine bolts"—and so forth?

A. Yes, sir. That is the information to which I refer as evidence we have found in our searches as to the indication of some types of materials and supplies included in this figure in our Table I.

By Mr. Rigney:

Q. Do you know what period of time Mr. Nelson was referring to in the testimony that you speak of?

A. He is referring to a period primarily when some of the serial numbers under P-56 were taken away from some of the gold mines, which would include principally the latter [fol. 1714] part of 1941 and the early part of 1942.

Q. He was referring to a period at least prior to March of 1942?

A. The testimony wasn't until May. Yes, I would assume that some little time had elapsed in the early part of '42, the first three or four months.

By Mr. Barnes:

Q. Mr. Nathan, how do the expenditures of gold mines for materials and supplies compare with the similar expenditures by other non-ferrous mines?

Mr. Rigney: That is objectionable.

The Commissioner: Sustained.

By Mr. Barnes:

Q. You have set forth on Defendant's Exhibit 53 figures for metalic mines, a total figure. What was the source of those figures that you made?

A. The source?

Q. Yes.

A. That figure was taken from this official document of the Census Bureau, Mineral Industries, Volume I.

Q. Is the same thing true with respect to the figures appearing opposite the heading "Iron" and opposite "Major Non-Ferrous Metalic Ores and other Non-Ferrous Metalic Ores"?

A. Yes. These figures are official figures from the Census of Mines for iron ore mines and all other mineral mines. [fol. 1715] metal mineral mines in the United States.

The Commissioner: You have gotten all of your figures, according to your previous testimony, from that book?

The Witness: Yes.

The Commissioner: We should not have any more questions relating to that.

Mr. Barnes: Would you mark this Defendant's Exhibit No. 54 for identification?

(Said document was marked for identification as Defendant's Exhibit No. 54.)

By Mr. Barnes:

Q. Mr. Nathan, showing you Defendant's Exhibit 54 for identification, which is marked at the top "Table 2", can you tell me what the source of the information is contained in that table?

A. Table 2 is derived from the Census of Manufacturers in 1939, which is another census of the United States Bureau of the Census, the Department of Commerce.

Q. And have these figures been taken directly from that publication without any interpolation or change?

A. Taken from that publication and from one table in that publication.

Q. What is Table 3 appearing on page 429, is that correct?

A. That is right, sir.

[fol. 1716] OFFERS IN EVIDENCE

Mr. Barnes: I would like to offer in evidence at this time Defendant's Exhibit 54 for identification.

Mr. Rigney: I will object on the same grounds heretofore stated, Your Honor.

The Commissioner: It may be received.

(Said document, Table 2, Value of Mining Machinery and Equipment Produced in 1939, marked "Defendant's Exhibit No. 54", admitted in evidence and made a part of this record.)

By Mr. Barnes:

Q. Mr. Nathan, can you express an opinion as to the importance of gold mines in 1939 as customers for or at least outlets for the producers of mining machinery?

Mr. Rigney: I object to that as to form. As to the importance, I don't know in what respect he is referring, and the competence of the witness also.

The Commissioner: Sustained.

Mr. Barnes: On which grounds, Your Honor?

The Commissioner: I think it could be sustained on either ground.

Mr. Barnes: I mean, if you were sustaining it on form only I would have tried to rephrase the question. But you think you could sustain it on the other ground?

The Commissioner: Yes.

By Mr. Barnes:

Q. Mr. Nathan, according to Defendant's Exhibit 53, the [fol. 1717] gold mines purchased in 1939 $6,391,000 worth of new machinery. According to Defendant's Exhibit No. 54, the total value of mining machinery and equipment produced in 1939 was $33,558,000. Can you tell us what the mathematical relationship between those two figures is?

Mr. Rigney: If Your Honor please, I object to that. The exhibits are in evidence and they speak for themselves.

The Commissioner: Which is the first figure you used? I have been looking for that.

Mr. Barnes: $6,391,000, Your Honor.

The Commissioner: All right, it is overruled.

The Witness: Approximately 20%.

By Mr. Barnes:

Q. Do you know, on the basis of your examination of the Census of Manufacturers, whether or not the total figure

of $33 million shown there includes only machines, or includes something more than complete new machines?

The Commissioner: That is clear from the exhibit?

The Witness: It includes machines and parts as well.

By Mr. Barnes:

Q. On the basis of your examination of the 1939 Mineral Industries Census, can you tell us whether the information that appears under the heading of Cost of Machinery is intended to reflect only the cost of complete machines or of repair parts for machines?

[fol. 1718] A. According to the definitions, it is only supposed to be complete machines. The repair parts are supposed to be in supplies.

Mr. Barnes: Would you mark this Defendant's Exhibit 55 for identification?

(Said document was marked for identification as Defendant's Exhibit No. 55.)

By Mr. Barnes:

Q. Mr. Nathan, showing you this document marked Defendant's Exhibit 55 for identification, is that a table that was prepared by you or under your supervision?

A. It was prepared under my supervision and checked by me.

Q. And what is the source of the information set forth there?

A. An official Government publication entitled "Mineral Industries, 1939, Volume I," of the United States Bureau of the Census.

Mr. Barnes: Your Honor, I would like to offer in evidence at this time Defendant's Exhibit 55 for identification.

Mr. Rigney: I object on the same grounds previously stated as to the other exhibits.

The Commissioner: All right, it may be received.

(Said document, Table 3, Fuels Consumed and Electric Energy Consumed by Major Non-Ferrous Metal-Ore Industries in the United States, 1939, marked "Defendant's Exhibit No. 55", admitted in evidence and made a part of this record.)

[fol. 1719] Mr. Barnes: Would you mark this as Defendant's Exhibit No. 56, please?

(Said document was marked for identification as Defendant's Exhibit No. 56.)

By Mr. Barnes:

Q. Mr. Nathan, I show you the document which has been marked Defendant's Exhibit 56 for identification. Was that prepared by you or under your supervision?

A. It was.

Q. And what was the source of that information?

A. An official publication of the United States Bureau of Mines, Department of the Interior, entitled "Minerals Yearbook" and it comes from the Volumes 1942, 1943, and 1944 Yearbooks.

Q. Referring to the information which appears here as to the number of mines, I see some difference between the figures here and those that are shown in Defendant's Exhibit 53. Can you furnish any explanation as to the reason for that difference other than the difference in year?

A. The Bureau of Mines' Mineral Yearbook figures include all mines, whereas the Census includes those mines whose values of product are under $2,500 per year. That is the major difference. It is a difference in coverage.

Q. Do you know whether or not there is any difference in definition from the ones you described as being used by [fol. 1720] the Census?

A. Between these two, other than the difference in value?

Q. Yes, that is right.

A. I believe that is the only real difference.

Mr. Barnes: Your Honor, I offer Defendant's Exhibit 56 in evidence.

By Mr. Rigney:

Q. Mr. Nathan, as to this Table I here, which is Defendant's Exhibit 53, where you refer to the number of lode mines as 841, does this include Alaskan mines, mines in Alaska, or just mines in the United States?

A. Just the United States.

Mr. Rigney: I will object to this, your Honor, if it is going to be used as a basis of drawing comparisons, because of the

dissimiliarity between the information in the two exhibits. The last exhibit, No. 56 for identification, includes Alaskan mines, and I would assume that the witness could not segregate them or say how many are included, so that it would not constitute a comparable standard or basis for drawing conclusions.

The Commissioner: I would imagine that this exhibit would be for another purpose. What do you have to say?

Mr. Barnes: I would like to have Mr. Rigney's statement read back to me. I missed the first part of it.

[fol. 1721] (The record was read by the reporter.)

The Commissioner: I feel that a further explanation should follow from what you said. On the basis of what counsel for the defendant said in relation to Defendant's Exhibit 53, I understand that this is a line of testimony and exhibits to follow with which to show what information was before the War Production Board at the time they were considering the issuance of the order. Do you have anything to say?

Mr. Barnes: This one goes somewhat beyond that, because it includes information as to the years 1943 and 1944, which was obviously not before the War Production Board.

The Commissioner: Oh, yes.

Mr. Barnes: But it is designed to show the trend, if you want, or the effect of the order, the extent to which mines were in fact closed as a result of the operation of L-208.

Mr. Rigney: I would not think it could be received for proof of the facts to which Mr. Barnes has just referred because it is hearsay, as to the number of mines that were closed, and so forth.

Mr. Barnes: Your Honor, I am perfectly willing to concede that there is no evidence that indicates that each of the mines that represent the decrease from 1942 to 1943 were closed by Order L-208. There is an element of inference there. It does show, however, the extent to which mines that [fol. 1722] had been producing gold in 1942 ceased producing gold in 1943, and it does afford some measure that may be used to evaluate the effect of the order.

The Commissioner: It boils down to the fact that you object to it as hearsay at this point?

Mr. Rigney: And to the unreliability of the information

obtained here, your Honor, because you cannot tell from the exhibit whether a particular mine or, of the total number of mines, how many of them were closed as a result of Order L-208 or for other reasons. That is a great difficulty that we are up against.

My attention is called, your Honor, to the fact that in Plaintiffs' Exhibit No. 1, Appendix C, the chart there in evidence indicates that gold mines were closing down very rapidly throughout the first half of 1942 prior to the issuance of L-208. There is a graph which illustrates very clearly the sharp decline in number of mines that were operating prior to the issuance of the order.

Mr. Barnes: Your Honor, I do not know whether you can see from your seat the heading of the table. The table relates to employment, it does not indicate that any mine at all closed down, not a single mine closed down. Mr. Rigney may be entitled to draw an inference from that exhibit, but I think similarly we are entitled to draw an inference from this exhibit.

[fol. 1723] The Commissioner: I am going to overrule the objection.

(Said document, Table 4, Number of Gold Mines in the United States and Alaska by class of ore, 1941-1943, marked "Defendant's Exhibit No. 56", admitted in evidence and made a part of this record.)

Mr. Barnes: Will you mark this Defendant's Exhibit 57 for identification?

(Said document was marked for identification as Defendant's Exhibit No. 57.)

By Mr. Barnes:

Q. Mr. Nathan, showing you the document which has been marked Defendant's Exhibit No. 57 for identification, may I ask you whether that was prepared by you or under your supervision?

A. Yes, sir.

Q. And what was the source of that information?

A. That came from the Minerals Yearbook, the same case as before, the Minerals Yearbook for 1944.

Q. Can you tell me whether or not that covers only pro-

duction in the continental United States and the Territory of Alaska for the years shown?

A. Yes, sir, it does. It excludes the Philippine Islands and Puerto Rico.

Mr. Barnes: Your Honor, I offer Defendant's Exhibit 57 in evidence.

[fol. 1724] Mr. Rigney: No objection.

The Commissioner: It is admitted.

(Said document, Table 6, Gold Production, United States and Alaska, 1939-1943, marked "Defendant's Exhibit No. 57", admitted in evidence and made a part of this record.)

Mr. Barnes: Your Honor, I am going to another subject, if you want to recess now.

The Commissioner: We will recess for five minutes.

(Thereupon, a five-minute recess was taken in the hearing.)

[fol. 1725] By Mr. Barnes:

Q. Mr. Nathan, was there any official data available as to the trend of employment in gold mines during the period subsequent to 1939?

Mr. Rigney: When do you say, now?

Mr. Barnes: I say subsequent to 1939 and prior to L-208.

Mr. Rigney: You mean available at the time he made his search, his study?

Mr. Barnes: Yes, that is right.

The Witness: Yes. As a matter of fact, in Special Study No. 9, which is already an exhibit, there is Appendix B, on page 69, a table which came from the United States Bureau of Labor Statistics indicating estimated employment in gold and silver mines, not the gold mines separately, but the gold and silver mines, by months, from January 1939 through February of 1944.

By Mr. Barnes:

Q. What does that show with respect to the trend of employment in the years 1939, '40, and '41?

A. It shows that employment in 1941 was about 5 per cent higher than it was in 1939 in the gold and silver mines combined.

Q. On the basis of your experience, is there any relationship between employment figures and the use by an industry of materials and supplies?

[fol. 1726] Mr. Rigney: I think that is objectionable, Your Honor.

The Commissioner: Overruled.

The Witness: Yes, I think on the basis of my own studies and, as a matter of fact, part of our war production period analysis was predicated on that. As I testified yesterday, when we projected in the War Production Board Planning Committee, and prior to that in the Bureau of Research and Statistics, projected estimated requirements of basic materials, such as steel, copper, and aluminum, under a total mobilization period, our projection was based fundamentally on employment figures, what the total manpower resources of the United States were, what those total manpower resources would be under conditions of total employment or full employment, what that full employment would permit in terms of levels of gross production in the United States, and then in turn translated that gross production into material requirements. As the period unfolded, it was clear that employment and materials consumption or materials usage is very correlated, positively.

By Mr. Barnes:

Q. Mr. Nathan, referring to Defendant's Exhibit 57, which has been marked Table 6, what was the trend of production in the gold mines during the years 1939, 1940, and 1941?

Mr. Rigney: The exhibit speaks for itself, I submit, Your Honor.

The Commissioner: Do you intend this as a preliminary [fol. 1727] question?

Mr. Barnes: It is a preliminary question, Your Honor.

The Commissioner: Overruled.

The Witness: Total gold production in the United States in 1940 and 1941 was slightly higher than it was in 1939.

By Mr. Barnes:

Q. On the basis of your experience, can you express an opinion as to whether or not there is a relationship between

the production by an industry and the use of materials and supplies by the industry?

A. On the basis of my experience, both in analyses of the over-all economy and company analyses which have been made by me and my firm in the past, I would say, without hesitation that there is a positive correlation and a close correlation between production in an industry and the use of materials and supplies by that industry.

Q. Mr. Nathan, have you made any attempt to check any available figures as to individual gold mining companies, as to their expenditures during the years in question for maintenance and repair materials?

A. Yes.

Mr. Rigney: Which years, now?

Mr. Barnes: 1939, 1940, 1941, and 1942.

The Witness: Yes, I have.

[fol. 1728] By Mr. Barnes:

Q. For which company or companies have you found information available?

A. For the Homestake Mining Company.

Q. Where did you find that information?

A. The Securities and Exchange Commission.

Q. In what form?

A. Documents submitted by the company to the Securities and Exchange Commission annually in its financial statements, which are a required submission by the Securities and Exchange Commission.

Q. What do those documents show as to the expenditures by Homestake during the years 1939, 1940, and 1941, for maintenance and repair expenditures?

A. The figures taken directly from the submitted reports by the company itself show that operating expenditures and maintenance and repair expenditures for the years 1939, 1940, 1941, and 1942, are quite stable, and in 1941 the company spent very nearly the same, only fractionally different amounts than it spent in 1939 for materials for maintenance and repairs.

Q. Do those same reports show the figures of Homestake for its operating expenses for mining, hoisting and primary crushers?

A. Those figures show that in 1941 the Homestake Mining Company spent not quite exactly but almost the same in 1941 [fol. 1729] as it did in 1939 for the operating expenses of its mining, hoisting, and primary crushing activities.

Q. What do those figures show as to the net sales of Homestake of bullion in those same years?

A. In 1940 and 1941, the proceeds from the sale of bullion by Homestake Mining was again fractionally different from what it was in 1939. It is very nearly a flat figure, insignificant differences between 1939, 1940, and 1941, in the proceeds from the sale of bullion.

Mr. Barnes: Your Honor, I would like specifically to call your attention at this time to Plaintiffs' Exhibit 10, so-called Document 12D, submitted to the November 18, 1941, meeting of SPAB, in which the statement is made that a great deal of new and relatively expensive equipment has been put into service in large placer mines, reaching a probable average total of $7,000,000 in the last two or three years. I call your attention to the fact that the figure shown in Defendant's Exhibit 53 for placer mine purchase of new machinery in 1939 is $3,348,000, so that a two or three-year projection of that would indicate a figure of approximately the magnitude used in Plaintiffs' Exhibit 10.

I would also like to call your attention to Defendant's Exhibit 43, a memorandum of September 9, 1942, from Mr. R. J. Lund to Mr. A. I. Henderson; Subject: Gold Mining Order, in which, under the heading "Critical Materials [fol. 1730] Saved," he makes this statement:

> "Sizable amounts of critical materials will be saved in closing these gold mines. Estimates as to total current consumption of such materials are not available, but the general order of magnitude of such consumption is indicated by the fact that in 1939, gold mines in the United States (excluding Alaska) spent about $17,000,000 on such supplies and materials, $2,000,000 for fuel, and about $5,000,000 for purchased electric energy."

I call your attention to the fact that those are very similar to the figures shown in Defendant's Exhibit 53 taken from the 1939 Census. This establishes that those figures were

then known and considered by the War Production Board. I realize that that is argumentative to a certain extent.

Mr. Rigney: I take exception to the last statement as a conclusion of counsel.

The Commissioner: Very well.

Mr. Barnes: That is all.

Cross-examination.

By Mr. Rigney:

Q. Mr. Nathan, this General Industries Book for 1939 to which you have been referring in your direct-examination —when was that published, do you know?

A. I am not sure. I think that the actual document is [fol. 1731] dated, letter of transmittal June 22, 1943. That is the date of transmittal from the Director of the Census Bureau to the Secretary of Commerce. I would assume it was in print shortly thereafter.

Q. Shortly after June 22, 1943?

A. That is right, sir.

Q. Now, sir, would you agree with me that neither you nor any other responsible official of the Government in the summer of 1942 could have predicted with any reasonable degree of certainty how long World War II was going to last?

A. Not with certainty, no.

Q. Not even with reasonable certainty, could you?

A. Well, if I may hazard an opinion, even in the summer of 1942 we were still building a lot of new facilities which wouldn't be in operation for at least another 12 to 18 months.

Q. There were many views expressed as of 1942 that the war conceivably might last for ten years?

A. I would say that the estimates were on the longer side rather than the shorter side.

Q. You were not able at that time, were you, to predict what the unfavorable balance of trade requiring settlement in gold would be during that period of time, those years following 1942, for however long the war lasted?

A. No. I am sure the longer the war lasted, the more we would try to import critical materials. There is no [fol. 1732] question of that.

Q. And our unfavorable balance of trade would continue to increase?

A. To the extent that materials were available to the United States.

Q. Yesterday you testified on your direct-examination with regard to the export of gold in 1943 and 1944, and you testified that in one of those years, it reached a total of between 800 and 900 million dollars, or about four per cent of our total reserve.

A. That is right. I was just going to get my Federal Reserve Bulletin which has the specific figures.

That is right. I can give you that specific figure in one year. In 1944, the net gold export was $845 million.

Q. That is in 1944?

A. That is in 1944.

Q. Could you give us the cumulative total for the period of World War II, in round figures, as to what our total exports of gold were?

A. Actually, the net for the war period, which was a net import, not a net export—1941—'41 should not be included. I beg your pardon. In 1942, we had a net import of 315.7 million dollars worth; in 1943, we had a net import of 68.9 million dollars worth; in 1944, we had a net export of 845.4 million dollars worth; and in 1945, we had a net [fol. 1733] export of 106.3 million dollars worth. The net of those four years would be about 570 million dollars net export over those four years, approximately; 567.1 million for the four-year net export.

Q. Isn't it a fact, Mr. Nathan, that the War Production Board had power to requisition property needed for war purposes, under the war statutes?

A. That is right, sir.

Q. And also had power to allocate critical materials and facilities?

A. Yes, sir.

Q. So, would you agree with me that if there were drills, hoists, generators, hoses, compressors, and like articles, needed for the war effort, the War Production Board had power throughout its existence to requisition them if it found it needed them?

A. The War Production Board came into existence in

January 1942. I believe the power to requisition was already in being in January 1942, yes.

Mr. Barnes: The Act was the Act of October 16, 1941, 55 Stat. 742.

By Mr. Rigney:

Q. So the War Production Board could have gone to any or all of the plaintiffs here in this case during the period of the war and requisitioned such things if it saw fit, [fol. 1734] couldn't it?

A. It had the authority to.

Q. As I understand your direct testimony and as I understand the fact to be, in exercising its powers of allocation of critical defense materials and facilities, the means by which the War Production Board acted was through its "P" orders, "L" orders, "M" orders, and then subsequently PRP and CMP, is that right?

A. That is correct.

Q. This was an integrated plan for thorough control?

A. CMP was the most integrated plan, yes. Each successive stage of control become a more integrated, more a total program and a tighter control over the flow of materials.

Q. Mr. Nathan, let me ask you, referring you to the entire period of these "L" and "M" orders, PRP, and later CMP, wasn't it the policy of the War Production Board to allow industry, regardless of its relative essentiality to the war effort, to obtain maintenance, repair and operating supplies? Wasn't that the general policy of the Board?

A. It was a general policy in the early stages; and later on, as you remember, under some of these orders when people, for instance, weren't able to get serial numbers, then they had to come in directly for aid. But generally the policy was to permit those industries which were allowed to operate, to get their essential maintenance and repair [fol. 1735] supplies. That was the general attitude.

Q. To allow industry generally to get maintenance, repair, and operating supplies?

A. That is right.

Q. That was without regard to their relative essentiality to the war effort?

A. Yes.

Q. Is it a fair statement to say that maintenance, repair and operating supplies never represented as much as 3 per cent of the total steel or copper production?

A. I frankly do not recall the figures, but in the total aggregate economy, the MRO, Maintenance, Repair and Operating supplies, would, I would say, never account for a major portion of the total requirements.

On the other hand, in the aggregate they certainly totaled much more than the amounts used by a great many industries which were closed down.

Q. Would I be pretty close to the fact if I suggest to you that this 3 per cent figure, as far as steel and copper are concerned, was a close approximation to the amount required for MRO during the period of the war?

A. I think that probably would not be unreasonable.

Q. And aluminum would be considerably less than that, wouldn't it?

A. I would think so, because aluminum generally had not [fol. 1736] been used so widely in the earlier periods that the maintenance and repair would be so large.

Q. You referred yesterday to the curtailment of automobile production. Let me ask you, was the purpose of the orders curtailing passenger automobile production, in so far as the saving of critical materials was concerned, to reduce or eliminate their use in the end product?

A. Your question is whether the purpose of the elimination of passenger cars was to save the raw materials used in their end product?

Q. Would you like to have it read back?

A. I would appreciate it.

(Thereupon, the question was read by the reporter.)

The Witness: That was certainly one of the purposes.

By Mr. Rigney:

Q. That was the primary purpose, wasn't it?

A. I think that was the primary purpose. The other major purpose was the conversion of the automobile industry to war production, to expedite and facilitate the conversion of that industry to war production.

Q. The same thing was true with respect to the refriger-

ators, isn't that right, as far as saving the critical materials that went into the end product?

A. I think the principal consideration was the saving of material. It was a very important consideration.

[fol. 1737] Q. That was also true with respect to domestic laundry machinery, wasn't it, sir?

A. Yes. I think in each one of these there was a complex of factors, in some of which I would suspect—not "suspect," I beg your pardon—in some of which I am certain the materials were the most important, and in others it was the facilities, and perhaps in others it was the manpower. There was a whole series of considerations, hardly ever an isolated one in these discussions, but material was the most important generally.

Q. With respect to the three that I have asked you about, would you agree that materials was the overriding consideration in those?

A. I would agree that if was the predominant consideration.

Q. Let me ask you if you were of the opinion, Mr. Nathan, in October and November 1942, that the release of labor from the so-called non-essential industries would be ineffective because adequate mechanisms did not then exist to channel the released labor into essential industries?

A. In the fall of 1942——

Mr. Rigney: If I may, Your Honor, I would like to have a "yes" or "no" to that, first, and then——

The Witness: Could I have that question reread, please?

(Thereupon, the question was read by the reporter.)

[fol. 1738] The Witness: No.

By Mr. Rigney:

Q. You would say "no," sir?

A. No.

Q. Let me ask you if you recall a memorandum of November 7, 1942, from you to Mr. Donald M. Nelson, on the subject of manpower? Do you recall that?

A. I remember——

Q. A memorandum of several pages.

A. I don't recall specific memorandums.

Q. Let me read to you from page 7 under the subject, "Transfer."

Mr. Barnes: I object to counsel reading from a document not in evidence.

Mr. Rigney: This is cross-examination, Your Honor. I have asked him the question, and he said that that was not his opinion, and I now propose to read from this document——

Mr. Barnes: It hasn't been established satisfactorily yet that the witness wrote the document.

Mr. Rigney: I will show him the document and ask him if he wrote it.

(Witness examining the document.)

The Witness: Yes, this appears to be a formal document of the Planning Committee which I sent to Mr. Nelson.

[fol. 1739] By Mr. Rigney:

Q. Do you recall that in that document you wrote:

"Unless the release of labor in non-essential industry is backed by an adequate organization to secure its transfer, training, and placement in war industry, the release will be in some measure ineffectual and demoralizing. Adequate mechanisms do not now exist. Development of such mechanisms is the major problem facing the War Manpower Commission and the Employment Service."

May I ask you if that was your opinion in November of 1942?

A. Apparently in 1942 we felt that the mechanisms for the effective transfer were not adequate.

Mr. Rigney: If we may have just a moment, Your Honor. I am not going to be very much longer. I would like to have just one moment.

The Commissioner: All right.

(Plaintiffs' counsel conferring.)

By Mr. Rigney:

Q. Directing your attention, Mr. Nathan, to Defendant's Exhibit 53, which is your Table No. 1, does the figure under

"Supplies and Materials," $17,369,000, include Maintenance, Repair, and Operating Supplies?

A. Yes.

[fol. 1740] Q. And the figure of 841 lode gold mines under the first column, "Number of Mines"—does that include mines which were substantial producers of other metals besides gold?

A. I believe before, sir, that I indicated how much the production of copper, silver, lead, and zinc was in this whole lode mine group. As I remember, it was about six million pounds of copper, about 20 million pounds of lead. That is included therein, yes.

Q. But the state of the figures would not permit you to say how many of the mines produced any substantial portion of the other metals?

A. No, sir. I can just say that those mines produced about six million pounds of copper, around 21 million pounds of lead, and a little over three million pounds of zinc. I can't tell how many of the mines produced those, no, sir.

Q. So it would not be possible for anyone to determine from these figures how many of those 841 mines were subject to closure under L-208?

A. No sir.

Mr. Rigney: That is all.

Redirect examination.

By Mr. Barnes:

Q. Just a couple of questions, Mr. Nathan.

You referred to the fact that this 1939 Census of Mineral [fol. 1741] Industries bore a letter of transmittal dated the middle of 1943.

A. June 22, I believe.

Q. On the basis of your experience, do you know whether or not that information is compiled at a date earlier than it is transmitted?

A. In my work, especially in the national income field, I have received Census data as long as a year or more before it is actually published. The data are tabulated in succession. Some of the summary data are available and some of the detail data are available. They put out preliminary reports, and some of the summary tables are available intra-

Government. So I am sure, without question, that these data were available, most of them, substantially before the actual publication date.

Q. With respect to the issuance of orders by the War Production Board, you referred to the fact that there was a complex of factors that was considered in connection with various orders, is that correct?

A. Yes, a number of considerations.

Q. What did those include?

Mr. Rigney: Your Honor, my recollection of the witness' testimony is that in his task as Chairman of the Planning Committee, he did not participate in the actual drafting or consideration of specific orders. His task was on the broader [fol. 1742] plane of planning, rather than the drafting or even the consideration within a particular division of the Board of specific orders. I object.

The Commissioner: Overruled.

By Mr. Barnes:

Q. Do you recall the question?

A. Yes. The considerations included a number in which materials savings were certainly highly important, if not the most important single factor. The conversion of that industry's equipment for use for war purposes or essential war-supporting purposes was very important. The availability of manpower was important. The availability of specific equipment therein was important. The question of location was a factor. A whole complex of economic and production considerations entered into the decision on either the degree to which an industry was curtailed or whether an industry was closed down completely.

Q. On the basis of your study of this matter, did those factors vary in their importance from order to order or industry to industry?

A. They certainly varied from industry to industry, because some industries were high material users relative, say, to the investment in facilities or the convertibility of the facilities to war production, and others were low material users. The factors varied considerably from one [fol. 1743] industry to another.

Q. You referred to the concept of facilities here. Was there ever a distinction made between the use of an entire plant with the installed facilities, and the use of some of the machinery in the plant severed from the plant and moved elsewhere?

A. Those were discussed in policy terms. I recall, as head of the Committee on the Flow of Materials, we talked about various controls, that is, techniques of distribution and the orders that supported those distribution techniques. But while there was quite a bit of discussion in that period of the thought of requisitioning specific items of materials, not very much was ever done in that matter, and mostly when there was conversion of facilities from civilian production to war production, the conversion was of a total facility rather than requisitioning a specific piece of equipment.

Q. Mr. Nathan, referring to this memorandum that you wrote on behalf of the Planning Committee in November of 1942, what was your view as to what happened to manpower that was released from a non-essential industry when it was closed down? Did it disappear?

A. No, it obviously didn't disappear, because total employment stayed very high in that period. Unemployment was almost nonexistent except for purely seasonal or geographic differences. So obviously people were reemployed. [fol. 1744] The rise in production of essential war industries and war-supporting industries, and the decline in the production of the non-essential, certainly indicated a general movement toward the essential industries and toward the war industries.

The problem was one of a deficiency of a mechanism for the precise movement of manpower, taking the man who was the most able into a job in which his talents would be 100 per cent utilized rather than 90 or 80 per cent. There wasn't a tight, close mechanism for moving men either geographically or occupationally or industrially where the talents would be most effectively utilized.

Q. Do you recall whether or not you or the Planning Committee at the time of this memorandum took any definite position on the manpower situation?

A. I don't recall whether we took any definite position on it. I know we were critical of the War Manpower Commis-

sion's failure to do an effective job of channeling the flow of manpower.

Q. What happened to a man who was released from a non-essential industry when it was closed down by a War Production Board order or otherwise?

Mr. Rigney: If Your Honor please, I don't see how anybody could answer that question. It is speculative.

The Commissioner: Sustained.

[fol. 1745] By Mr. Barnes:

Q. What employment opportunities were available to employees who were released from non-essential industries in 1942?

Mr. Rigney: I object again, Your Honor, on the grounds that the scope is so broad that we would be here all afternoon with Mr. Nathan answering that, I should think.

The Commissioner: Let's have that question again.

(Thereupon, the pending question was read by the reporter.)

The Commissioner: Yes, that is too broad.

By Mr. Barnes:

Q. Mr. Nathan, going back for a moment to the factors that you said were given consideration in the issuance of orders, I grouped them in my notes here under the broad headings Materials, Facilities, and Manpower. Was there, to your knowledge, a morale factor that was ever considered in connection with any of these orders?

A. Yes, there was a morale factor. I think many items—not "many"; some items were not eliminated from production that I don't think it would have made any difference as to life and death of the civilian population, but their continued production would have been helpful in maintaining the production of the working men and women. For instance, cosmetics. Cosmetics production was continued from the morale point of view, but I don't think they could be [fols. 1746-1749] classified as first order of essentiality.

Q. What about items that were eliminated? Was the morale factor ever considered in connection with their elimination, to your knowledge?

A. In our study of this gold order, many of the statements of the people in the War Production Board urged the closing of the gold mines as a positive morale factor, in terms of giving to the people of America, to the Armed Forces, to the soldiers in relation to the furlough matter, a sense of all-out dedication to the war. It was suggested—I don't recall any discussion of it, but just in reading these documents and making our study, we found references which suggested that as part of the morale factor.

[fol. 1750] **Transcript of Testimony**—February 13, 1953

TESTIMONY FOR DEFENDANT (resumed)

BREHON BURKE SOMERVELL, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Barnes:

Q. Will you state your full name, please?

A. Brehon Burke Somervell.

Q. What position do you hold at the present time?

A. I am Chairman and President of the Koppers Company.

Q. What rank did you hold in the Army.

A. I was General.

Q. And you are retired now?

A. I am retired.

Q. During World War II what were your official duties in the Army?

A. I was Assistant Chief of Staff until the creation of what was known as the Services of Supply in March of '42, later the Army Service Forces, when I was made Commanding General of the Army Service Corps.

Q. And did you hold that through the duration of hostilities?

A. I did.

Q. General Somervell, do you recall at any time during

the war having the question of gold mining come to your attention?

[fol. 1751] A. Yes, it was widely discussed at one stage of the game.

Q. Can you fix the approximate date when it came to your attention?

A. I think it was in 1942.

Q. Can you recall how it came to your attention?

A. No, I don't. The matter was widely discussed, as I said, with our staff, and most likely with the General Staff and with the WPB.

Q. What were the—in what connection did it come to your attention, the question of gold mining?

A. The shortage of miners needed for critical materials, particularly copper.

Q. Now you refer to copper as a critical material; what was the situation with respect to copper in 1942?

A. Well, copper, of course, is used extensively in munitions making and in signal equipment and in other uses in the Army, primarily for munitions, needed for cartridge cases, rotating bands, and things of that kind in munitions making.

Q. And what was the relationship of supply and demand of copper in 1942?

A. Extremely bad. We were way behind on our requirements, so much so that extraordinary measures were discussed in order to increase the supply of copper.

Q. Do you recall whether or not any request was ever [fol. 1752] received by the Army for the furloughing of miners who might be in military service?

A. Yes, such a request was received, and men were furloughed, as I recall it.

Q. Can you tell us approximately when that was?

A. Sometime in '42, as I recall it.

Q. Did the question of gold mining come under discussion in connection with this furloughing of miners? To your knowledge, did the Army have any need for gold in 1942?

A. No, sir.

Q. There is testimony here, General, that in approximately August of 1942 a Mr. Bjorge, who was general manager of the Home Stake Mining Company, came to see

you by appointment made by one of the Senators. Do you have any present recollection of that?

A. Well, I have a recollection of discussing the matter with people connected with this problem, whether it was Mr. Bjorge or not, I can't recall.

Q. Do you have any recollection of the substance of any discussions you might have had with representatives of the gold mining industry, as distinguished from others?

A. Yes.

Mr. Rigney: I think we ought to try to identify who they were.

The Commissioner: As far as we can.

[fol. 1753] By Mr. Barnes:

Q. Do you have any recollection as to what members of the gold mining industry you spoke to?

A. No.

Q. Can you tell us now what, in general, they said to you, as well as you can recall.

A. As well as I can recall it, they claimed to curtail the activities of the mines would bring on unnecessary hardships on the communities that were dependent on the mines. I remember it was during this time that I became aware of the fact that there was a gold mine in South Dakota; I didn't know there was one there before. They said that if we did anything to curtail the mines, that it would bring considerable hardship on the communities which existed on the mines.

Q. Do you recall in any discussions that you had with representatives of the gold mining industry, any information they might have given you as to the number of men available, number of miners available in the gold mines?

A. I can't say that I do, although representations were made that such action wouldn't produce the number of miners that were needed.

Q. Do you recall by whom those representations were made?

A. No; it could have been made at the time you suggested, it could have been made in the WPB, it could have been made by the Staff, in fact, I think it was the general

[fol. 1754] discussion of how much good it would do if the operations were detailed.

Q. By "Staff" you are referring to——

A. My own staff.

Q. And who on your staff was in direct charge of this matter?

A. Well, from the point of view of operations, General Clay was the head of our Productions Division, and Mr. Mitchell was the head of our Industrial Personnel.

Q. Was he under General Clay?

A. No.

Q. That was separate.

A. Yes, we had production and personnel, separate divisions.

Q. Do you recall now with what officials of the War Production Board you may have discussed this matter?

A. I think it's too far away; I imagine I discussed it with quite a number of them.

Q. Do you recall having any estimates available at any time as to the number of men who might be released by closing the gold mines?

A. Oh, I am sure we did; although I can't state what those figures are now; we must have known how much good such an act would do, or we wouldn't have done it.

Mr. Rigney: Your Honor, I move to strike that, "we must have known how much good such an act", and so [fol. 1755] forth.

The Commissioner: It may be stricken.

By Mr. Barnes:

Q. General Somerville, do you recall attending a meeting of the War Production Board on October 6, 1942, when the subject of an order closing the gold mines was discussed?

A. I think I attended practically all of them at that time. As to any particular meeting, I have difficulty in fixing the date.

Q. General Somerville, let me show you this document, Plaintiff's Exhibit No. 92, which is a copy of the minutes

of the meeting of the War Production Board on October 6, 1942; and ask you whether, looking at that, that refreshes your recollection as to the fact that that was the day when this matter was discussed.

A. It says I was there, yes.

Q. The minutes indicate, General, that in opening the discussion of the gold mining order Mr. Batt read certain figures as to the number of miners who might be released from the gold mines. Do you have any recollection now of that event?

A. I can't honestly say that I recall being there; although I can say honestly that I recall discussion of the subject at a War Production Board meeting, but as to details, eleven years ago, I can't honestly testify that I remember [fol. 1756] it in any detail.

Q. Referring to the fourth paragraph of the minutes there, General; there is a summary there of remarks ascribed to you. Do you have any present recollections as to—after refreshing your recollection by reading those minutes—as to making those remarks?

A. That sounds as if that is probably what I said, yes.

Q. Referring to the situation with respect to the supply and demand for copper: What effect would that shortage have in the Army production program?

A. Well, it was having a very material effect. Our whole munitions program was dependent on copper, either as such, or as an alloy; and we even went so far as to talk about taking the copper and brass grilles off public buildings and banks and melting down the statues in Washington, and things of that kind, to help out. Such action had been taken in other countries where they had shortages.

Q. Do you recall whether or not the labor situation in the copper mines was a factor which had any effect on the supply of copper?

A. Oh, yes.

Q. Do you have any recollection now as to the magnitude of the shortage of miners in the copper industry?

A. No, all I know is that it was bad and we had to furlough soldiers in order to step up production to acceptable [fol. 1757] levels, or try to step it up to those levels. It was a long leadtime between actually getting the ore out and the production of the shell, so it was an urgent matter.

Q. Looking at this statement, the early part of October, 1942, what was the general strategic situation existing then?

Mr. Rigney: If Your Honor please, I object, as being outside the scope of the issues here.

The Commissioner: Overruled.

By Mr. Barnes:

Q. You may answer that.

A. Well, it had improved considerably, and the dark days of Bataan and the reverses in the other islands in the southwest Pacific.

The Commissioner: That was in the Spring of —?

The Witness: 1942.

The Commissioner: Just fix the time as you go along, and speak up clearly.

The Witness: I thought that was the question. What was the situation in October.

After those reversals and so forth, we gained the ascendancy, we won the Battle of Midway, we won the Battle of Coral Sea, which was really the turning point, I think, in the Pacific campaign, the situation was improved. We were hard at work assembling forces for the invasion of North Africa, which, as you recall, was made on election day in 1942—so we were hard put to build up our material and pass on the advantages that we had gained and those [fol. 1758] that we expected to gain in North Africa. We hadn't yet taken on too large a commitment for the French forces, because we didn't know what the French forces were going to have. That wasn't determined until Casablanca, but on the other hand, we had very large land-lease commitments, in addition to our own requirements.

In other words, we were right at the peak of our effort to build up our materiel.

By Mr. Barnes:

Q. Was any consideration given during this period of 1942 to the use of materials other than copper in the munitions program?

A. I suppose so; but it wasn't until much later in the war, I have forgotten exactly when. I would say in '44

that we developed the steel cartridge cases; it was a very technical problem that was a very stubborn one, and we didn't learn to draw the shells, and what not, until around that time.

Q. You mentioned earlier the use of copper in rotating bands; what do you mean—what are rotating bands?

A. Well, you have a steel rifle gun barrel, you have a steel projector. In order to give direction to the projectile, prevent it from tumbling and varying from true course, you impart a rotating motion to the shell, and that's done by a copper band fastened around the projectile, which fits into the grooves of the gun and imparts this motion. [fol. 1759] You have to have a softer material than steel to do that, otherwise the gun would wear out almost immediately.

Q. Do you recall whether or not you discussed the general gold mine situation with any of your superiors in the War Department?

A. Oh, I can't definitely recall, but I am sure that I discussed it both with General Marshall and Secretary Patterson; whether I talked to Mr. Stimson about it, I don't know, but I am sure I did with the other two.

Q. Let me show you this document, which is Plaintiff's Exhibit 25, a letter from Undersecretary Patterson to Mr. Batt of the War Production Board. I ask you whether you had anything to do with the preparation of that document?

A. Well, there is nothing on here to indicate that I drafted it; on the contrary, it looks more as if Secretary Patterson wrote it. But unquestionably I did have something to do with it, because I had something to do with everything in this connection.

Mr. Rigney: If Your Honor please, I don't like to interrupt, but I don't know whether the General is now merely assuming that he had something to do with it, or whether he does have a recollection of it.

The Witness: I have no definite recollection of having prepared this paper, no.

[fol. 1760] Mr. Rigney: You do or do not, sir?

The Witness: I do not.

The Commissioner: Do you have any recollection of having discussed the subject with Judge Patterson prior to this date?

The Witness: I have a definite recollection of having discussed it with Judge Patterson, yes.

The Commissioner: So far as the date is concerned, you are uncertain?

The Witness: It is impossible for me to say; I can't recall having had a hand in this particular piece of paper.

The Commissioner: Do you recall whether you saw that document or a copy of it at or about that time?

The Witness: No, sir.

By Mr. Barnes:

Q. Let me show you this document, which is Plaintiff's Exhibit 26, a memorandum to Mr. Donald M. Nelson, signed jointly by Mr. Patterson and Mr. Forrestal, and ask you whether you have any recollection at all of that document?

A. No. This has been a good many years ago; I can't remember every letter that was written.

Q. A lot has happened since then?

A. Yes, sir.

Q. Were there other things happening at that same time, General?

A. Yes, sir; we were having crises every fifteen minutes. [fol. 1761] Q. Let me ask you this: On the basis of your knowledge of the situation that existed in October, 1942, will you tell us whether or not it is your opinion that the order closing the gold mines, Limitation Order L-208, went beyond what was required under the situation that existed?

Mr. Rigney: If Your Honor please, I object to that, as called for a conclusion. The issue in this case is for Your Honor to decide. This is not a proper question.

Mr. Barnes: Your Honor, this is not going to be determinative of your decision, but is always desirable to have aid from the people who were concerned at the time. You can attach such weight as you desire. It is not binding, his conclusion, on any one.

Mr. Rigney: You can go on forever calling people on one side who would say it is proper, and those on the other side could say equally forcefully that it was improper.

The Commissioner: I think it is improper. I think that, through this witness, you could develop what the situation

was with respect to the various phases of the problem confronting the country, but I think that that question exceeds propriety.

Mr. Barnes: Your Honor, I will then make an offer of proof and ask permission to have General Somerville state that, in his opinion, the order closing the gold mines was [fol. 1762] required by the situation that existed in October of 1942.

By Mr. Barnes:

Q. General, do you recall whether or not there were shortages in any of the other non-ferrous metals other than copper in 1942?

A. Yes, we were quite short in aluminum. I imagine also in some of the others, but copper and aluminum were the two principal ones.

Q. Do you recall what the situation was with respect to alloy steel?

A. It was tight.

Q. For what purpose did the Army require alloy steel?

A. Oh, for most any purpose, munitions, and other purposes; various types of equipment require alloys.

Q. Did the tank program originally require alloy steel?

A. Yes; for the armor plate.

Q. What was the status of the tank program in 1942, October, 1942?

A. Well, we were desperately working to get it into the highest gear, the requirements for tanks were being increased from month to month, changes in models; the requirements were very heavy.

Q. Do you recall whether or not shortages of armor plate were affecting that program at that time?

[fols. 1763-2058] A. That is rather hard to say definitely, but I am sure they were, because shortages of everything were affecting the program.

Mr. Barnes: That is all.

[fol. 2059] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

Transcript of Testimony—April 7, 1953

TESTIMONY FOR DEFENDANT.

(The trial was resumed, at the time above stated, pursuant to the recess previously taken.)

APPEARANCES

Present: Hon. William E. Day, Commissioner; Ralph D. Pittman, Esq.; Edward E. Rigney, Esq., and Carlton S. Connor, Esq., counsel for plaintiffs, and Kendall M. Barnes, Esq., and Thomas H. McGrail, Esq., counsel for defendant.

COLLOQUY BETWEEN COURT AND COUNSEL RE: MR. BATT

The Commissioner: I think we might have a statement on the record for the testimony or lack thereof of Mr. Batt.

Mr. Barnes: Your Honor, the situation there is this: To go back and review what has transpired in the case during the course of plaintiff's evidence; counsel asked [fol. 2060] U. S. counsel whether they intended to produce Mr. Batt as a witness. They declared they did not.

The government, as I stated in the opening of our case, did not intend to call Mr. Batt as a witness. But in view of your interest in him, we made an attempt to locate him. As you recall, at that time he was in Mexico and was not expected at the Eastern Seaboard until around the first of April.

We stated we were prepared to close our case without his testimony, but we would be glad to produce him if you felt his testimony was desirable or necessary. And you stated that if we had not done so you probably would have called him as a Commissioner's witness.

We communicated immediately with Mr. Batt and asked him whether those dates would be satisfactory to him, but received no reply.

The first intimation we had that Mr. Batt had actually received our letters other than the fact that they had not been returned by the post office was when Mr. Berger,

the head of the Civil Division, received a call from Mr. Stassen, the head of the Mutual Security Agency, asking why he had Mr. Batt tied up the first week of April, that the President wanted to send Mr. Batt to Paris on a special mission.

[fol. 2061] Mr. Batt replied that Mr. Berger had him tied up and he was unavailable.

I explained the situation in detail to Mr. Berger, and after consideration of the respective missions Mr. Batt was being sent on, he determined that that was of much greater importance than any testimony Mr. Batt might give in this case, and that although we did not have Mr. Batt subpoenaed, or anything of that type, he instructed me not to press to take Mr. Batt's testimony at this time.

I had previously discussed the matter with you and explained the situation. It has been discussed with counsel for all of the plaintiffs.

The situation at the present time is that Mr. Batt is in Paris, has not returned. I don't know when it will occur. The government is prepared to rest their case without calling Mr. Batt.

The Commissioner: Frankly, I feel that the government's action in this thing is breaking faith with the court in that when I was informed by you that you were going to call Mr. Batt, I made no effort to locate him myself. I feel that we could have had his testimony before he went to Europe.

However, I was first advised that he was about to go to Europe just a few days before he went, while we were concluding the hearings with respect to the cases of Oro [fol. 2062] Fina and Bald Mountain.

In view of the situation, however, I felt that I was going to give the plaintiffs an opportunity to reconsider their not having called Mr. Batt in this way: I spoke to Mr. Rigney and Mr. Connor, who informed me they were in touch with West Coast counsel, and told them that if they wanted Mr. Batt as a Commissioner's witness we would leave the matter open until we got him, whenever that might be.

And that, of course, was in the presence of other counsel, Mr. Suydam and Mr. Nugent.

So that I think all plaintiffs were represented.

I was informed by plaintiff's counsel that he was not wanted as a Commissioner's witness.

So I would not hold the record open for Mr. Batt's testimony, in view of all that has transpired.

Mr. Barnes: There is just one thing, in view of the statement, your Honor, that you feel the defendant broke faith with the court, one additional fact I would like to record. That is that at the time we communicated with Mr. Batt and at the prior hearings, I read to you—I think it was read into the record—portions of Mr. Batt's first letter to me, in which he stated that he will be available to have his testimony taken in Mexico City during the month of February or on the West Coast during the month of March.

It was your preference to wait until April to take his [fol. 2063] testimony.

The Commissioner: I could have meant readily available for a West Coast hearing. But having been advised that he was going to be back on the East Coast in April, by you, that was the reason for deferring until April the taking of his testimony.

The breaking of faith that I feel has been done here was because you told me, as a representative of the government, that you were going to call him.

Having that in mind, I made no effort to communicate with him.

Mr. Barnes: If your Honor feels that is the case, I am still ready to hold the record open until Mr. Batt can be produced, if that is your desire. I am not trying to preclude calling Mr. Batt in this case.

The Commissioner: I realize that. But having told me you were going to call him, I made no effort, from February until about the first of April, to secure his attendance at any place, relying upon the statement by you that we were going to have him present.

Then I am told at the hearings that were held on Bald Mountain and Oro Fina that the decision had been made by the Department of Justice not to call him.

Mr. Barnes: No, sir. That is not the case, your Honor, I am very sorry.

[fol. 2064] The statement was made that Mr. Batt would not be available the first week in April because he was

being sent abroad on a mission of greater importance. And the statement was made that we were prepared to close our case without Mr. Batt's testimony, as has been our position throughout the course of these hearings.

We are still ready, if you feel Mr. Batt's testimony should be taken, to have you hold the record open until Mr. Batt can be produced here.

The Commissioner: Of course, I think that would be my prerogative, in any event, to hold it open.

Mr. Barnes: That is right, sir.

The Commissioner: But I am not going to do that, in view of the fact that the government has delayed, by its action, the action by the Commissioner in securing the attendance of Mr. Batt. We have lost all this time, from February until April.

Mr. Barnes: I am sorry you feel the government has delayed you, sir: I don't believe the charge is warranted, but I don't want to discuss it any further because we won't gain anything by it.

Your Honor, during the course of the hearings in January and February, a reference was made by Mr. Lipkowitz, a witness called by the defendant, to a study that had been made by the Social Security Board. That is referred to [fol. 2065] in a footnote to Special Study 9, which I believe is Plaintiff's Exhibit No. 1.

We attempted to find that in the record of the War Production Board and could not find it in the documents that have gone to Archives.

We have secured from the Federal Security Administration a copy of that document. The document had originally been held confidential under Section 1106(a) of the Social Security Act and the regulations under that.

But the Commissioner for Social Security has approved its release for use in this case.

OFFERS IN EVIDENCE

I now offer it in evidence as Defendant's Exhibit next in order.

That is on page 57, footnote 96, Special Study 9.

The Commissioner: That will be Defendant's Exhibit No. 62.

(Said document was marked for identification as Defendant's Exhibit No. 62.)

Mr. Barnes: I might state, your Honor, that it does not disclose the names of any employees. It does disclose the names of some seven gold mine companies, two of which are among the present plaintiffs.

Mr. Rigney: We have no objection.

Mr. Pittman: No objection.

The Commissioner: Without objection, it may be re-
[fol. 2066] ceived.

(Said document, marked "Defendant's Exhibit No. 62," admitted in evidence and made a part of this record.)

Mr. Barnes: Your Honor, during the course of the same hearings, Mr. Lipkowitz referred to certain forms that had been filed on form WPB-732.

You made inquiry at that time as to whether either those forms or information from them would be available. You remember there was some discussion as to the possibility of having to use secondary evidence.

We have checked with the Bureau of the Census, which is the agency which receives those forms. They advised us that the forms have all been destroyed, that none of them are available at the present time. And they informed us no summaries prepared from them are available, either.

I just wanted to note that on the record so as to dispose of that point.

Following Mr. Lipkowitz's testimony, your Honor, there was some controversy between counsel as to what Mr. Lipkowitz had meant in a portion of his testimony where he referred to the fact that he had had probably no more than twenty of the 732 forms in his possession at the time of a certain meeting which he attended in the latter part of September and first of October 1942.

[fol. 2067] I wrote to Mr. Lipkowitz and asked him if he would explain what he had meant at that point. I have received a letter from him.

He states in the letter that he is going to be on vacation during this week and will not be back until April 13. I have read the letter to Mr. Rigney over the telephone. He indicated that he would probably be willing to stipulate either that the letter or the substance of it could be accepted in lieu

of Mr. Lipkowitz's testimony for clarification of that point.

Mr. Rigney: Your Honor this relates to testimony that Mr. Lipkowitz gave on his direct examination at page 1479 of the transcript, where, after some preliminary testimony with respect to form 732, he was then asked by your Honor:

> "You have testified that you had a number of them at this meeting?"

That was with reference to the form 732.

And he gave the answer as follows:

> "Yes. But the ones I had at the meeting were of mines which I considered would be affected by this order."

Your Honor then asked:

> "How many were they?"

He answered:

> [fols. 2068-2075] "I would say probably no more than twenty."

I am perfectly willing to stipulate with Mr. Barnes, based upon what Mr. Lipkowitz has written to him in this letter of March 24, 1953, that Mr. Lipkowitz did not mean by that testimony to convey the impression that, in his opinion, only twenty mines would be affected by the proposed closing order.

Mr. Barnes: But that he had no more than twenty forms with him?

Mr. Rigney: Yes.

Mr. Barnes: That is satisfactory to me, your Honor.

The Commissioner: Do other counsel have any observations?

Mr. Pittman: No objection, your Honor.

[fol. 2076] Mr. Rigney: Plaintiff offers in evidence Plaintiffs' Exhibit 336, for identification, being a memorandum of July 9, 1942, from Mr. Bernard C. Gavit, general counsel of the War Manpower Commission, to Mr. Reginald G. Conley, "Subject: Release of Employees from Gold Mining Industry."

I might say parenthetically that Mr. Conley was a mem-

ber of the staff of the general counsel of the War Manpower Commission, and I have spoken to him on the telephone within the last few days. He is now employed by [fol. 2077] the Federal Security Agency—I believe it is called—and I did not imagine it would be necessary to produce him here today.

I haven't spoken to Mr. Barnes about that heretofore, but I presume there is no objection on that score.

Mr. Barnes: I fail to see how this is proper rebuttal testimony, your Honor.

It seems to me that if it had any standing it would be part of the plaintiffs' case in chief rather than rebuttal.

Mr. Rigney: Mr. Barnes, in the government's case, your Honor, put great stress upon the fact that one of the primary purposes of the order L-208 was the saving of the critical materials.

Here is a memorandum of July 9, 1942, and I don't think that there is any document in evidence at an earlier date which shows the real beginning of the drive to adopt order L-208.

I don't think there is any earlier document than this, and here is a document of this date which makes no reference to critical materials at all, but says:

"General McSherry wishes to secure"——

Mr. Barnes: I object to counsel's reading it into the record, your Honor.

Mr. Rigney: The document speaks for itself.

[fol. 2078] But it is General McSherry's statement as to what he wants to do about closing the gold mining industry.

The Commissioner: It may be received.

(Said Document, marked "Plaintiffs' Exhibit No. 336," admitted in evidence and made a part of this record.)

The Commissioner: Are you going to put in any further document that followed up this?

Mr. Rigney: Our search did not disclose any reply, your Honor.

I called Mr. Conley and asked him if he would have any recollection of his reply, and he said he does not. He recalls the subject matter generally, but he has a very vague recollection of it.

Our search of Archives did not disclose any reply from Conley from Mr. Gavit to this memorandum.

Mr. Barnes: Mr. Conley was a subordinate of Mr. Gavit, on his staff?

Mr. Rigney: That is right.

With respect to Defendant's Exhibit 55, which was table 3, which was introduced through the Witness Nathan, our examination of that exhibit has indicated to us some errors. I think that because of that I should move to strike the exhibit.

In other words, the two extreme right-hand columns, one [fol. 2079] designated "Load" and the other designated "Placer" are incorrect in that they should be reversed. They have been transposed in error.

So that the column which is labeled "Load" really should have been labeled "Placer" and conversely.

And the last line of the chart, which reads, referring to electric energy, "generated by reporting companies," and then under this column which is here designated "Total," being the second column designated "Total," $48,172, which is presumably the total of the next two figures, that is an erroneous addition.

That should be $108,172.

So I move to strike the exhibit.

Mr. Barnes: Your Honor, there doesn't seem to be any proof of that. This is a matter that should have been handled on cross-examination.

Mr. Rigney: I submit, your Honor, that examination of a chart like this can't be done while the witness is testifying about it.

Mr. Barnes: Your Honor, comparing this table with volume 1 of the Mineral Industry Census of 1939, it does appear that the columns on load and placer have been reversed in Defendant's Exhibit 55.

I have not checked the revised total of those of the electric generating by the reporting companies, but it does appear [fol. 2080] on a visual inspection that the total of the gold mines shown here is in error.

But that is something that can easily be added up by anybody at any time.

It would be satisfactory to me to have the record merely show that these headings have been transposed on load and placer.

Mr. Rigney: Don't you think it would be better for you to substitute a corrected exhibit?

The Commissioner: What that would require, of course, would be to check each one of the exhibits.

Why don't you put that in for identification with that statement in there? That would take care of it.

Mr. Rigney: You mean put the other corrected chart in for identification?

The Commissioner: Yes.

Mr. Rigney: That will be Plaintiffs' Exhibit 337.

(Said document was marked Plaintiffs' Exhibit No. 337 for identification.)

Mr. Rigney: So that, as I understand it, Plaintiffs' Exhibit 337 is in evidence supplementing Defendant's Exhibit No. 55.

Mr. Barnes: It is marked for identification.

Mr. Rigney: Would we be permitted to cite it in the proposed findings unless it is in evidence, your Honor?

[fol. 2081] The Commissioner: I think you could.

You see, you could offer it in evidence, but that is going to require a check by the government again to see that it is absolutely accurate. If the figures are correct, excepting the one figure that you pointed out and then the transposition of "Load" and "Placer," the exhibit plus the exhibit for identification will complete the record.

Mr. Rigney: All right, sir.

I would next like to offer as Plaintiffs' Exhibit 338 a photostatic copy of pages 18 and 19 of the 1939 Minerals Census. These are the two pages of the census report from which Mr. Nathan prepared Defendant's Exhibit No. 53, which was his table 1.

I am merely offering this to have before your Honor the complete figures here and also because there was some error made in the preparation of Mr. Nathan's table 1, a mathematical error.

For example, in note 2 of his table 1, it states that——

The Commissioner: Can you dispose of this exhibit first before we get into that?

Mr. Rigney: Yes, sir.

Mr. Barnes: Your Honor, without going back to the record and reviewing it, I don't want to concede, in other words, that this is the source used by Mr. Nathan. But

[fol. 2082] assuming that it is, I have no objection to its receipt.

The Commissioner: It may be received.

Mr. Rigney: I have the census volume right here if you want to check it.

The Commissioner: That will be received as Plaintiffs' Exhibit 338.

(Said document, marked "Plaintiffs' Exhibit No. 338," admitted and made a part of this record.)

Mr. Rigney: Now may I state for the record the errors to which I have referred.

In note 2 of table 1, which is Defendant's Exhibit 53, it states that 637 preparation plants are operated in conjunction with the metallic ore industry.

The correct figure is 678, according to the Plaintiffs' Exhibit 338, which has just been received.

It appears that the compiler of Exhibit 53 subtracted the number of iron ore preparation plants from the total. I don't know why, but that seems to account for the difference.

Then it is pointed out in this Defendant's Exhibit 53 that the 1,180 gold mines are operated by 820 companies.

Instead of 820 companies, the figure should have been 1,124 companies. He just dropped a line in taking the total and instead of taking the total for all gold mines he took [fol. 2083] the total for the load mines only.

Those are the two principal corrections there.

Mr. Barnes: Are there some others that you don't consider principal, Mr. Rigney? Or was that just a figure of speech?

Mr. Rigney: I don't believe there are, Mr. Barnes.

But, like yourself, I don't want to make any brash concessions.

Now may this be marked Plaintiffs' Exhibit 339?

(Said document was marked for identification as Plaintiffs' Exhibit No. 339.)

Mr. Rigney: I offer in evidence now Plaintiffs' Exhibit 339, which is a table of mining machinery and equipment, which is taken from page 429 of the Census of Manufacturers for 1939.

Mr. Nathan's table 2, which I believe was Defendant's

Exhibit 54, reproduced a part of this page, one of the charts from it, which is designated table 3 here on this Exhibit 339.

I would like to offer the entire page chiefly for the definitions which appear at the top, at the extreme left.

I have a copy of the Census of Manufacturers here for 1939.

The Commissioner: Is there any objection?

Mr. Barnes: I was hesitating here only because I don't [fol. 2084] think it proves anything. But I have no objection to it.

The Commissioner: It may be received.

(Said document, "Plaintiffs' Exhibit No. 339," admitted and made a part of this record.)

The Commissioner: We will recess now until one-thirty p.m.

(Thereupon, at 11:15 o'clock a.m., a recess was taken, to reconvene at 1:30 o'clock p.m., same day.)

[fol. 2085] AFTERNOON SESSION

The hearing reconvened at 1:30 p. m., upon the expiration of the recess.

The Commissioner: Let us come to order.

Mr. Rigney: May this be marked as Exhibit No. 340 for identification?

(Said document was marked for identification as Plaintiffs' Exhibit No. 340)

Mr. Rigney: Plaintiffs now offer in evidence Exhibit 340 for identification, being the photostatic copy of page 98 and 99 from the Mineral Yearbook for 1943. We have that book here, Mr. Barnes, in case you wish to check it.

Mr. Barnes: What is the purpose of this offer?

Mr. Rigney: The exhibit starts out with the statement:

> "Gold continued to play an important part in the war for use in many types of instruments."

And so forth.

And the chart on page 99 gives figures on the net industrial consumption of gold in the United States during the period 1939 to 1943.

There was testimony from Mr. Nathan that the industrial uses of gold were infinitesimal during the war years, and [fol. 2086] in connection with such testimony we offer this exhibit.

It shows rather substantial industrial consumption of gold.

I think Mr. Nathan used that exact word, "Infinitesimal," as his description for the uses of gold.

Mr. Barnes: We have a problem here, your Honor, of comparability. It seems to me it may almost require some testimony with respect to this exhibit. The table counsel refers to, if you will note, is in dollars for gold rather than ounces or any other unit of measure that has been the standard in all the other gables.

The Commissioner: Of course, the price is the same for gold throughout the periods.

Mr. Barnes: We don't know whether the price used for monetary purposes is the price on which this was computed, or whether it is some other basis.

The Commissioner: That is the price?

Mr. Barnes: I don't know.

The Commissioner: Are you stating an objection?

Mr. Barnes: Yes, sir; I am. I am objecting on the ground that there is no testimony showing a conversion of this to ounces or any other measure of weight, which is the basis on which all other tables have been prepared.

The Commissioner: I am prepared to rule on that. But I have a question about the document. I don't under- [fol. 2087] stand the two columns on page 98. This relates only to silver.

Mr. Rigney: Yes, your Honor.

The Commissioner: It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 340," admitted and made a part of this record)

Mr. Rigney: Plaintiff now offers in evidence Exhibit 341 for identification, your Honor, which is a table showing the net industrial consumption shown of gold in the United States, 1941-1945, which is taken from page 106 of the Minerals Year Book for 1945.

We have the book here and offer it to Mr. Barnes for his perusal.

Mr. Barnes: Your Honor, I object to this on the ground, entirely aside from the question of the objection I made with the preceding exhibit, there is no definition on here whatsoever as to the meaning of the term "Net industrial consumption," which is used in the exhibit.

Mr. Rigney: All through the trial, your Honor, the testimony, it seems to me, of government witnesses was that gold was completely useless, worthless, and there is no sense, as far as the war effort was concerned, in having any gold.

We offer this for what it is worth showing a substantial [fol. 2088] industrial consumption of gold.

In connection with Mr. Barnes' objection, I have already talked to the people at the Bureau of Mines in an endeavor to obtain from them the definitions or breakdown of the categories that are included in these figures. They told me that they got the figures from the mint and that there are no such categories or breakdowns available.

So this exhibit is all that we are able to get on the subject.

The Commissioner: That is the unit of measurement? Is it tons, ounces, dollars?

Mr. Barnes: It is shown in dollars, your Honor, in the table from which this is copied:

I make a further objection, your Honor, on this basis:

In the preceding exhibit, which you admitted over my objection, Plaintiffs' Exhibit 340, plaintiff has reproduced the text that appears in the Minerals Yearbook. In this case they have eliminated the text apparently because the text in this case seemed to be less favorable to them.

I object to this on the ground of its incompleteness.

The Commissioner: Does this table appear in that volume in that form?

Mr. Rigney: Yes, your Honor.

The Commissioner: It will be received.

[fol. 2089] (Said document, marked "Plaintiffs' Exhibit No. 341", admitted and made a part of this record)

Mr. Rigney: I might say that the table in the book refers to silver, but we didn't reproduce that for obvious reasons.

Mr. Barnes: And I don't know whether the record shows it, but the book indicates this in terms of dollars.

Mr. Rigney: Yes.

May this be marked Plaintiffs' Exhibit 342 for identification.

(Said document was marked for identification as Plaintiffs' Exhibit No. 342.)

Mr. Rigney: I offer now, if your Honor please, Plaintiffs' Exhibit No. 342 for identification, being a photostatic copy of a chart appearing in the Federal Reserve Bulletin. I happen to have the issue for March 1953. This chart shows gold production outside the USSR from 1941 onward, by years, each year thereafter, including 1952. 1952 is also broken down by months.

We offer this in evidence.

Mr. Barnes: Your Honor, I see nothing in this which is in proper rebuttal of any testimony offered by the defendant in this case. There has been no testimony offered by the defendant relating to production of gold in places [fol. 2090] outside of the United States.

Figures with respect to production of gold in the United States are already amply in the record.

I object to this certainly to the extent that it shows production of gold in places other than the United States. It is the only thing we are concerned with and the only thing the case has been related to to date.

Mr. Rigney: I think, your Honor, it might be useful for the court to have it before it showing what was going on so far as gold was concerned not only in the United States, but in other countries during the years with which we are concerned.

Mr. Barnes: It opens up a whole new field of inquiry, your Honor. It may require the necessity of surrebuttal testimony.

We don't know what the situation was in any of these other countries.

The Commissioner: Certainly in this offer you are not relying upon any figure after 1945, are you?

Mr. Rigney: No, your Honor; that is correct.

The Commissioner: It may be received.

(Said document, marked "Plaintiffs' Exhibit No. 342," was admitted and made a part of this record)

Mr. Rigney: That is all that we have, your Honor, in behalf of Homestake.

[fol. 2091] There is just one other item which has been requested to offer on behalf of Idaho-Maryland.

The Commissioner: You are closed, so far as Homestake is concerned?

Mr. Rigney: Yes, your Honor.

May this be marked as Plaintiffs' Exhibit 343 for identification?

(Said document was marked Plaintiffs' Exhibit No. 343 for identification.)

Mr. Rigney: I have been requested, your Honor, by counsel for Idaho-Maryland, who are not able to be here today, to offer on their behalf Plaintiffs' Exhibit 343 for identification, which is a photostatic copy of page 15 of the Volume 1, United States Import and Export Statistics, for the calendar year 1945, prepared by the Bureau of the Census, Department of Commerce.

This is offered in connection with the allegation which is contained in Idaho-Maryland's amended petition, at page 47:

> "Mining machinery of an aggregate value in excess of three hundred million dollars was produced, manufactured, and exported from the United States to foreign countries during the years 1942 to 1945."

If your Honor will look under "Industrial Machinery", which is about the third principal line on the exhibit, and [fol. 2092] then follow that down to the line described as "Mining, Well and Pumping Machinery", your Honor will then see the years 1942, 1943, 1944, and 1945 are underlined.

I don't know whether it shows very well on that photostat, or not, but those are the figures in which Idaho-Maryland is interested and therefore for which the exhibit is offered.

Mr. Barnes: May I point out again, your Honor, a series of objections to that.

This is an allegation in the plaintiff's petition in which plaintiff offered no proof. The government has offered no proof on that subject whatsoever.

The exhibit is not properly offered at this time as part of the rebuttal case.

In any event, the classification to which they call attention is "Mining, Well and Pumping Machinery." We have

no testimony as to what part of it is mining machinery and what part of it comprises other items.

The Commissioner: That is true. The objection is valid, particularly the last part of it.

As a matter of fact, I felt that, in view of the fact that time was not extended, that there was not an extended period for preparaion, I would receive it in evidence even though it might properly be offered as proof of the case in chief.

[fol. 2093] In other words, I would be liberal in regard to whether the evidence should be properly rebuttal evidence, or not.

But here I don't see that the figure can be considered at all because it is a composite figure that we don't know how much is related to mining and how much to well and how much to pumping.

I am going to sustain the objection.

You can leave it in for identification.

Mr. Rigney: Very well, your Honor.

That is all we have, your Honor.

The Commissioner: Then proof is closed in the Idaho-Maryland case and Central Eureka?

Mr. Rigney: Yes.

The Commissioner: Then proof is closed on all, with the exception of Bald Mountain and Ermont.

Mr. Barnes: That raises a question. I understood counsel was going to file motions to dismiss some of the Bald Mountain plaintiffs. No such motions have been filed to date.

That does have to be addressed to the court, as I understand it.

The Commissioner: Yes.

Mr. McGrail: Yes, I will do that.

Since I have been released from these hearings I have been engaged in other work up in New York on an arbi-
[fol. 2094] tration. I will get back here Friday night. So that probably tomorrow I will be able to prepare them and file them.

I think separate ones should be filed in each case, although they have the same docket number.

Mr. Barnes: Your Honor, in view of your ruling admitting Plaintiffs' Exhibit 342, and in view of your state-

ment that you had intended to be liberal with respect to the scope of rebuttal proof, I suppose you will now accord the defendant a reasonable opportunity to investigate the information which has been injected into this case by virtue of Plaintiffs' Exhibit 342 to determine whether or not it desires to offer any surrebuttal with respect to the situation which has not been previously in the case, relating to production of gold in foreign countries.

The Commissioner: What do you have in mind with respect to an investigation?

Mr. Barnes: We have found out what the circumstances were in the countries listed on this exhibit, your Honor; whether there is any degree of comparability.

It has been offered without limitation or qualification whatsoever as establishing the situation with respect to the production of gold in South Africa, Rhodesia, West Africa, Belgian Congo, Canada, Mexico, Colombia, Chile, Nicaragua, Australia, and India.

If that has any relevance and materiality in the case, [fol. 2095] we are entitled to an opportunity to investigate what the circumstances were in those countries.

The Commissioner: You knew, did you not, that the plaintiffs have maintained throughout these hearings that the War Production Board permitted the export of mining equipment despite the issuance of L-208, to these countries?

Mr. Barnes: You are right.

The situation in that connection is this: There are allegations in some, although not all, petitions, to that effect. There was no proof offered as part of the case in chief.

It was my conclusion from that—and I think it was a reasonable conclusion—that plaintiff has therefore withdrawn that allegation of its case and did not intend to offer any proof with respect to it.

Mr. Rigney: Mr. Barnes, I don't think that is an accurate statement, that there was no proof offered during the plaintiffs' case with respect to that, because I think in the documents, in the exhibits which were offered, in several of them there is proof to some extent on that phase of the case.

The Commissioner: What can you point to?

Mr. Rigney: Your Honor, I don't have at my disposal

the precise number of the exhibits, but specifically, Plaintiffs' Exhibit 1, Report No. 9, does make reference to [fol. 2096] that very fact of the shipment of that machinery abroad during this period, and I know that there are on some of the documents that went in.

So that it is not an accurate statement to say that no proof was offered of it on the plaintiffs' case. There was proof offered, and there is evidence in plaintiffs' exhibit, Exhibit 1, on the point, Report No. 9.

The Commissioner: Of course, we have a lot of records in this case. I won't attempt to remember the contents of all these documents.

Mr. Rigney: Your Honor, I thought I might be able to pick it up rather quickly, in the Report No. 9, but I haven't been able to turn to it.

The Commissioner: I seem to remember——

Mr. Barnes: May I point out in that connection, your Honor, with respect to Plaintiff's Exhibit No. 1, that although, as Mr. Rigney indicates, looking at the sixty-page book, the first fifty-two pages of it are devoted to the historical events leading up to the issuance of the order L-208.

All he has to look at are the last eight pages, which are under the "Administration of Results of Order L-208."

I have just reviewed those eight pages and I find nothing in there indicates that there has been any exportation of mining machinery to these countries involved.

[fol. 2097] I might point out in that instance, your Honor, that, in any event, the situation we are faced with is this:

Regardless of what the plaintiff may have proved as part of his case in chief, the defendant offered no testimony whatsoever with respect to either the exportation of mining machinery to the other countries, or, on the issue of the production of gold in countries other than the United States.

It seems to me that we are faced very definitely with a situation where this exhibit, 342, is not proper rebuttal testimony.

I would like to renew my objection and make a motion to strike.

The Commissioner: The motion is overruled.

Mr. Barnes: In that case, I have no alternative but to

ask for an opportunity, your Honor, to make an investigation of this point.

Mr. Rigney: I seem to recall that plaintiff offered in evidence a letter of Donald Nelson to the Economic Defense Board, as I believe it was then called, later the Board of Economic Warfare, which was answered by what I believe is Plaintiffs' Exhibit 12 in evidence, letter of December 18, 1941, from Mr. Milo Perkins, answering certain questions which were posed in Mr. Donald Nelson's letter of December 3 concerning shipments of mining machinery abroad.

Then on the defendant's case, if I recall correctly, the [fol. 2098] government offered three exhibits which had been marked for identification on the pretrial, which were the responses of the Secretary of the Treasury and the Federal Reserve Board and the Department of State to this same letter of December 3 from Mr. Donald Nelson, bearing on this question of shipments of mining machinery to foreign countries.

The Commissioner: I seem to recall evidence contained in the documents that were admitted at pretrial bearing upon this point. Which ones they were, I do not remember.

I don't think that the defendant is entitled to additional time to study whether or not they are going to have any rebuttal.

Mr. Barnes: Your Honor, strangely enough, if we had any rebuttal, we would limit it to Plaintiffs' Exhibit 342.

As I see it, whether plaintiff proved any offer of proof on this point, or not, the defendant did not. And it does not seem to me this is properly admissible at this time to bolster its case in chief.

The Commissioner: Of course, you have urged that point twice, and I have overruled it.

Do you have anything now?

Mr. Barnes: I have a request, your Honor, for an opportunity to examine the facts underlying Plaintiffs' Exhibit 342, to determine whether we have any surrebuttal proof to offer.

[fol. 2099] The Commissioner: Yes, I know you made that request. I am now asking you if you have any other matters to present.

Mr. Barnes: The only other matter I have to present, your Honor, is this: I would like for the record to show that the minerals yearbook for the year 1945, from which plaintiff took the table that appears as Plaintiffs' Exhibit 341, contains the following preparatory note before the gable, under the heading "Gold.":

> "The arts require a much larger quantity of gold than does industry, but its corrosion resistant and other properties have resulted in some industrial demands. Consumption in the arts increased rapidly during the war. A high war-stimulated marriage rate and widespread prosperity have increased the sale of jewelry, watches and many luxury items made from gold."

The Commissioner: Is there anything further?

Mr. Barnes: Aside from our surrebuttal of Plaintiffs' Exhibit 342, that is all the defendant has.

PROOF IS CLOSED

The Commissioner: Then proof is closed with respect to all cases, excepting Ermont and Bald Mountain.

In the event that the defendant should find——

I am doing that because I want to get started on the submission of proposed findings so that we can work toward getting this case to the court as promptly as possible.

[fols. 2100-2138] If the defendant, while the plaintiffs are submitting their proposed findings, conducts an investigation and determines that it would like to have the evidence reopened, to put in evidence on this point, then that matter will be considered by the Commissioner.

And if the evidence is documentary as distinguished from testimony, then it may be possible to stipulate further exhibits into evidence in meeting what you feel is a situation that puts you at a disadvantage.

If there is nothing further the hearing is adjourned.

(Thereupon, at 2:15 o'clock p.m., the hearing was adjourned).

[fol. 2139] PLAINTIFF'S EXHIBIT 1

Copy No. 81

THE CLOSING OF THE GOLD MINES

(August 1941 to March 1944)

June 1, 1944

Report No. 9

Policy Analysis and Records Branch Office of the Executive Secretary War Production Board

[fol. 2140] WAR PRODUCTION BOARD
Washington, D. C.

May 31, 1944.

Memorandum

To: Mr. G. Lyle Belsley,
Executive Secretary.

From: James W. Fesler, Chief,
Policy Analysis and Records Branch,
Office of the Executive Secretary.

The attached study, *The Closing of the Gold Mines, 1941 to 1944*, records the history of one of many attempts by the War Production Board to meet labor, material, and equipment shortages by curtailing production of commodities adjudged to be low on the ladder of essentiality. Many interesting policy and administrative problems are raised by the report: the monetary importance of continued gold production; equal sacrifice among allies; coordination of manpower controls and production controls, though each is assigned to a separate agency; validity of by-product production as an excuse for continuation of production of an unneeded commodity; the relation of "unusual hardship" appeals cases to the effectiveness of promulgated policies of the Board; the participation of labor production officials in major policy decisions of the War Production Board; the administration of industry-regulating orders by Board officials who lack full sympathy with the policies expressed by the orders; and the role of the War Depart-

ment in pressing for prohibition of "non-essential" production.

A preliminary draft of this report was prepared on April 14, 1944, and circulated among officials who have actively participated in the formulation and administration of Limitation Order L-208. The comments and suggestions of these officials have been taken into account in preparation of the study in its present form.

All reports of the Policy Analysis and Records Branch are the result of collaboration. The present report was prepared by Miss Marycleire McCauley under the general supervision of Mr. Charles M. Wiltse.

[fol. 2141] I. Introduction

On October 8, 1942, the War Production Board, by Limitation Order L-208, ordered that all gold mining operations in the United States should cease within sixty days. The order defined a non-essential (gold) mine as "any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P-56". The primary reasons for this action were declared to be conservation of critical materials used in such mines and the release of labor and equipment to other nonferrous mines whose products were more essential to the war effort.

Issuance of this order climaxed a long period of storm and conflict in the War Production Board on the problem of most effectively diverting the equipment and labor resources of the admittedly non-essential gold mining industry to areas and industries whose products were vital to the war effort. Controversy over the gold mine closing order was not confined to one segment of the Board. Rather, there were a series of conflicts, from the top to the bottom levels of authority. At top-side, it was a question of policy, a disagreement between civilian and military opinions, between the "hair shirt" and "minimum sacrifice" schools of thought, on the depth to which civilian production, adversely affecting military and other essential needs, should be curtailed. Here the question of closing the gold mines was not of primary importance *per se*. Its importance lay

in the fact that it was a symbol, a more convenient and less easily defensible basis than other nonessential industries, or occupations, such as vacation resorts or professional flower-growers, on which the whole policy question could be focused. The fact that the gold mines were ultimately closed represented a definite and important victory for the "hair shirt", or military point of view.

At lower levels of authority, while the policy question bore some weight, specific controversies arose over methodology of diverting the resources of the industry: (a) whether gold mining should be curtailed, or stopped completely; (b) what criteria should be used to determine "essential" (from the stand-point of by-product nonferrous or fluxing ores) and "non-essential" gold mining; (c) whether the loss of by-product nonferrous metals entailed by stoppage of gold mining operations would be compensated by transfer of labor to other nonferrous metal mines; and (d) whether any labor would, or could, be transferred by stopping gold production.

[fol. 2142] Conflicting personalities were an important factor underlying the whole story. So too was the fact that the War Production Board mining authorities, viewing mine output in the light of essentiality to the war effort, used different criteria in determining mine classification than the generally accepted Bureau of Mines classification.

At the time of the present writing, the gold mines of the United States and its territorial possessions have been closed for some seventeen months—a period sufficiently long to permit balancing the results achieved by the order against the economic casualties incurred. It is the purpose of this report to attempt such analysis; to trace the evolution of Order L-208; to enumerate the benefits anticipated under the order, and to evaluate the effects of the closing of the gold mines upon the production of baser nonferrous metals and upon the economy of the mining communities affected by the order.

However, because gold plays a dual role, being at the same time a monetary standard and a commodity, produced, sold, and bought in the same manner as other commodities, analysis of the effects of the closing of the gold mines, with all attendant confusion, cannot be simply a resume of the stepwise processes by which the resources of the gold min-

ing industry were diverted to other base metal industries. Rather, broad political and economic factors must be considered, as well as repercussions upon the whole strategy of economic warfare of an action ostensibly affecting only a segment of the domestic economy. The reverence in which gold has been traditionally regarded over the greater part of the world is important to the background of the whole problem of closing the gold mines. The monetary role of gold is not particularly important from the domestic standpoint. Nevertheless, the collateral effects of a cessation of domestic gold production upon the international finance mechanisms; the delicate balancing of Allied requirements for gold mining machinery against domestic requirements; and the protests of domestic interests against a policy that on the surface gave tacit approval to continuance of foreign gold mining at the expense of the domestic industry, must all be borne in mind.

[fol. 2143] II. Early War Policies on Gold Mining

The competition between the gold mining industry and the baser metal industries in the machinery and equipment markets came to the attention of the Office of Production Management in the early autumn of 1941 and resulted in the exclusion of placer gold mines from priority ratings under Preference Rating Order P-56.

Necessity for granting priority relief to mining machinery manufacturers was recognized as early as May 1941. As the summer advanced, requirements for strategic and critical metals and for the machinery to produce these metals began to outdistance productive capacity. Shortages of both raw materials and facilities threatened to hold production under the level required to supply even the planned two million man army of the United States, much less the imperative needs of the Allies. Germany had invaded Russia in June; Japan moved into Indo-China in July. England was nearing the end of her own resources, and lend-lease material was desperately needed to stem the tide of Axis aggression.

First Priority Control on Mining Machinery; Order P-23.—By July, OPM realized that if metal production was to be expanded, some means of ensuring mining machinery deliveries had to be developed. With the thought in mind

of promoting production of such machinery, on July 29, 1941, OPM issued Preference Rating Order P-23, which assigned an A-3 rating for deliveries of materials needed in the production of mining machinery. The order was selective, and applied only to a special list of qualified mining machinery manufacturers. However, because of the similarity of most metal mining operations in underground drilling and blasting, in loading and transport, crushing and elevation of ores, the same concerns that supplied the coal and base metal mines with drills, explosives, hoists, cages, and screens, also supplied the gold mines. It was estimated that machinery for gold mines had been supplied by at least ten of the manufacturers permitted to use the A-3 preference rating under Order P-23. The order was intended merely as a temporary expedient, and was scheduled to expire on November 30, 1941. After a short period of administration of the order, it was discovered that an extremely small percentage of new mining equipment went into gold mines; but the use in gold mines of maintenance and repair equipment was considerably larger.

Exclusion of Gold Placer Mines from Priority Ratings for Maintenance and Repair Equipment: Order P-56.—By September, the necessity for providing for maintenance and repair equipment, as well as production of new equipment, for the mines, was generally admitted, and on September 17, Preference Rating Order P-56 was issued. Under this order, each mine whose operations were "important from the standpoint of defense or essential civilian needs" [fol. 2144] was granted a serial number, and could then apply for a priority rating under the order. A preference rating of A-1-a was assigned to deliveries of repair material to a mine in the event of an actual breakdown, to minimize the delay in resumption of production. Other deliveries of essential material and supplies to a mine were given an A-3 rating, while mine supplies and repair parts in general were assigned on A-8 rating. Order P-56 covered approximately 15,000 mines and was intended to facilitate an uninterrupted flow of mine products essential to the defense effort.

Gold placer mines were not granted serial numbers, and were therefore shut off from the priority benefits of Order P-56.

The reason for this exclusion, according to Wilbur A. Nelson, then Priorities Specialist and Administrator of Order P-56, was "that we felt that we must start restricting mining activities where they were not essential to the production of materials needed in a defense effort."[1] A further reason for exclusion of the placer gold mines was that placer operations could be (and often had been, seasonally) discontinued without deterioration of equipment.[2] It was still possible for such non-serialized placer mines to apply for an A-10 rating under the general Preference Rating Order P-22. In special cases, a placer mine operator was permitted to apply for a specific item of equipment on a PD-1 form, "which we will expedite as promptly as possible, provided he is not asking for an unreasonable amount of material. In other words, we wish to keep the mines going on a restricted basis and not to dislocate any more labor than is necessary,"[3] Wilbur Nelson explained.

There were immediate allegations of discrimination in the exclusion of gold placer mines from ratings under Order P-56. "United States Senators from several Western states and the Governor of one state have come to Washington to try to have the order changed", Nelson reported. However, the most vociferous protests came from Alaska, where placer gold mining was a major industry. Out of a total 7,891 gold and silver producing mines in the United States and Alaska, in 1941, 3,349 were placer operations. In Alaska alone, out of a total of 855 gold and silver producing mines, 799 were placer operations.[4]

Gold placer mining, in contrast to gold lode mining, which is an underground working of auriferous quartz veins in hard rock, consists in the derivation of gold from gravels or [fol. 2145] other stream-borne materials that have been displaced or carried away from original ore bodies. The principal type of modern placer operations consists in

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[1] Wilbur A. Nelson, "Address Before Training Group of the Priorities Field Service", November 10, 1941.

[2] "Status of Gold Mining", November 18, 1941 (SPAB Document 12d).

[3] Wilbur A. Nelson, "Address Before Training Group of the Priorities Field Service," November 10, 1941.

[4] U. S. Bureau of Mines, *Minerals Yearbook*, 1941, p. 67.

the handling of these gravels by connected-bucket floating dredges. Other methods of placer mining include operation of dragline and power-shoved excavators in connection with dry-land and floating amalgamating and sluicing plants, and such older methods as hand washing, hydraulicking, drift mining (in frozen ground or ancient buried river channels), sluicing, and rocking. Enumeration of placer mines is generally more difficult and less accurate than that of lode mines, because many of the placers are sporadically worked and individually small operations, some employing a single operator on a part-time basis. Thus, while the main reason given for the omission of the gold placer mines from Order P-56 was that placer operations could be discontinued without deterioration of equipment, the virtual cutting off of so large a proportion of Alaska's gold mining industry from obtaining maintenance and repair equipment threatened a major economic catastrophe in that territory. Not only would it seriously affect Alaskan employment, but it would also result in a considerable reduction in the territorial revenue, since in Alaska there was a 3 percent gross production tax on the precious metals, while other mining operations paid only a net income tax.

With regard to foreign gold mines, Wilbur Nelson, using the discretionary authority permitted under P-56, "decided not to issue serial numbers to any foreign gold mines"[5] although such foreign mines were allowed to apply for maintenance and repair parts under the general

[5] "Status of Gold Mining", November 18, 1941 (SPAB Document 12d). On September 22, 1941, D. M. Nelson, Director of Priorities, delegated authority to act for him in the issuance of mine serial numbers. "Preference Rating Order P-56 provides in Paragraph B for the issuance by the Office of Production Management of mine serial numbers to approved mines. I hereby authorize you from and after the date of this memorandum and until this authority is revoked to act for me in the issuance of mine serial numbers to mines in the United States of America, its territories and possessions." Memorandum, Donald M. Nelson, Director of Priorities, to Wilbur A. Nelson, Administrator of Mine Priorities, September 22, 1941. This

A-8 rating that applied to domestic mines. This placed Canada and South Africa, two of the largest gold-producing countries in the world, in a position similar to that of the Alaskan placer industry, and coupled with the fact that shipments of new gold mining equipment to Alaska [fol. 2146] and to the above mentioned countries were scheduled to expire with Order P-23 on November 30, resulted in strong protests from these interests, and raised questions on over-all international policy. In three specific cases, the Policy Committee of the Economic Defense Board protested refusal of mining machinery to foreign countries on the grounds that "political and good neighbor considerations" were important.

Development of Over-All Policy on Gold Mining Equipment.—The status of Canadian gold-mining, under the United States' restrictions was brought before the Joint Economic Committees of the United States and Canada, and after a series of discussions, these committees resolved:

> "(a) Whereas, one of the purposes of the Hyde Park Agreement was to remove the problem of exchange as a barrier to the combined defense effort of Canada and the United States, and
>
> "(b) Whereas, the Hyde Park Agreement is having this effect to a large degree; but
>
> "(c) Whereas, the current production and refining of gold in Canada remain an important means to obtain dollar exchange which is necessary to pay for a large volume of needed war supplies from the United States;
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> Therefore, the Joint Economic Committees recommend that: Although in the allocation of scarce supplies the gold mining and refining industry should in general be treated as a non-defense industry, wherever priorities or allocations would, through curtaining gold production, diminish the supply of exchange for vital

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memorandum was actually written late in October but was mödated to the time when Wilbur Nelson began exercising the delegated authority on verbal instructions from the Director of Priorities. Wilbur A. Nelson, in an interview with the writer, April 21, 1944.

imports, this prospective deficit should be prevented:

(1) By increasing the purchase of defense articles or by other methods which will maintain the exchange position in the spirit of the Hyde Park Agreement; or

(2) By such particular modification of the system of priorities and allocations as will permit the continuance of gold production to prevent the deterioration of the exchange position." [6]

[fol. 2147] It was now decided within OPM, not to continue Order P-23 after its November 30 expiration, but to incorporate certain of its provisions in Order P-56. This would, of course, prohibit gold placer mines from obtaining new equipment, as well as maintenance and repair equipment, since under the proposed amendments to Order P-56 the Director of Priorities could at his discretion forbid the use of A-ratings for manufacture of any gold-mining machinery. A supplementary order, P-56-a, to replace P-23 was prepared, with new serial numbers to replace those that had been listed under Order P-23, but as it was clear that this order could not be issued by November 30, the expiration date of Order P-23 was advanced to December 31, 1941.

Meanwhile, the policy questions involved in the matter were under active consideration. The Clearance Committee asked Donald M. Nelson for a "policy determination, perhaps by SPAB, giving preference to copper, iron ore and coal mining as against gold mining." [7] On November 18, a document of the Supply, Priorities and Allocations Board declared that "A general announcement of policy toward gold mining is needed. Otherwise, specific administrative actions will be questioned by the mines as unfairly discriminatory. This is particularly necessary if the purchase of new machinery for gold production is to be

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[6] Resolution of the Joint Economic Committees of Canada and the United States, W. A. Mackintosh, Canadian Chairman and Alvin H. Hansen, U. S. Chairman, November 8, 1941 (SPAB Document 141).

[7] Memorandum, Stanley Phraner, Clearance Committee, to Donald M. Nelson, November 23, 1941.

virtually prohibited after November 30."[8] Several alternative methods of handling the problem were suggested:

"(a) Continuation of the right of lode gold mines to use the A-8 rating under Order P-56 could be made entirely discretionary with the Director of Priorities. The guiding principle might be established by SPAB of requiring their purchases to be held to the bare minimum necessary to prevent disastrous shut-downs. SPAB might also wish to establish a separate test of eligibility in terms of the amount of other more useful metals that are produced jointly with gold. For example, if the selling value of the essential metals is 25 percent and that of gold produced 75 percent, the mine might be permitted to buy machinery and supplies on the same basis as other essential metal producers. Or the minimum ration might be set at 40 percent in the value of other metals, and 60 percent gold. The intent would be to avoid any discouragement to production of the essential metals.

[fol. 2148] "(b) An alternative, and more drastic, policy would be to eliminate all domestic gold mines, whether lode or placer, from Order P-56 and also from the general repair Order, P-22. Gold mine operators would thus be forced to buy repairs and supplies without A-ratings, but could apply for special help on form PD-1. It is quite possible that only very gradual declines in output and employment would result, because of managerial ingenuity. Here again, exceptions could be made for mines producing other metals.

"(c) In lieu of any blanket privileges to foreign mine operators, all foreign mine needs could be reviewed continuously with the Economic Defense Board, so that considerations of inter-American and British American policy could be consistently applied to decisions authorizing or forbidding shipments of gold-mining machinery and repair parts. No serial numbers authorizing several purchases would be issued, but

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[8] "Status of Gold Mining", November 18, 1941 (SPAB Document 12d).

applications for individual shipments would be entertained. Here again, the specific quantities of burdened material (which are not large) are not the issue, but the political considerations involved and the question of treating non-essential industries consistently are paramount. In the special case of Canada, the Joint Economic Committees could secure all relevant statistical data.

"(d) Some special basis of treatment might be worked out for Alaska, where gold-mining assumes the proportions of a major industry. To cut off suddenly all shipments of new equipment needed for replacement, and to make it unduly difficult to secure supplies, might have several effects upon employment in Alaska, and upon the revenues of the Territory. The Labor Division might be asked for a formal opinion on the probable impact upon employment in the Territory of . . . suggested restrictions. The Territorial Government could also be asked for a formal report on the importance of gold-mining, with all relevant statistical data."

As a necessary preliminary to any over-all policy declaration, it was believed that the Treasury Department should be asked for "an immediate informal opinion on the significance of new gold production to monetary policy."

[fol. 2149] On November 25, the Economic Defense Board stated that because the United States was allowing "$35.00 to accrue to Canada's credit for every ounce [of gold] she delivers", Canada was "finding it . . . advantageous to apply precious labor, capital, supplies and power to gold mining, even giving to this industry substantial aid in the form of (a) Tax concessions, both under the corporation income tax and under the excess profits tax, and (b) Preferred priority ratings." Further, this Board suggested that "the question of exports of machinery for Canadian gold mines presents an opportunity to reduce now a problem raised by the very grave weaknesses of United States gold purchase policy . . . . The Canadians have shown reluctance to reduce substantially their production of gold while United States gold producers are

still going full blast. The Canadians point out, quite accurately, that there is no economic or financial reason whatever for the continuation of United States gold production, since there is no foreign exchange problem within this country . . . . We can assist Canada's war effort by declining to ship machinery for gold mines and at the same time making a financial arrangement which recognizes Canada's grave inability to pay now in useful goods and services."[9]

The preceding day, at a meeting of the Financial Division of the State Department, the consensus of opinion of representatives from the Treasury Department, the Federal Reserve System, and the Office of Production Management, was reported to be:

> "(1) That preference ratings for gold mining equipment should be granted only after careful scrutiny with a view to maintaining, at the very most, existing rates of output, and to refusing equipment for any expansion of output, subject to exceptions in cases where extraordinary hardship might result, as in the case of isolated communities having no alternative forms of employment;
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> "(2) Preference ratings for exports of gold mining equipment should be made to depend on a showing that the maintenance of the present level of gold production is necessary.
>
> (a) To supply dollars for an otherwise deficit dollar position in the balance of payments of the country (or as in the case of South Africa) for the dollar position of the sterling area, or
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> [fol. 2150] (b) For special political reasons;
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> (c) To give effect to the foregoing conclusions, no general priority ratings for gold mining equipment, including repair and maintenance parts, should be granted, but individual consideration should be given to each application on its merits, unless adequate

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[9] Ralph Turner, C. H. Burgess, Warren S. Hunsberger, Economic Defense Board, "Canada's Gold Mining Industry," November 25, 1941.

compliance investigations can be made (particularly in Canada) as is done in the United States." [10]

On December 2, the Supply, Priorities and Allocations Board directed Donald M. Nelson to obtain the official opinions of the State Department, Treasury Department, Federal Reserve Board, and Board of Economic Warfare on "supplying gold mining equipment abroad and on other possibilities of providing dollars to offset probable dollar deficit positions." [11] Nelson carried out these instructions in a letter addressed to the foregoing agencies and departments on the following day, and on December 23 reported the summary of the opinions received as follows:

"(1) In a war economy labor, materials and machinery applied to gold production are largely wasted. Moreover, dollars made available through Lend Lease, R. F. C. and stabilization loans, etc., have made gold unnecessary as a provider of dollar exchange. Therefore:

(a) Nothing should be allowed for expansion, although minimum amounts for maintenance and repair should to some extent be provided.

(b) Only high-grade ores or those yielding high percentages of other minerals useful in the war effort should be mined.

(c) Labor, materials and machinery should be converted to more vital production except where extreme political or economic hardship would result.

[fol. 2151] "(2) In-the-ground purchase of gold is neither necessary nor desirable. It is an experiment which raises serious complications and not only fails to solve the present problem but also presents a new one for the post war period.

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[10] Minutes, Financial Division, State Department, Meeting November 24, 1941 (SPAB Document 14g, December 2, 1941). Participants in this meeting were: *Treasury Department*, Frank V. Coe; *Federal Reserve System*, Walter R. Gardner, Charles P. Kindleberger; *OPM*, L. A. Morrison, Dennis E. Pickens, Shaw Livermore.

[11] Minutes, Supply, Priorities and Allocations Board Meeting XIV, December 2, 1941.

"(3) Agreements should be entered into with gold producing countries to the end that they do not divert labor, materials and machinery from more essential uses to gold production." [12]

While all of the agencies were unanimously of the opinion that "gold mining is hardly justified except where special conditions surrounding a particular case make a maintenance or increase in gold production desirable", and that "domestic gold production in wartime serves no military purpose but does consume labor and materials that have usefulness in military production, particularly in the mining of scarce metals",[13] the Board of Economic Warfare went beyond this. Milo Perkins reported that "in dealing solely with the question of gold mining equipment, there is a danger of losing an opportunity both to solve the longer-term aspects of the gold problem and to maximize the joint war effort. Such an opportunity exists now. The United States can and should use the power that it derives from being practically the sole buyer of the yellow metal in order to initiate a program of a gradual reduction in gold production. Such a program would contribute to maximization of the joint war effort and, at the same time, would facilitate a solution of the post-war gold problem. . . . It is essential . . . that a reduction in gold mining should be envisaged for the post-war period." [14]

On December 23, the Supply, Priorities and Allocations Board adopted the spirit of the recommendations. "It was the judgment of the Board that in view of the military program only limited priorities and export licenses should

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[12] Memorandum, Donald M. Nelson to the Supply, Priorities and Allocations Board, December 23, 1941 (SPAB Document 19b).

[13] Letter, Henry Morgenthau Jr., Secretary of the Treasury, to Donald M. Nelson, December 15, 1941. Letters from the State Department; the Board of Governors of the Federal Reserve System and the Board of Economic Warfare concurred in these conclusions (SPAB Document 19b).

[14] Letter, Milo Perkins, Executive Director, Economic Defense Board, to Donald M. Nelson, December 19, 1941 (SPAB Document 19b).

be granted to the gold mining industry", and it was agreed "that in granting priorities and export licenses for gold mining machinery, materials should not be allowed for expansion of production although minimum amounts for maintenance and repair may be provided."[15]

[fol. 2152] On December 31, 1941, Order P-56-a was issued, replacing Order P-23. A preference rating of A-3 was assigned to all types of mining machinery and equipment. Serial numbers which had been issued under P-23 were to be replaced by new serial numbers upon application of the manufacturer, although this was optional; the manufacturer could operate simply by extending the individual ratings he received from mines under Order P-56. The new serial numbers for mining equipment were based upon the use for which such equipment was intended: lead mining, copper mining, coal mining, etc. This, in effect, allowed the Director of Priorities discretionary authority in the assignment of the serial numbers, and in the actual assignment of such numbers, gold mining equipment came in last. On December 18, the general Preference Rating Order P-22 was replaced by Order P-100, which liberalized the provisions of the old P-22 so far as essential users were concerned, but by the same token tended to leave gold mining at the tag end.

Impact of Pearl Harbor Upon Mining Equipment Requirements.—After Pearl Harbor, the whole metals and mining machinery problem became acute. In the first few months of 1942 the war with Japan was not going well; sources of large supplies of alloying materials, especially chrome and manganese, were cut off by enemy action, while steel requirements skyrocketed. The metals and fabricating equipment necessary to produce mining machinery were at a premium, and used mining equipment was pitifully short of requirements. At the same time, it was necessary to continue to expand domestic copper, lead, and zinc production not only to replace the supply cut off by enemy action, but to meet the enormously enlarged Army requirements. On January 15, 1942, the Supply, Priorities and Allocation Board amended its previous policy of expedit-

[15] Minutes, Supply, Priorities and Allocations Board, Meeting XIX, December 23, 1941.

ing "expansion of copper production to the maximum that can be obtained by the middle of 1943 . . . to urge expansion within the next few months to the maximum that can be obtained by the middle of 1944." [16] The same policy of all-out expansion was followed with the other critical metals and minerals. Expansion necessarily meant the opening of new mining enterprises, and maximization of existing mining activities, both of which required additional mining equipment when the supply was already inadequate for existing operations. E. R. Rott, Deputy Administrator of Order L-208 states that: "December 1941 and January 1942 were marked by activity in collecting information as to requirements of gold mines for continued operations. Restriction on priority assistance was increased." [17]

[fol. 2153] In a letter to the Chairman of the War Production Board, writen on January 20, 1942, Wilbur Nelson, Administrator of the Mining Branch, asked that the branch be given "clear-cut authority . . . to make final decisions" in the sale of mining machinery for use both in domestic and foreign mines.

> "The point is that no single agency will take responsibility in making decisions on policy, particularly with reference to foreign mines outside of North and South America (e.g., South Africa). I have made decisions myself, but without clear-cut authority. In each case such decisions have restricted or prohibited the shipping of items to gold mines. The Mining Branch should have such authority to make final decisions. We must have this power if we are to divert the limited supply of mining machinery into the most important channels, both domestic and foreign. There are other types of mining besides gold which may also have to be given harsh treatment in future months." [18]

In February 1942, the Office of Lend-Lease Administration joined in the general plea for prohibiting essential

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[16] *Ibid.*, Meeting XXIII, January 15, 1942.

[17] Edward H. Rott, "Report on Gold Mine Order L-208, Its Effect and Accomplishments", May 24, 1943.

[18] Memorandum, Wilbur A. Nelson to Donald M. Nelson, January 20, 1942.

equipment and material to gold mining operations. While E. R. Stettinius, Jr.: Administrator of the Office of Lend-Lease Administration was primarily concerned with the supply of such items to foreign countries, he stressed the non-essential nature of gold-mining generally:

"Originally the British asked us for 100,000 tons of steel to increase their South African gold production. Naturally, in view of the steel and shipping shortage here, we turned them down. However, one of the most acute shortages in this country is nitroglycerin which is used extensively in gold mining. In addition, gold mining requires large amounts of hardened steel and the use of a considerable body of capable mining labor which might well be used in other fields.

"In order to divert this extremely valuable stockpile of men and material *we would like to suggest that both nitro-glycerin and hardened steel be denied the gold mining companies for the duration of the war. If we could set this example in the United States it might be possible to speed up the whole British war effort by getting the British to concentrate on the production of war materials rather than on the production of dollars* as exemplified by their request for 100,000 tons of steel for gold mining in South Africa.

[fol. 2154] "In order to allay their fears of a shortage of dollars for exchange it might be possible to make them a loan based on future gold production, or better still, to buy their normal production for the next two years in the ground, said production to be delivered to us when the war is over. *The important thing is to put to war uses the men and labor supply that are now being consumed in gold mining.*" [19]

Nelson replied that:

". . . The decision on the large volume of requests for material and equipment on the part of South African gold mine operators will have important economic and political implications. Under these circumstances and in view of several communications received from General Smuts in the last few months, the Board of

[19] Letter, E.R. Stettinius, Jr., to Donald M. Nelson, February 11, 1942. (Underlining added).

Economic Warfare is now in the process of preparing an agenda of specific subjects to be investigated by a commission which it is contemplated will be sent to South Africa and which General Smuts has indicated would be most welcome. I understand that one of the principal subjects for investigation will comprise the possibilities and requirements for the development and operation of mines both in the Union itself and in Rhodesia for the production of copper, chrome, asbestos, manganese and other available materials required for the war effort.

"Pending a final decision on a general policy, together with the receipt of further information from the South African gold mines concerning the circumstances surrounding their requirements, little or no equipment or materials including nitro-glycerin are being exported to South African or other foreign mines."[20]

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[20] Letter, Donald N. Nelson to E. R. Stettinius, Jr., February 24, 1942. The Lend-Lease Administration's reply to this letter mentioned the fact that "A member of our staff who attended a recent meeting of Mr. Batt's Requirement Committee stated that some mention was made at one of these meetings that there had been some form of directive received from the White House relative to furnishing supplies for the maintenance of the South African gold fields at their current level of operation. We have not seen the purported directive, but it may be that you will wish to check into that." Letter, T. B. McCabe, Deputy Administrator, Office of Lend-Lease Administration, to Donald M. Nelson, March 2, 1942. No other reference to this directive has been found. The Minutes of the Requirements Committee simply state: "A mission is being sent to South Africa to assist in converting equipment and men from work in gold mines to the extracting of copper and other materials needed for the production of munitions. It is recommended that the South African gold mines be granted priorities for basic maintenance but not for expansion. Conversion is to be stimulated by paying more than recent market quotations for the desired materials." Minutes, Requirements Committee, Meeting II, February 18, 1942 — Statement of Lt. Col. R. B. Lord, Assistant Director and Chief of Operations, Board of Economic Warfare.

[fol. 2155] On February 18, John P. Gregg, Chairman of the Clearance Committee, wrote to C. H. Matthiessen, Jr.:

> "The Committee is of the view that the restrictions with respect to materials to be used in the mining of gold and silver are not sufficiently restrictive and that a limitation order should be drafted forthwith to stop production of gold and silver in the United States, appropriate consideration being given to the continuance of such production in Canada, Mexico, South Africa, and other areas now permitted to obtain materials and equipment from this country under Lend-Lease or direct purchase." [21]

With the mining equipment shortage so acute, and in view of the fact that top-side policy decreed that shipments of mining equipment to foreign countries must be maintained, it became necessary to revise order P-56 so as to uprate for essential mines and to reduce priority ratings for non-essential operations.

Exclusion of all Gold Mines from Priority Ratings Under Order P-56.—On March 2, 1942, Preference Rating Order P-56 was amended to up-rate the priorities on machinery for essential mines. This uprating followed seven steps:

(1) The A-1-a rating for repair of actual breakdowns was continued;

(2) An A-1-c rating was assigned to deliveries to essential mines of repair parts for essential machines;

(3) An A-1-c rating was assigned to deliveries of other repair parts and to other mines when necessary to avert breakdowns;

(4) The A-3 rating formerly in effect was withdrawn;

[fol. 2156] (5) The A-8 rating for other repairs and for material for maintenance and operating supplies for essential productive purposes was continued;

(6) An A-10 rating was assigned for repair, maintenance and operating supply material not closely connected with production (office supplies, etc.).

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[21] Memorandum, John P. Gregg to C. H. Matthiessen, Jr., February 18, 1942.

(7) Gold and silver mines were excluded from the ratings assigned by the order.

The clause relating to gold and silver mining described as a mine eligible for ratings:

> "Any plant actually engaged in the extraction by surface, open-pit or underground methods, or in the beneficiation, concentration or preparation for shipment of the products of mining activity, but not including any plant more than 30 percent of the production of which in dollar value consists of gold and or silver."

This exclusion of gold and silver mines resulted in the cancellation of 373 serial numbers held by mines producing gold [22] and caused a veritable deluge of protests from the mining industry. It was, of course, still possible for mines excluded from P-56 to apply for equipment under the general repair, maintenance, and operating supplies order, P-100, but with demand for the desired equipment far under the available supply, the possibility that the equipment would thereby be obtained was rather remote.

On March 12, 1942, a meeting on priorities for mining machinery was held in Nevada, with the Senators, Representatives, Governors, and mining experts from the western mining states, and Dr. Wilbur Nelson, Chief of the Mining Branch of the Materials Division of WPB in attendance. The Governor of Nevada stated the purpose of the meeting to be the "bringing of our views and problems relative to recent mining priority ratings before the War Production Board." [23] After a review of these views and problems by Governor Carville of Nevada and others, Dr. Nelson stated the policies of WPB with regard to Order P-56, and particularly on the 30 percent exclusion clause.

[fol. 2157] "I am administering the amended Order P-56, containing the '30 percent' clause which has excluded gold and silver mines. However, there is a relief clause in this

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[22] Edward H. Rott, "Report on Gold Mine Order L-208, Its Effect and Accomplishments", May 24, 1943.

[23] Minutes, Meeting on Priorities, University of Nevada, March 12, 1942.

order, as there is in every order passed. That clause permits those who feel the order is doing them untold damage to apply for relief.

"In accordance with this order, when it was passed on the second of March, I notified those mines which were primarily gold and silver producers. There is no desire on the part of any one in the Priorities Division or in the Materials Division of the War Production Board, the two divisions concerned, to cut down for one minute the production of copper, lead, or zinc, which are the three things that are primarily tied into our production of gold and silver. I can assure you that where any mines are producing appreciable amounts of copper, lead, or zinc (and great amounts are needed for the war effort), irrespective of the amount of gold and silver produced along with these strategic metals, those mines will get back their priority ratings. I do not mean to say that every mine will get back its priority rating. I don't want to be accused of making promises. A mine producing nothing but gold, unless it can be shown that it is a siliceous flux for a smelter and that the smelter cannot get along without it, will have to work on a lower priority rating.

"Now, there are many people working today satisfactorily on the A-10 rating which any mine can get under Order P-100. They can get all the powder they want under A-10 or without rating, they can get all the grease they want.

"I know you are all wondering why all of the mines cannot have what they need. The answer is the mining machinery situation. The makers of mining machinery have the finest machine shops in the United States, and every one of them has been in part, you might say, taken over by the Army and Navy. The capacity of every mining machinery plant in the United States is taken up in part in making munitions and machine tools or parts of machine tools." [24]

Nevertheless, the turmoil continued. By May, the opposition to the 30 percent exclusion clause had coalesced into

[24] Quoted from original text supplied by Wilbur A. Nelson. Differs only grammatically from the version recorded in the minutes of the meeting, cited in the preceding footnote.

a powerful lobby, and the matter was taken up in a series of hearings before the Senate Special Silver Committee.[25] [fol. 2158] Out of these hearings several facts emerged:

(1) That the 30 percent exclusion percentage had been arbitrarily chosen in order to "get complete information on all the gold and silver" so that a survey of the essentiality of those mines might be made;[26]

(2) That the psychological influence of the 30 percent clause would detract from the opening of new strategic metal mines, since it removed a considerable part of the profit incentive;

(3) That, because the siliceous ores yielding gold and silver also produced fluxing materials absolutely necessary to the smelting of copper, lead, and other metals, the closing of the gold mines would necessitate the opening of quartz mines or other sources of flux, so that the benefits derived from closing the gold mines as a result of lack of equipment would be cancelled out by the cost and new equipment required to open the new fluxing ore mines.

Appreciation of the importance of fluxing materials and other products associated with gold production depends upon an understanding of the metallurgy and mining processes of gold. The domestic supply of new gold is obtained chiefly from two sources: (1) dry and siliceous ore, and (2) placer gravel. These two sources yielded 87 percent of the output of gold in the continental United States in 1940.[27] The dry and siliceous gold-bearing ores may yield gold alone, or may, in addition, yield copper, silver, lead, zinc, and arsenic, as well as small percentages of other metals. Dry and siliceous ores, according to the Bureau of Mines, include "both dry siliceous and irony, but chiefly siliceous ores, valuable for their gold and silver content . . .

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[25] U. S. Senate, 74th Cong., 2nd Sess., Subcommittee of the Special Committee on the Investigation of Silver, *Hearings*, May 5, 6, 8, and 28, 1942.

[26] *Ibid.*, p. 523. Statement of Wilbur A. Nelson, May 5, 1942.

[27] U. S. Bureau of Mines, *Minerals Yearbook*, Review of 1940, p. 65.

and dry fluxing ores carrying considerable quantities of iron and manganese oxides or iron sulfides; and very small quantities of gold and silver."[28]

Where large deposits of ores high in gold content occur, the gold is mined solely for its own value, and the baser metals are recovered as by-products. Where the gold content of the ore is small in proportion to other metals, gold [fol. 2159] is recovered as a secondary product, the dollar value of the precious metal providing a profit incentive to compensate for the production costs of the baser metal. Dry and siliceous fluxing ores are essential to the smelting and refining of certain non-ferrous metals, particularly copper, nickel, and zinc. Here the yellow metal is scrupulously recovered from the slime resulting from the refining process, the high price of gold ($35 per fine ounce) adding substantially to the total profit obtained from the production of the baser metal. It is estimated that about 15 per cent of the total gold production, and 80 per cent of the total silver production of the world are recovered as by-products from copper, lead, nickel and cobalt refining.[29]

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[28] *Ibid.*, p. 76.

[29] T. E. Veltfort and B. B. Caddle, Copper and Brass Research Association, "The Copper Industry," in John G. Glover and William B. Corneli (eds.), *The Development of American Industries* (1941), p. 427. According to Veltfort and Caddle, a typical blister copper slime (blister copper being obtained by a "flotation process" from ores where the copper occurs as copper or copper-iron sulphides) will have about the following composition:

Metal	Percent	Ounces Per Ton
Silver	42.23	12.610
Gold	.234	68.4
Copper	13.86	
Arsenic	3.88	
Antimony	2.46	
Selenium	1.46	
Tellurium	6.14	
Lead	3.96	
Bismuth	0.26	
Iron	0.22	
Nickel	0.27	

From the above table, it is evident that the by-product gold and silver contribute a not inconsiderable amount to the total profit obtained from the mining and refining processes.

Governor Osborne of Arizona, describing the situation in his state, said:

> [fol. 2160] "Here is the situation in my State. We have any amount of small operators that are shipping gold and silver. Maybe that ore does not carry any other metallic content; however, that goes to the smelters. They have to have it for flux. If they don't get that ore they will have to provide their own flux and that will take new machinery. So isn't it better to . . . take that ore and get some money out of it, rather than have to get new machinery and produce fluxing rock that has no metal at all?" [30]

Governor Maw of Utah stated:

> "We have one of the largest copper mines in the world, but not counting that, the silver and gold mines produce ten million ounces of silver a year, one hundred fifty million pounds of lead, eighty-seven million pounds of zinc. Yet the value of the gold and silver is 40.8 percent of the total value of the ore taken out. That would mean . . . if the order were enforced, every single gold and silver mine in Utah except one small one . . . would be closed down . . . Forty percent of the people of Utah are dependent almost entirely on the mining industry for their livelihood. Shut down our silver and gold mines, and we will be moving out." [31]

The Governor of Idaho stressed the dependence of his state upon mining activities for revenue:

> "We have about five million dollars annual production in gold. We collect not only ad valorem taxes and income taxes, but we have them [the mines] pay us a 3 percent tax on the gross output of their mines. Our budget in Idaho is made up on the anticipated revenue from that gold, and if this revenue were taken away

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[30] Minutes, Meeting on Priorities, University of Nevada, March 12, 1942, Statement of Sidney B. Osborne, Governor of Arizona.

[31] *Ibid.*, Statement of Herbert B. Maw, Governor of Utah.

from us, it would of course upset our revenue and budget in our State. . . . If you need the machinery to make guns to help us win this war, you take that machinery. We can close our gold and silver mines, and we will develop our State of Idaho after the Japs and the Germans and Italians have been whipped."[32]

Senator Pat McCarran deprecated the sending of mining machinery to foreign countries while denying it to domestic interests:

[fol. 2161] "Mining machinery was shipped out of this country during the months of October, November and December. In October, $1,843,454 worth. In November, $1,236,186 worth. In December, after Pearl Harbor, we shipped out of this country $2,174,673 worth of steel and mining machinery. Now, it is getting so scarce we cannot have it at home. Where are they shipping it and why?"[33]

In response to a query as to where the 30 percent figure came from, who is responsible for it?", Wilbur Nelson replied:

"The orders are drawn by the Priority Division, not by the Materials Division. I am in the Materials Division."[34]

All of these statements were corroborated, and enlarged at the Senate hearings in May, and the pressure became overwhelming, despite the fact that Wilbur Nelson reported that, "Slightly over 300 serial numbers were withdrawn from mines producing gold and silver, and over 200 were reinstated."[35] On May 15, 1942, the definition of "mining enterprise" in Order P-56 was amended to include any plant "actually engaged in the extraction by surface, open-pit or underground methods, or in the beneficiation, concentration or preparation for shipment of the

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[32] *Ibid.*, Statement of Chase A. Clark, Governor of Idaho.

[33] *Ibid.*, Statement of Senator Pat McCarran.

[34] *Ibid.*

[35] U. S. Senate, 74th Cong., 2nd Sess., Subcommittee of the Special Committee on the Investigation of Silver, *Hearings*, May 6, 1942, p. 562.

products of mining activity." The elimination of the 30 percent clause removed psychological, rather than actual, deterrents to obtaining mining machinery, and it was stated at the time of the issuance of the amendment that the change in language would "have no practical effect, as no person can use the ratings assigned; unless a serial number is assigned by the Director of Industry Operations, and gold and silver mines which produce no substantial quantities of critical materials have not been and will not be issued serial numbers."[36]

[fol. 2162] III. Evolution of Limitation

Order L-208

After the removal of the 30 percent clause from Order P-56, there was no mandatory restriction on the granting of priority assistance to gold mines, and what restriction there was lay in the discretionary power of the Director of Priorities to issue serial numbers for the various ratings under Order P-56. Approximately 373 serial numbers had been cancelled under the 30 percent exclusion clause. In the period between March 2 and May 6, 1942, 121 of these were reinstated. The criteria for reinstatement, according to Edward H. Rott, Deputy Administrator of Order L-208 was "based on the amount of strategic metals produced along with the gold or the necessity of the production of the mine for smelter flux."[37] Non-serialized mines were slowly being starved for machinery. In April, the Chairman of the Requirements Committee, in approving uprating for essential mining machinery, had directed that "Gold and silver mines are to receive repair parts only and are not to receive new machinery to replace old equipment or to expand production."[38] As these non-serialized mines were increasingly unable to secure equip-

[36] Recommendation for Issuance of Amendment to Order P-56, on file with the Recording Secretary, War Production Board.

[37] Edward H. Rott, "Report on Gold Mine Order L-208, Its Effect and Accomplishments", May 24, 1943.

[38] Minutes, Requirements Committee, Meeting XIX, April 3, 1942.

ment with their low priority ratings, some curtailed operations, others closed down. However, a new critical shortage was developing, over and above the need for equipment. This was a general shortage of labor in the western nonferrous metal mines.

Shortage of Labor in Nonferrous Metal Mines.—Mine labor supply had remained fairly stable during the first quarter of 1942, but with the beginning of the second quarter, war industries, Army construction projects, and Selective Service began to drain labor from the mines. Gold mines were no exception to the general migration of workers, tempted by high wages, to the West Coast shipyards and airplane factories. By April, when the large construction projects sponsored by the Army went into operation, a general manpower shortage in the nonferrous metal mines threatened. However, because copper was at this time most critical, with expanding Army requirements left begging, the plea for more labor for the copper mines became most urgent, and the matter reached the top levels of the government.

Several factors contributed to the outmigration of labor from the mines: (1) Higher wages in government [fol. 2163] projects and defense industries;[39] (2) the workings of the Selective Service System; (3) fear of the possibility of freezing of wages or freezing of men in jobs; (4) lack of adequate living and working conditions in the new mining areas (particularly acute in the case of housing facilities); and (5) wage disputes between unions and companies.

For these reasons, labor accessions at the mines began to fall below the number sufficient to maintain current production levels, much less to increase total production. In approximately 50 mining establishments for which data were received by the Bureau of Employment Security in May, total employment actually decreased about 340, although more than 4,000 workers were known to have been

[39] Daily earnings on construction projects proximate to the mines ranged between $12 and $15 as compared with earnings of $5 to $7.25 in the mines. A similar difference prevailed between wages in war industries and those in the mines.

hired in the 60-day period prior to May 31. During the entire second quarter of 1942, withdrawals amounted to 13 percent of total employment, there being, on an industry-wide basis, approximately 11 withdrawals for every 10 hires. In June, the Tacoma plant of the American Smelting and Refining Company reported that it would lose by July 1, production of 2,000 tons of copper per month due to the loss of men, some 200 having already departed. The Butte operations of the Anaconda Copper Mining Company were maintained at full force only because of the transfer of labor from zinc to copper mines. Kennecott Copper operations in Utah, and the Morenci, Bisbee and Douglas operations of the Phelps Dodge Corporation in Arizona, reported serious loss of labor.[40] On July 25, current copper operations were declared to stand absolutely in need of 1,000 more workers, while planned expansion of mining facilities would require 3,000 additional workers. Lead and zinc mines were reporting a current shortage of 2,000 workers.[41]

While hindsight reveals that the shortage of zinc, and perhaps also of copper, was to a certain extent statistical rather than actual,[42] the need for additional labor was real at this time, and the War Production Board, through its Labor Production Division; the War Manpower Commission; and the Army and Navy undertook a series of steps to augment the labor supply. There were several courses of action open. (1) to attempt to hold labor at the mines; (2) to recruit additional mine labor from out- [fol. 2164] side areas; (3) to prevent recruitment by other war industries of workers in the mining areas; (4) to transfer workers from nonessential mines to the nonferrous mines; (5) to utilize aliens and Mexican labor in agricultural regions of the West in order to release addi-

[40] Memorandum, H. O. King to A. I. Henderson, July 3, 1942.

[41] Memorandum, H. O. King to A. I. Henderson, July 25, 1942.

[42] See Policy Analysis and Records Branch, Office of the Executive Secretary, War Production Board, *Lead and Zinc Policies of the War Production Board and Predecessor Agencies* (Report No. 8), Appendix F.

tional workers for employment in the mines; and (6) to urge the Army to furlough enlisted soldiers for work in the mines.

Various efforts were made to hold labor at the mines and to recruit additional outside labor. Labor management committees were set up in the mining areas. The Labor Production Division of WPB, in cooperation with the Labor Morale Section of the Services of Supply of the War Department, arranged a series of publicity programs designed to impress miners with their patriotic duty of remaining at their posts. On June 3, 1942, a celebration for this purpose was held in Butte, Montana. On June 13, Donald M. Nelson, in a radio address to a Miner's Day rally at Butte, formally launched the War Production Drive in the nonferrous metals industries.[43] In spite of these efforts, and inducements offered by the mine operators to new labor in the form of promises of better housing and transportation of miners and their families to the new mining areas, the labor supply continued to decline. Miners accepted the transportation to the mining areas, worked a few days or a week, and went on to the more lucrative jobs on the Coast. There was no authority to force them to remain at a job.

Efforts to handle the labor situation were for the most part uncoordinated until July. Early in that month, at the suggestion of the Labor Production Division of WPB, a meeting of those interested in the problem was called by J. P. Mitchell of the Manpower Branch, Army Services of Supply.[44] In a report dated July 8, 1942, the group out-

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[43] H. O. King and Wendell Lund, "Manpower Shortages in Metal Mining," September 1, 1942 (War Production Board Document No. 135).

[44] Allen Buchanan, in an interview with the writer, April 25, 1944. Those in attendance were:

War Production Board: Dr. Wilbur Nelson, Allen Buchanan, H. O. King, Samuel Lipkowitz, Herbert Heasley, Richard A. Lester.

Labor Morale, War Department: Captain Berylson.

Manpower Branch, Civilian Personnel Division, Services of Supply: J. P. Mitchell, L. J. Maloney, Captain Rus-

lined a joint program of responsibility on the problem of increasing mine labor supply. A recommendation, submitted by the Services of Supply of the War Department, urged immediate action.

[fol. 2165] It was agreed that the War Manpower Commission be assigned responsibility for recruitment of additional mine labor, maintenance of existing labor supply, transfer of unemployed iron miners and coal miners to the copper mining regions, utilization of alien and Mexican labor in agricultural regions of the West to release additional workers for employment in the mines, and arrangement for Selective Service deferments for mining operations.

The War Labor Board was urged to eliminate the wage element in the problem by accelerating settlement of wage disputes. The War and Navy Department and the Army and Navy Munitions Board were asked to cooperate with the War Production Board in securing employer, labor, and community backing for a morale-building program for the mines, to "use their influence to have their contractors desist from further recruitment of workers in the nonferrous mining areas," and "to give formal endorsement and backing to the program" as outlined by the committee.

The War Production Board, in addition to using the full force of its War Production Drive to form labor-management production committees in the mines, and to impress workers and mine owners with the necessity of cooperating

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sell Nauman, Frederick Harbison, William Orr, John Ohley.

Liaison, Manpower Branch, Civilian Personnel Division, Services of Supply: Major S. B. Coblentz.

Control Board, Services of Supply, Army: Colonel Thompson.

Army and Navy Munitions Board, Navy: Lieutenant A. Wolff.

Army and Navy Munitions Board, Army: Lieutenant J. P. Hall.

Navy Department: Lieutenant Garlock.

War Labor Board: J. D. Ewing.

War Manpower Commission: Leo Wertz.

United States Employment Service: Ellis Stocking.

with the United States Employment Service and the War Manpower Commission in labor recruitment, was assigned responsibility for curtailing gold production.

> "Production of gold," the committee reported, "with the exception of required amounts of essential siliceous gold ores, should be curtailed by an order of the War Production Board to free labor which is urgently needed in the nonferrous mines which are essential to the war effort. In special cases where smelter operations may be severely handicapped by lack of sufficient fluxing ores or diluent, it may be necessary to permit limited production of siliceous gold-bearing ores." [45]

The War Manpower Commission was to have responsibility for the "orderly transfer of workers in gold mines and other nonessential industries to the non-ferrous mines." [46]

Proposal to Curtail Gold Mining Operations.—The question of curtailing gold production was now out in the open, with the benediction of many government agencies. The Labor Production Division of WPB went to work to gather background data necessary for such curtailment. On July 13, Bela Low, a mining engineer retained by the Raw Materials Section of the Labor Production Division, summarized the case for retaining gold production as a source of fluxing ores in a memorandum to Allen Buchanan, Chief of the Section:

> [fol. 2166] "Regarding the question of curtailing production of gold and silver, there may be specific instances where such properties ought to be kept in operation because their ore is useful as a flux, but as you will note . . . the proportion of such properties will evidently be very small.
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> "According to Minerals Yearbook, year of 1940, ore, old tailings, etc., treated in amalgamation and

[45] Memorandum, H. O. King to A. I. Henderson, July 25, 1942.

[46] *Ibid.*

cyanidation mills amounted to 16,078,947 tons, from which 2,003,466 ounces gold were recovered.

"Siliceous gold, gold-silver and silver ores shipped to smelter during the same year amounted to 973,820 tons, from which 262,676 ounces gold were recovered.

"Of the siliceous gold and silver ores produced in the United States, 94.3% were thus treated in mills, while 5.7% were shipped to smelters."[47]

Using this estimate of a small proportion of siliceous fluxing ores necessary for other nonferrous ore smelting, the Labor Production Division prepared a program for curtailing gold mine operations. On July 31, Richard A. Lester outlined this program in a memorandum to A. I. Henderson.

Lester defined the purpose of the curtailment as the "release of labor and facilities for nonferrous metal mining", and the conservation of "critical material for which priorities are now being granted for maintenance, repair and operating supplies." A gold mine was defined as "property on which the value of the recoverable gold content is three times or more the total value of all other recoverable metal content, at the price prevailing on the effective date of the order."

In this definition, which classified mines on the basis of the dollar value of the metal produced, lies the beginning of a controversy that eventually beclouded the whole issue of closing the gold mines, aligned labor and mining officials on opposite sides, and led to unnecessary bitterness in both camps. For almost a year WPB mining officials had been evaluating mine output not in dollars but in terms of the needs of the war program. A mine deriving 75 percent of its income from gold and 25 percent from copper would be a gold mine on Lester's definition, but if the actual output of copper were appreciable, the Mining Branch would classify the same operation as a copper mine.

Only lode mines were included in the proposed curtailment, presumably because the crying need was for under-

[47] Memorandum, Bela Low to Allen Buchanan, July 13, 1942.

ground miners and muckers. Dredging, hydraulicking, or [fol. 2167] other placer operations were not to be included, although it was not recognized that placer operations might be affected later. Further, the curtailment was to apply to both the United States and Alaska, the reason given for the inclusion of Alaska being that this territory was drawing mine labor from the critical Pacific Northwest area.

The curtailment was to be applied to gold mines coming within Lester's definition, and was envisaged as a series of graduated cuts. Gold mines that produced 50,000 tons or more of ore in 1941 were to be limited to 50 percent of the average monthly ore production in 1941; mines that produced 30,000 or more tons of ore in 1941, but less than 50,000 tons, were to be cut to 70 percent of the average monthly ore production in 1941; and those whose output was 5,000 or more but less than 30,000 tons of ore in 1941 were to be allowed to produce 90 percent of the average monthly yield in that year. Gold mines that produced less than 5,000 tons of ore in 1941 were to be excluded, provided their future production did not exceed 5,000 tons.

Curtailment by this step-wise process, Lester explained, would affect an estimated 221 mines (employing between 15,000 and 20,000 men in 1941) in the continental United States, and the suggested bases of curtailment would free initially between 4,000 and 5,000 men. About eight of the large Alaskan mines would be affected by the order. The plan also contemplated stoppage of all exploration and development work on gold mining within ten days after issuance of the order; and provided for appeals to alleviate hardship cases, particularly those of gold mines producing other metals in sufficient quantity to justify their continued operation, and mines shipping siliceous ore to smelters as fluxes.

Controversy Over Method of Curtailment.—Wilbur Nelson's reaction to the proposed curtailment was immediate. On August 3 he wrote to A. I. Henderson:

> "I have received a copy of Richard A. Lester's memorandum of July 31 to you in regard to the proposed limitation order on gold mining. This memorandum, if put into effect, would seriously curtail the

> production of nonferrous metals and disrupt smelter practice." [48]

Thus the cleavage of opinion between the labor officials and the mining officials on the question of closing the gold mines was sharply presented. From this time on, WPB's Labor Production Division, with the support of the War Manpower Commission, and later, of the War Department, pressed for the closing of the gold mines. The WPB [fol. 2168] divisions concerned with mining activity took a firm stand on the opposite side, and remained adamant in their position until the gold mines were finally closed. The psychology behind each position is clear: the labor officials were being urged to exhaust every means to supply additional labor to the copper mines, and try though they did, labor continued to move on to the lucrative positions on the West Coast, either by-passing the mining districts entirely, or stopping only long enough to earn travel fare to the Coast. The mining officials, on the other hand, with the experience of the 30 percent exclusion clause still fresh in mind, were reluctant to accept any closing order in which the definition of a gold mine was based upon percentage of gold produced.

Since it was clear from Wilbur Nelson's first reaction to the Lester memorandum that strong opposition would have to be overcome, the labor officials carried the question of the necessity of closing the gold mines to higher authority. On August 14, Richard A. Lester wrote to Wilbur Nelson again:

> "In a discussion the other day Mr. Batt told me that he hadn't realized that priorities were still being granted for maintenance, repairs and operating supplies for gold mines and he was surprised when I told him of the attached item in the Journal of Commerce [49] indicating that gold mines seemed to be getting materials enough to get along.

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[48] Memorandum, Wilbur A. Nelson to A. I. Henderson, August 3, 1942.

[49] The article mentioned which had been referred to Lester by Samuel Lipkowitz was as follows: "Domestic gold mining companies anticipate a further contraction in operations in the last six months of his year, due to grow-

"The Labor Policy Committee has also asked how much materials are being used for gold mining in view of the fact that workers are being laid off in war [fol. 2169] plants for lack of materials.[50] In order to answer the questions of Mr. Batt and the Labor Policy Committee, I should like to obtain information on the amount of iron and steel, non-ferrous metals, mercury,

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ing labor scarcity. The industry appears fairly well supplied with equipment for the next six months or year, but may have to reduce mining operations slightly due to minor shortages, it is reported in the trade. Because of the reduced volume and higher taxes, net earnings of the industry for the last half of this year may be smaller than for the first six months. However, a few companies may report an increase, since in some cases comparisons will be made with relatively poor showings in the last half." *The Journal of Commerce and Commercial*, New York, August 7, 1942.

[50] A summary of the critical situation in mining machinery and equipment was given by A. I. Henderson on July 31, 1942. "The mining machinery companies are already behind on deliveries. Shipments of mining equipment and supplies from certain of the largest mining machinery companies have declined as much as 35% in July below June shipments. Most of them have mining machinery orders booked for nine months or more in advance. This makes it imperative that these plants produce more machines and repair parts in the future than they are now making if mine production is to be maintained, much less increased.

"Many makers of mining machinery operating under Processing Directive PRD 39 are fulfilling Army and Navy orders carrying AAA and AA-1 ratings on direct ordnance contracts calling for full production for several quarters ahead. These ratings are making it increasingly difficult and in many cases impossible to obtain materials and fabricating components from suppliers for mining equipment which the Mining Branch is directing them to produce in order to maintain mining production." Memorandum, A. I. Henderson to J. A. Krug and C. H. Matthiessen, July 31, 1942.

etc., on which priorities have been granted to gold mines since January 1. . . . The Labor Policy Committee was particularly interested in the Juneau Alaska operations since materials sent there consumvaluable shipping space and there is such a shortage of labor that companies were recruiting copper miners for work in Alaska until the War Department and Selective Service put a stop to it."[51]

On the same day, Wilbur Nelson wrote to H. O. King, Chief of the Copper Branch:

"The Mining Branch views with serious alarm the dissipating of the only appreciable reserve of highly competent mining labor through the hasty closing of the gold mines in the United States. The gold and silver miners constitute the last reservoir of the skilled mining labor. We must, therefore, be certain that labor is directed toward the most critical points before permitting it to be [dispersed.]

[fol. 2170] "The present critical situation developed when copper, lead, zinc, mercury and other miners left their jobs and went to the west coast on shipbuilding and on aircraft jobs, and into the mountain areas in new war industries work.

"If we close down the gold mines while these same opportunities are available for work at substantially higher rates of pay in other war industries, the miners will not move to a copper, lead or zinc mine but will do just as their predecessors have done, move on to other more fruitful jobs on the coast.

"Logic dictates this, for when a copper miner at Butte is willing to leave his home and go to the coast, I am sure that a gold miner, living in the excellent living conditions at Lead [South Dakota] is not going to leave his family and stop at Butte if he could go to the west coast."

Nelson suggested an all-out effort to obtain labor from other sources before closing the gold mines, but agreed that "when it becomes clear that the next labor which is free

[51] Memorandum, Richard A. Lester to Wilbur Nelson, August 14, 1942.

for employment in the critical metal mines would be obtained by closing down the gold mines, I think steps should immediately be taken to force gold mines to shut down except for skeleton crews to maintain them in a workable condition so that mining operations in these mines can be started again at the close of the war." [52]

At the request of Frederick Eaton, Assistant General Counsel, J. Churchill Owen drafted a proposed order on August 20, 1942. This proposed the closing of all "nonessential mines" within a period of thirty days after issuance of the order. A "nonessential mine" was defined as "any mining enterprise in which gold is produced, unless the operator of such mining enterprise is the holder of a serial number for such enterprise issued under Preference Rating Order P-56, as amended". Any mine producing 1200 tons or less of commercial ore in the year 1941; and producing commercial ore at the rate of 100 tons or less per month from and after the date of issuance of the order, was not to be closed. In substance, this draft was remarkably similar to Order L-208, as finally issued.

H. O. King, Chief of the Copper Branch, questioned the feasibility of tying the gold closing order with Order P-56.

> "It appears . . . that a number of mines that produce practically nothing but gold have serial numbers, and I wonder if the definition in the Gold Curtailment Order tying this to mines with serial numbers would be effective.
>
> [fol. 2171] "I realize the issuance of this order is a function of neither the Copper Branch nor the Joint Interdepartmental Committee, but the pressure for action is so great that I feel it advisable to call this to your attention, as I am continually called upon to answer questions as to when the curtailment order is to be issued.
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> "With the continuing and increasing loss of production in copper mines, I feel that immediate action should be taken." [53]

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[52] Memorandum, W. A. Nelson to H. O. King, Chief, Copper Branch, August 14, 1942.

[53] Memorandum, H. O. King to Wilbur A. Nelson, September 1, 1942.

Wilbur Nelson's reply was that:

> "The . . . mines producing gold which have serial numbers are mines which also produce critical minerals needed in the war effort. These serial numbers in each case were only given after the branch handling the needed mineral was consulted and requested that each such number be issued.
>
> "The Mining Branch was designated as the Branch to handle the curtailment order. Naturally, it is not within the power of the Mining Branch to issue this gold mining curtailment order. When those responsible for issuing this order issue it, the Mining Branch is ready to enforce it."[54]

Shortly after this, A. I. Henderson directed the Miscellaneous Minerals Division to prepare an order closing all gold mines in which the total value of gold production was 50 percent or more of the total value of all metals produced, and Wilbur Nelson put himself on record as opposing any order drawn on such a basis:

> "If this basis is used for shutting down the gold mines, it will result in temporarily closing down many mines in the West producing siliceous fluxing ore for smelters, as well as a number of mines producing needed amounts of copper, lead, and zinc.
>
> "It naturally goes without saying that such mines will be reinstated when they have presented their cases. This method, however, of closing down gold mines is a method that was used so disastrously by the War Production Board last March in an amendment to the mine order, P-56. As a result of this amendment, a meeting was held of the Special Silver Committee of the Senate, protesting the use of a percentage basis for closing down any mines, as it worked an unnecessary hardship on mines that would be reinstated. Mr. Batt, Mr. Knowlson, and I appeared before this committee, and as a result of that presentation, the 30% clause relating to gold mines in order P-56 was taken out of the Order.

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[54] Memorandum, Wilbur A. Nelson to H. O. King, September 3, 1942.

[fol. 2172] "It was our consensus of opinion that this was an approach that should not be used in the future by the War Production Board in any future orders which were designed to close down any mines by denying them the ability to get equipment, materials, or supplies. Due to my statement before this committee, which had the concurrance of Mr. Knowlson and Mr. Batt, I would have to oppose handling the closing down of gold mines in the proposed limitation order on the basis of closing down all mines where the value of the gold was 50% or more of the total value of the mine's production. You can get the same result and close down the gold mines just as quickly by using the Limitation Order first written by Mr. Churchill Owen, in which mines, having serial numbers under P-56, would not be considered as gold mines. None of the 100% gold mines have serial numbers under P-56 at the present time. If there are any mines producing gold which also are producing minerals needed in the war effort which have serial numbers under this order and should not have serial numbers, these numbers can be promptly withdrawn. In this way you can promptly close down any and all gold mines in the United States without reverting to the percentage basis, which has been recognized as a bad policy to be followed by the War Production Board.

"Let me emphasize again that the gold mines can be closed down promptly under the Limitation Order as drawn up first, which ties the whole administration of such a closing down under Order P-56."[55]

For the time being Wilbur Nelson appeared to have carried his point, or so J. M. Scribner, operating assistant to A. L. Henderson, reported to Donald Nelson a few days later.

"Mr. Henderson", he wrote, "requested that the order be prepared in a manner completely divorced from Order P-56. However, in his absence, after a consulation with Mr. H. W. Dodge and Dr. Wilbur A.

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[55] Memorandum, Wilbur Nelson to H. W. Dodge, September 9, 1942.

Nelson, and a meeting with Messrs. Fred M. Eaton, Richard Lester and myself, it was determined to be most practical that the order not be divorced from P-56.

"The effect of this order will be to close down all gold mines not having a serial number, within 30 days from issuance. It is the intention of the Mining Branch to review all mine serial numbers assigned to [fol. 2173] mines producing 50% or more gold in dollar value and to withdraw such serial numbers unless the balance of the production represents critical materials urgently needed for the war effort in amounts sufficient to justify continuance of the operation."[56]

In the same memorandum, Scribner stated that "this order is in process of circulation in accordance with the procedure for order clearance and should be presented to the Clearance Committee for action about September 21."

Pros and Cons of Gold Mine Closing.—While the interested groups within the War Production Board were debating methods, word of the contemplated closing of the gold mines leaked out and a barrage of protests began to arrive. First came a letter from Senator Pat McCarran of Nevada, who had been largely influential in getting the 30 percent clause rescinded.

"I maintain that the object to be accomplished by those who propose shutting down the gold and silver mines will not be accomplished; that the only accomplishment coming out of such an order would be the irreparable injury of communities dependent upon the mines for their existence. . . .

"Some months ago the gold and silver mine operators assured the War Production Board that they were not going to be competitive in any sense with war industries, and their promise in this respect has been carried out.

"I am reliably advised that the gold and silver mine operators have in many instances made special effort to inform their men that they could get better wages in the war industries. Then mine operators have not

[56] Memorandum, J. M. Scribner to Donald M. Nelson, September 11, 1942.

raised wages in their mines in any attempt to compete with war industries.

"Gold and silver mine operators have assured the men who left their employ to enter war industries that their positions would be waiting for them when they came back. Cooperation of the precious metal mine operators has been forthcoming at all times. . . .

"I respectfully suggest, first, that any order closing down the mines of gold and silver in the United States would avail nothing in the way of increasing labor for mines of strategic metals; and secondly, if such an order were enforceable, its principal result would be the destruction of the moral and economic life of communities in the several states, without any beneficial results."[57]

[fol. 2174] Senator McCarran specified several alternatives to increasing the labor supply available to the nonferrous metal mines, principal among which were (1) direct subsidies to essential metal mines, to be paid to labor in addition to current wages; (2) removal of price ceilings on essential metals; (3) expediting of government loan procedures; and (4) giving to the producer of copper, lead, and zinc, the full and proper value of $1.29 per fine ounce for silver and $35 per ounce for gold which he produces in combination with the copper, lead, and or zinc.[58]

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[57] Letter, Senator Pat McCarran to Wilbur Nelson, August 27, 1942.

[58] Wilbur Nelson drafted a reply to this and a similar letter that had been addressed by McCarran to Donald Nelson. This draft reply stated that "We are not contemplating closing gold mines in the United States, although such a suggestion has been made." Donald Nelson modified this to read: "The War Production Board has no plan nor has it considered any plan to close down the silver mines of the United States of America. Serious study has been and is being made of a source from which mine labor could be made available to the nonferrous metal mines. Naturally, our thoughts have included gold mines but we have not at this time reached any conclusions thereon." Letter, Donald M. Nelson to Senator Pat McCarran, September 1, 1942.

On September 15, Guy N. Bjorge, General Manager of the Homestake Mining Company of Lead, South Dakota, (the largest gold producer in the United States) protested curtailment of domestic gold production when the record gold production of South Africa was being made possible through shipment of United States machinery.[59] Bjorge enclosed an article from the July 25, 1942 issue of the *South African Mining and Engineering Journal*, which revealed that production on the Witwatersrand (the largest producing area of South Africa) had reached an all-time high during the first half of 1942. Senator Chan Gurney of South Dakota sent a copy of the same article to William L. Batt, Director of the Materials Division of WPB, protesting the injustice of the contemplated closing of domestic gold mines. The Labor Production Division received a third copy.

The issues raised by the gold mine closing order were summarized, but not resolved, in a memorandum from Morris Creditor, Sejcial Assistant to the WPB Chairman, on September 15:

> "'. . . In the preamble of the limitation order no mention is made of manpower requirements. It simply states that the order is made necessary because of the shortage in the supply of critical materials which are used in the maintenance and repair of gold mines. [fol. 2175] "It would seem to me that if the order is based on the premise of critical materials alone, the question might be raised as to why such an order would not apply to materials being sent by this country to other gold mines in Canada, South America, and South Africa.
>
> "If the main purpose of this order is to divert miners from the gold mining industry to copper and other mining industries, it seems to me that there is no assurance that this order would accomplish the desired results. . . . Would it not be more practical to accomplish the purposes by a freeze order similar to that which is now in effect for workers in the copper mines and the lumber industry. This may be more drastic but, on the other hand, may give better assurance that

[59] Letter, Guy N. Bjorge to Wilbur A. Nelson, September 15, 1942.

the miners in the gold mines would eventually find their way into the copper mines.

"Even aside from the possible dissipation of these skilled miners into other occupations, there is question whether the closing of all the gold mines will release any relatively large number of workers. As I understand it, in the case of Homestake Mine the proposed order would affect only about 450 miners. This is the largest gold mine and has from a third to a half of all the miners to be released. The Alaska-Juneau miners, incidentally, will be stuck in Alaska. Where are they expected to go?

". . . Unless there is a high degree of assurance that the *main purpose* will be accomplished; namely, the diversion of these miners to the non-ferrous mines, I feel it is important to weigh the adverse effects it might have in other directions.

"Acutally, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, the preamble should give the real reason; which is to divert this labor to more necessary industries."[60]

The truth of the matter was that those concerned with the order did not agree among themselves as to its real purpose, nor as to its probable effects. As late as September 25, 1942, A. I. Henderson believed that "conserving of materials, rather than labor, was the main purpose of the order," while F. H. Hayes of the Copper Division contended that the primary object was "the transferring of gold-miners to the strategic mines."[61] Even those who con- [fol. 2176] curred with Hayes as to the reason for closing the gold mines did not agree as to the number of miners that would be released, nor as to how their transfer to other mines was to be effected.

The Labor Production Division believed that a minimum of 4,000 to 5,000 workers would be released by closing the

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[60] Memorandum, Morris Creditor to Donald M. Nelson, September 15, 1942.

[61] Minutes, Interbranch Meeting of Branches concerned with Mineral Production, September 25, 1942.

gold mines. The Mining Division and other WPB Mining officials believed the number would be much less. The bases for both beliefs were taken in good faith. The Labor Production Division had United States Bureau of Labor Statistics' verification of the fact that in August of 1942 slightly more than 17,000 workers had been employed in United States gold and silver mines, this despite the fact that there had been a steady outmigration of labor since January 1942, when gold and silver mine employment had topped 25,000 workers.[62] Here again, however, the classification of the mines was based upon dollar value of the mine output, and many of the mines here called "gold" mines actually possessed serial numbers under WPB Order P-56. As such serial numbers were granted only to mines producing a substantial proportion of metals and minerals essential to war production, the WPB Mining Division refused to recognize them as "gold" mines, defined them rather as "copper," "zinc" or "arsenic" mines, and contended that they could not be shut down regardless of the amount of gold they produced.

Furthermore, the Mining Division believed that all "loose" labor, i.e., such as could readily be transferred, had already been siphoned away from the gold mines and what labor remained would resist a transfer.

While the processes employed in mining gold are roughly similar to any other hard rock mining processes, specific techniques vary because of differing geological formations of the ore bodies. Gold miners work mainly narrow quartz veins in hard rock, and, except in the largest gold mines, little timbering and relatively simple stoping operations are required. Copper mines, on the other hand, are mainly large deposits, worked on a greater scale with complicated methods of timbering and stoping.

Hard rock mine labor includes several highly skilled trades. Pump operators, hoisting engineers, and surface labor, such as mechanics, may be transferred from auriferous mines to base metal mines without noticeable loss of efficiency. The need was not so much for transferring this type of worker, however, as for transferring miners and muckers to the copper mines, and here technical difficulties

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[62] See Appendix C.

would be encountered. A miner transferred from a gold mine to a copper mine, for example, must learn an entirely new type of ore deposit, learn to follow a different ore, master new drilling, blasting and timbering techniques, [fol. 2177] and must become accustomed to a new set of underground hazards. While it is true that such technical difficulties could be, and often had been, overcome, and that an experienced hard rock miner could be brought to efficient operation in a base metal mine such as copper much more rapidly than would be possible in the case of a man with no mining experience, psychological factors arising out of the middle age and settled condition of the majority of the gold miners militated against an effective transfer.

The mining officials advanced arguments to this point, stating that (1) the gold miners would be reluctant to leave established homes, families, and good living conditions for relatively poor living conditions in new mining communities; (2) the gold miners would not exchange working conditions in the cool depths of the gold mines for the higher temperatures and humidity of the copper mines if an alternative of high-paying surface labor in the construction projects adjacent to the gold mines were offered; and (3) the old adage, "Once a gold miner, always a gold miner" still held true, not so much from the miner's reluctance to turn from one type of mining to another as from the peculiar satisfaction a gold miner derived from producing the precious metal. Such intangibles were discounted by the labor people. In their view, gold mining was nonessential to the war effort; the gold mines possessed a reservoir of hard rock mining labor; such labor was desperately needed in the copper mines; practically every other method of obtaining additional labor for the copper mines had been tried, without much success. In addition, the War Manpower Commission and the War Production Board were now requesting the Army to furlough 4,000 soldiers for work in the nonferrous metal mines. This the Army was reluctant to do, in view of the fact that the reservoir of gold mine labor was still untapped.

The political and strategic considerations underlying the policy of tacitly approving foreign gold mining while prohibiting domestic operation were not generally understood. Even where it was recognized that the economy of South

Africa, and, in fact, the good will of the government toward the cause of the Allies, was dependent on continued mining of gold, there was a general feeling that machinery for gold mining in South Africa had been supplied to some extent through the British Army's military priorities, and that there should be some insistence on curtailment of South African gold production.

Probably in response to this general undercurrent of feeling over the South African situation, on September 19, Batt requested Wilbur Nelson to:

> [fol. 2178] "(1) Determine definite measures that will ensure the South African gold mining being slowed down by a reasonable amount, and
>
> "(2) Consider, with the aid of those concerned, the advisability of holding a meeting with the labor and mining interests involved to the end of securing a voluntary transfer of a substantial portion of the mining labor from gold mining to the desired types of mining." [63]

Drafting the Gold Mine Closing Order.—After almost two weeks of work on the order, the Miscellaneous Minerals Branch protested that it was concerned primarily with materials, and that the gold mine closing was outside its jurisdiction. The problem of drafting the order was then turned over to Wilbur Nelson's Mining Branch, and on September 17, J. M. Scribner advised Marcellus Stow, Acting Chief of the Mining Branch, as to the procedure to be followed.

> "Acting in accordance with instructions received from Mr. Donald Nelson's Office this morning, please be advised that the gold order is to be cleared with all of the branches involved as promptly as possible, but it is not to be presented to the Clearance Committee until further word is received from Mr. Nelson's Office.
>
> "The order is to be held in the branch in such shape that it may be presented to the Clearance Committee

[63] Memorandum, L. R. Boulware to Wilbur Nelson, September 19, 1942.

for action immediately upon advice from Mr. Nelson's Office that it is to go through."[64]

On the 22nd, Stow replied:

"In accordance with your instructions of September 17, I have had this order, which has been given the number L-208 prepared in final form and am holding it pending further advice from you.

"I am informed that the order has been circulated among the various branches by the Office for Order Clearance and that no substantial objections were raised. Since the order was circulated, the Mining Branch has made a few minor verbal changes for purposes of clarity, has included an exception for small placer operations, and has added a provision permitting use of mills or machine shops to fill rated orders or to do milling work for essential mines which are not closed down by the order."[65]

[fol. 2179] On September 23, following Batt's suggestion of the 19th, Wilbur Nelson met with a group interested in the closing of the gold mines. Among those present were Samuel Lipkowitz of the Labor Production Division, Samuel Hill of the War Manpower Commission, and Richard Lester, who by this time had left WPB and was with WMC. The purpose of the meeting was to "discuss" the various "wishes in regard to bringing the gold mine operators to Washington to discuss the curtailment of gold mining." It was the opinion of Wilbur Nelson and Marcellus Stow, his Deputy, that the gold mine operators should be given an opportunity to turn to other types of mining, to open zinc, tungsten, or vanadium mines, and transfer their labor to this type of mining. Lipkowitz and the War Manpower Commission representatives believed that while RFC subsidies were available to finance such development, only the larger companies would be in a position to take advantage of such offers, and even in such cases it would be months

[64] Memorandum, J. M. Scribner to M. H. Stow, September 17, 1942.

[65] Memorandum, Marcellus H. Stow, Acting Chief, Mining Branch, to J. M. Scribner, September 22, 1942.

before a transfer of labor could be effected. Then, too, if Wilbur Nelson's argument were correct, i.e., if the miners would show great reluctance to transfer, it would be preferable to force such transfer by mandatory government action rather than intercompany edict. No decision was reached at the meeting.

On the same day, the Interdepartmental Group on Mineral Production, presided over by Wilbur Nelson, went on record as believing that—

> "South African gold mines . . . have appreciably increased production during the first six months of 1942 over any previous six-months period in their history. It is felt that the production of these mines should be kept as low as is consistent with wise political policy, and that they should be prevented from building excess inventories of supplies. The Witwatersrand mines have a central pool of supplies, which it is doubted has been kept down to a minimum. These mines are supplied to some extent through the British Army's military priorities." [66]

On the 24th, another meeting was held in Batts Office, with General McSherry of the War Manpower Commission in attendance. "At the conclusion of this meeting Mr. Batt stated that he felt we should go ahead with the issuing of the gold mining order, but he would hold it up at General McSherry's request until the wage awards had been made by the War Labor Board." [67]

On the 25th, W. L. Batt informed A. I. Henderson:

> [fol. 21[illegible]] "I have told the Chairman that my judgment is that the limitation order on gold mining should be released at the appropriate time, and he has agreed. It was the consensus of opinion that we should wait until the War Labor Board had acted on certain wage matters, and I shall expect to be advised when the situation is clear on this point.

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[66] Minutes, Interdepartmental Group on Mineral Production, September 23, 1942.

[67] Memorandum, Wilbur A. Nelson to A. I. Henderson, October 1, 1942.

"It seems to me imperative that we very carefully word our press release so that the predominant objective: namely of releasing less essential labor for *more essential requirements, shall be clearly evident.* And I particularly direct the attention of those who have to do with this matter at this point.

"It is also important that General McSherry be notified several days in advance in order that he may take such steps as he outlined.

"I shall advise Senator Gurney a day or so in advance so that he learns it from us and not in the newspapers. Please see that I am protected on this point."[68]

On the same day that Batt's memorandum, which seemingly settled the issue, was written, a meeting of the WPB Branches concerned with mineral production was held, with Wilbur Nelson presiding. At this meeting the following resolution was unaimously passed:

"Resolved that before the Gold Mining Limitation Order L-208 is sent to clearance that:

"1. Representatives of the gold mining companies be called to Washington immediately to confer with Government officials on the gold order so that:

A. Where possible, existing organizations may be utilized for important mining operations, or prospective operations, necessary in the war effort;

B. Labor, and especially experienced miners, can be made available to the mining industry, rather than lost to vital metal production."[69]

At the next meeting of the group, on September 28, Wilbur Nelson reported that the resolution had been "turned down by Mr. William Batt," but those attending the meeting stuck to their guns.

[fol. 2181] "It was the consensus of opinion that by calling together the leaders of the large gold mining

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[68] Memorandum, W. L. Batt to A. I. Henderson, September 25, 1942.

[69] Interbranch Meeting of Branches Concerned with Mineral Production, September 25, 1942.

companies, we could ask them to work as a unit, both management and miners, to produce strategic metals so necessary to the war effort. We want to give management a chance to talk to the workers and ask them to cooperate and work systematically as one unit. We want to point out to the men that we feel that gold mining will come back after the war, and that by sticking together now they will be able to have their jobs back after this war is over." [70]

Batt yielded the point, and the next day Wilbur Nelson telephoned the largest gold mine operators, inviting them to a meeting in Washington on October 1.[71]

On September 30 a preliminary meeting was held in Batt's office. Among those present were Senators Gurney of South Dakota and McCarran of Nevada, Congressmen Englebright of California and Case of South Dakota, General McSherry of the War Manpower Commission, Wilbur Nelson and Samuel Lipkowitz, who represented the WPB Labor Production Division. The Senators and Congressmen argued against closing the gold mines, on grounds of community dislocation and individual hardship, while the labor case was based on the non-essentiality of gold and the need for manpower in the strategic metal mines. When the meeting reached an impasse, Batt adjourned it with the remark that if a use for gold could be found in the war program the mines probably would not be closed.[72]

On October 1, the meeting with the gold mine operators opened at 2:30. It was attended by branch chiefs and production men from each of the branches dealing with mineral production; by military and manpower officials; by Senators and Congressmen from the principal gold mining states;

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[70] Minutes of Interbranch Meeting of Branches concerned with Mineral Production, September 28, 1942.

[71] Memorandum, Wilbur Nelson to A. I. Henderson, October 6, 1942 (Weekly Activities Report).

[72] *Ibid.* Also Allen Buchanan and Samuel Lipkowitz, in an interview with the writer, April 25, 1944.

[fol. 2182] and by various gold mine operators.[73] It was a stormy session. Most of the mine operators were statistically unprepared to present their case, and there were bitter recriminations and denouncements. Lipkowitz was accused of having said the day before that 20,000 men would be released by the closing of the gold mines, but this he denied, offering reports to show that the figure was about

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[73] Memorandum, Wilbur Nelson to A. L. Henderson, October 6, 1942. The following is a partial list of those in attendance at this meeting:

Mica-Graphite Branch: M. H. Billings, S. A. Montague, E. H. Dawson, E. F. Wierum.

Copper Branch: H. O. King, Frank Ayer, F. H. Hayes.

Mining Branch: M. H. Stow, Wilbur A. Nelson.

Tin-Lead Branch: Erwin Vogelsang, C. A. Wright.

Ferro-Alloys Branch: Miles K. Smith, E. F. Hatch, O. N. Rove.

Miscellaneous Minerals Branch: R. J. Lund, J. S. Macgregor.

Others:

Senator Edwin C. Johnson of Colorado
Senator Pat McCarran of Nevada
Senator Chan Gurney of South Dakota
Representative Harry L. Englebright of California
Representative Francis Case of South Dakota
William L. Batt

Brigadier General Lucius D. Clay, Deputy Chief of Staff for Requirements and Resources, Services of Supply, War Department.

F. H. Harbison, Manpower Branch, Civilian Personnel Division, Services of Supply, War Department.

Brigadier General Frank J. McSherry, Director of Operations, War Manpower Commission.

Samuel Lipkowitz

Guy N. Bjorge, Homestake Mining Company, Lead, South Dakota; Merrill Shoup, Golden Cycle Corporation, Colorado Springs, Colo.; Errol Macboyle, Idaho-Maryland Mines Co., Grass Valley, Calif.; Thomas MacCormack, Natomas Dredging Co., Sacramento, Calif.; Carroll Searls and H. E. Dodge, Empire Star Mines Co., Grass Valley, California.

5,000.[74] Even this figure was believed by the operators to be too high. At 5 p.m. Batt left the meeting and turned its chairmanship over to Wilbur Nelson. In a session that lasted until seven o'clock statistical data were developed that indicated some 3,270 workers would be released by closing the gold mines.

[fol. 2183] Immediately before the meeting, Batt informed Donald Nelson that "The more I study the gold mining situation, the more uncertain I am as to the form a restriction of operations should take. Complete closing without exceptions will produce very serious economic dislocation and the total possible gain in men is a small figure."[75]

How small the figure was could not be accurately determined, but it was estimated at the meeting "that if all of the gold mines and dredges in the United States" were put on a stand-by basis, the number of men released, including workers of all types, would approximately as follows:

"Homestake Mining Company, Lead, South Dakota		1,373
Cripple Creek, Colorado		338
Idaho-Maryland California Mine, Grass Valley, California		69
Empire, North Star, Pennsylvania Mines, Grass Valley, California		240
Total		2,020
Estimate of men available from other mines		500
Total		2,520
Dredge Operators in California	525	
Dredge Operators in Other States	225	750
Total from lode mines and dredges		3,270
From these figures we find that there are the following number of muckers:		
Homestake Mining Company		421
Cripple Creek		100
Idaho-Maryland		45
Empire, North Star, Penna. Mines		130
		696
Estimated additional miners and muckers from other small mines		200
Total number of experienced miners and muckers		896

[74] Samuel Lipkowitz, in an interview with the writer, May 5, 1944.

[75] Memorandum, W. L. Batt to Donald M. Nelson, October 1, 1942.

"Of these 896 miners and muckers a certain percentage of them would have to be left in the mines when the mines operate on a stand-by basis. Probably 300 of them would be needed for this purpose. This makes available about 600 miners and muckers for other mining enterprises provided they can all be induced to go into other mines."

[fol. 2184] "If the gold mines are curtailed to 50% of the 1941 tonnage or to the tonnage they produced in September of this year where it is less than 50% of their 1941 tonnage, the only mine affected would be the Homestake Mine. If this mine reduced to 50% of its 1941 tonnage, it would probably have to reduce the men employees from 1876 on their payroll at the present time to around 1000, so that such action by WPB would release around 900 men of whom probably 200 would be miners and muckers." [76]

The labor representatives did not quarrel with the figures for the listed properties, but objected that the estimate of men available from other mines was too low.

On October 2, Wilbur Nelson reported to W. L. Batt and Donald Nelson on the results of the gold mining meeting.

"As a result of this conference, it was decided that a new order would be drawn giving the gold mines six months in which to close, and during that period to require them to curtail their production to 50% of their average production for 1941." [77]

Later on October 2, Wilbur Nelson, J. Churchill Owen, and Frederick Eaton conferred for the purpose of drawing a new gold mining order. On October 3, another meeting was held in the office of Senator McCarran, on the "necessity for closing gold mines at the present time." Wilbur Nelson represented W. L. Batt, and Paul V. McNutt and General McSherry were also present.[78]

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[76] Memorandum, Wilbur A. Nelson to W. L. Batt, October 3, 1942.

[77] Memorandum, Wilbur A. Nelson to A. I. Henderson, October 6, 1942.

[78] *Ibid.*

Meanwhile, the War and Navy Departments brought pressure to bear. On October 2, Robert P. Patterson, Under Secretary of War, stated his views to Batt:

> "I hope that prompt and effective action will be taken with regard to gold mining. I need not call your attention to the urgent need for more miners in the production of copper and other nonferrous metals, as you know the situation as well as I do. The longer the delay in shutting down gold mining, the further off will be the relief of the copper shortage. The matter has hung fire for some time, and I trust that there will be no further delay.
>
> "If it is thought best to have the order approved by the War Department and the Navy Department, I will be glad to give the War Department's approval, and I believe that Mr. Forrestal will do the same for the Navy." [79]

[fol. 2185] On October 5, the Under Secretaries of War and Navy joined forces in requesting the War Production Board to close the gold mines.

> "The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.
>
> "There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production. These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.
>
> "The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step and others will not give complete relief if nothing is done to transfer gold miners to copper mining.
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> "The matter has hung fire for some time. We deem

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[79] Letter, Robert P. Patterson to William L. Batt, October 2, 1942.

it of the utmost importance that prompt action be taken and that half-measures be avoided."[80]

Decision to Close the Gold Mines.—The Chairman of the War Production Board, harassed on all sides, now took the matter before the War Production Board, convened on October 6. Batt appeared before the Board to outline the problem. He reported:

1. After conferences with the War Manpower Commission and the gold operators, it had been revealed that the current employment in the gold mine industry was 3,270, of which 750 were engaged in dredging and only 896 were hard-rock miners.

2. Higher costs and loss of labor had already sharply curtailed operations of all domestic mines except Homestake, whose labor force had dropped from a peak of more than 2,000 workers to 1,876, including lumberman and machine shop workers. If Homestake were shut down, all but 500 of these workers could be released for work elsewhere.

3. Lead and Deadwood, South Dakota, with aggregate populations of 16,000 were totally dependent on the Homestake mine's operation.

[fol. 2186]. 4. In regard to foreign gold mining, the State Department, "because of broad international considerations" had previously urged that South African and Honduran gold mining be maintained; South African because "the economy . . . and the stability of the present government are largely dependent on gold mining" and Honduran because the "basic industries" were "the cultivation of bananas, whose exportation to the United States has been reduced to 20 percent of normal, and gold mining." Canadian gold mining was already being curtailed.

5. From consideration of the foregoing, he recommended that (a) "all nonessential domestic mining of gold other than that incident to the mining of critical metals be stopped as soon as possible and not later than within 60 days" and (b) "gold mines not producing critical metals be allowed to continue standby maintenance operations lest it be impossible to reopen them at the close of the war."

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[80] Joint Memorandum, Robert P. Patterson and James S. Forrestal to Donald M. Nelson, October 5, 1942.

The consensus of the meeting was that the gold mines should be closed, and only Vice President Wallace had any other suggestion to make. He thought definite arrangements should be made to channel the released labor into the critical nonferrous mines before the gold mines were closed. *General Somervell's position, however, amounted almost to an ultimatum, which permitted no alternatives.* In view of the fact that the Army had "taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines" he said, "failure to stop [gold] production immediately would be inexcusable." It was therefore agreed that:

> "An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within sixty days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition."[81]

With this directive in view, Limitation Order L-208 was drafted that same evening (October 6) by Wilbur Nelson and Frederick Eaton, Assistant General Counsel of the War Production Board. Order L-208, closing all gold mine operations in the United States and its territorial possessions, was issued on October 8, without prior circulation and without reference to the Clearance Committee. By the terms of this order, the Director General for Operations prohibited all operators of gold mines, whether lode or placer: (a) from breaking ore or proceeding with any development work or new operations after October 15, 1942, and (b) within 60 days from October 8, from carrying on any operations incident to gold mining except to the minimum extent necessary to maintain buildings, machinery, and access facilities in safe and accessible [fol. 2187] condition. Lode mines that produced 1200 tons or less of commercial ore in 1941 were exempted from the provisions of the order on the condition that their future rate of production should not exceed 100 tons per month, and placer mines that treated less than 1,000 cubic yards of material in 1941 were likewise exempted on condi-

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[81] Minutes, War Production Board, Meeting XXXIV, October 6, 1942.

tion that their future treatment of material should be limited to 100 cubic yards per month.

The die had been cast: the gold mines of the United States were ordered closed. It now remained to channel the labor into other strategic metal mines—a matter that had caused considerable apprehension since August. Preliminary plans had been made: on September 27, in anticipation of the closing of the gold mines, the United States Employment Service had issued USES Operations Bulletin B-50, so that its field staff would have advance information. "Thus, the prohibition of employment of gold miners, except with a certificate of separation issued by the Employment Service, had been confined to the twelve states covered by the employment stabilization plan [of September 7]. In order to restrain the workers from moving to other employment, the certificate of separation provided for is a 'limited' certificate of separation good for employment only in other nonferrous metal employment."[82] A meeting was held by War Production Board mining and labor representatives with War Manpower Commission representatives on October 7. It was reported that:

> "Since the issuance of Operations Bulletin No. B-50 the General Counsel has raised questions as to the possibility of modifying the procedures. That office takes the position that the contemplated plan with respect to gold miners, being a transfer plan rather than a freezing plan, must be recognized as essentially different in principle and objectives from the nonferrous metal plan of September 7, 1942. It therefore recommends (1) that the use of limited and unlimited separation certificates presently contemplated in Operations Bulletin No. B-50 be abandoned, and that instead all employers be ordered not to hire former gold miners except upon referral by the United States Employment Service, which will utilize the ordinary referral card for that purpose; and (2) that the pro-

[82] From the Agenda of the Gold Curtailment Order Meeting, October 7, 1942.

> hibition on hiring extend not only to employers in the twelve western states covered by the non-ferrous metal plan, but also at the very minimum to employers in other states, in which substantial numbers of gold miners will be released and in states bordering on such states."[83]

It was also reported that application had been made "for $375,000 from the President's fund to pay transportation for gold miners to new employment in other nonferrous metal mining activities."[84]

[fol. 2188] On October 8, War Manpower Commission Directive No. 13 was issued, incorporating the above provisions. Employers were instructed not to "hire in, or hire for work in, Alaska or any state west of the Mississippi River, any person who on or after October 7, 1942, has left employment as a production or maintenance worker in connection with gold mining, except upon referral of such worker to such employer by the United States Employment Service." The Directive also instructed the U. S. Employment Service to refer "gold mine production or maintenance workers to essential non-ferrous metal mining, milling, smelting and refining activities." The War Manpower Commission announced further that "transportation expense for workers and in some instances their families will be provided where transfers to new locations are involved," and that "every gold worker who transfers to copper, aluminum, zinc, and other nonferrous activities is contributing to the war effort."

Donald M. Nelson and Paul V. McNutt issued a special appeal in a joint letter, urging gold-mine workers to transfer to nonferrous metal mines rather than to other war industries, as a patriotic duty.[85]

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[83] *Ibid.*

[84] *Ibid.*

[85] This appeal, which was undated, read:

> "At the present time the armed forces of the United States are in vital need of large quantities of copper, zinc and other non-ferrous metals. These metals are used in carrying the war to our enemies

[fol. 2189] The anticipated protests against the order materialized immediately; the benefits did not. There was a flood of criticism from the gold mining interests, the affected communities, and their Congressional representatives. There were claims of damage to community economy, of dislocation of normal debtor-creditor relationships and property rights in the mining districts, and of personal hardships. Complaints were made to the War Production Board, to the War Manpower Commission, to the Army and Navy, to the President. One of the largest gold mine operators threatened an injunction against the WPB, saying, "There is no action of Congress which authorizes the War Production Board to close any industry.

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and must be available in sufficient amounts if victory is to be assured.

"Inadequate supplies of non-ferrous metals are reducing production of tanks and airplanes, ships and shells. Immediate production of these weapons of war in the amounts necessary is of the utmost importance. We are not mining enough of these critically needed metals. One reason for this is a shortage of hard-rock miners in the western states.

"To meet our war production program with respect to these metals, it becomes necessary now to maneuver our manpower so that less essential mining can be diverted to vitally important operators. With this as our objective it has been determined that all gold mining shall be discontinued at the earliest possible moment.

"It is realized that such an order must occasion considerable hardships. Nevertheless, at this juncture no other course is open and, accordingly, the shutdown will become effective in sixty days.

"We urge all miners now working in gold mines to leave such work for jobs in mines producing the more essential nonferrous metals. It is important that gold miners transfer to nonferrous metals mines rather than to other ware industries. This is imperative to meet the shortage of miners, and it will enable men now working in gold mines to make a most effective contribution to the national war effort."

Its powers are limited to regulating materials and supplies used in industry where necessary for the war effort."[86] Newspapers predicted utter ruin of mining communities in Colorado, California, Nevada, Montana, Arizona, Utah, and South Dakota. Stocks of the larger companies slumped.

Within a short time, strong community and Congressional blocs had been organized to force modification or recision of Order L-208. Through the winter of 1942-1943, appeals for relief from the provisions of the Order poured into the War Production Board. The legislatures of Nevada, California, South Dakota, and Alaska, passed resolutions calling for the withdrawal of L-208. Several bills were introduced into the Senate and the House of Representatives by members of Congress from the western mining states, calling for suspension of the enforcement of obligations against gold mine owners required to suspend operations as a result of the War Production Board's action.[87]

On May 24, 1943, a group of thirty Senators from the Western states petitioned the War Production Board for "immediate recession or modification of the order."[88] The appeal was denied when, on June 15, the WPB unanimously voted to continue Limitation Order L-208, with exceptions allowed on appeal only if:

> "(a) The critical material output of the individual mine makes an equal or larger contribution to the war effort than the materials, equipment and labor used in operating the mine, considering the relative urgencies of the critical materials involved, or
> [fol. 2190] "(b) The necessary labor can be obtained without drawing upon any essential war activities, and

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[86] Statement of David P. Strickler, President of Stratton-Cripple Creek Mining and Development Company. *New York Times*, October 15, 1942.

[87] S. 27, 78th Cong. 1st Sess., January 7, 1943; S-344, 78th Cong. 1st Sess., January 14, 1943; H. R. 3009, 78th Cong., 1st Sess., June 19, 1943.

[88] Letter, Senator Pat McCarran to Donald M. Nelson, May 24, 1943, signed by twenty-nine other Senators.

certification to this effect can be obtained from the War Manpower Commission."[89]

At this time a serious effort was made by the mining officials, and the Administrators of Order L-208, within the War Production Board, to modify L-208 by amendment.

In April, the staff of the Planning Committee of the War Production Board made a study on the effectiveness of Order L-208 at the direction of William L. Batt. This study, using largely the figures of the Labor Production Division, reported:

"1. Displacement of Labor by the Order and Results.

(a) The Gold Order was responsible for the transfer of approximately 2000 gold miners to war industries, at least 1200 of these going to copper and other essential non-ferrous metal mines;

(b) As a result of the Labor transferred from gold mines, more than 11,000 tons of copper, 4,000 tons of zinc, 2,400 tons of lead, 13,000 tons of tungsten, and 6,000,000 pounds of molybdenum have been added to the annual production of these metals.

"2. Release of Equipment and Materials by the Order.

(a) One and a half million dollars in equipment has been transferred from the gold mines to essential non-ferrous mines and has accelerated strategic metal development.

(b) Approximately $15,000,000 worth of strategic material has been released from gold mines that were closed."[90]

The report was immediately challenged by Wilbur Nelson, Administrator, and Edward H. Rott, Deputy Administrator of L-208. On April 30, Wilbur Nelson informed Howard I. Young that,

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[89] Minutes, War Production Board, Meeting LXI, June 15, 1943.

[90] Memorandum, Edward T. Dickinson, Jr., Executive Director, Planning Committee, to William L. Batt, Vice Chairman, War Production Board, April 22, 1943. (Planning Committee Document 236).

[fol. 2191] "It is stated that the gold mining limitation order was responsible for the transfer of approximately 2000 gold miners to war industries and at least 1200 of these went to copper and other essential non-ferrous metal mines. In no place do any statistics refer to gold miners, but only to workers in gold mines. Those familiar with mine employment know that only about 60 percent of the total workers at a mine are underground miners and muckers. . . . On the basis of my checks with . . . officials of . . . companies, it can readily be seen that instead of 1200 workers from gold mines going to copper and other essential non-ferrous metal mines, that only between a third and a half of this number are actually working in such mines today; that of the 1200 referred to these mines, many of them never accepted employment. . . . 497 workers in gold mines probably were actually placed in metal mines due to the gold mine closing order, and only a percentage of these workers were miners or muckers. This is the most optimistic view that can be taken.

"I believe that only between 3000 and 4000 tons of all non-ferrous metals can be logically assumed as possible additional production for the year 1943 due to the closing of the gold mines.

"Of the $1,500,000 in equipment that has been transferred by the Mining Equipment Division from gold mines to other mines, $713,500 went to essential non-ferrous mines and the remainder to other operations. About 33⅓ percent of this equipment came from gold dredging operations, which were limited by the War Production Board before the gold mine closing order was issued; and about 5 percent came from gold mines which were shut down before the gold mine closing order was issued."[91]

On May 24, Edward H. Rott, Deputy Administrator of Order L-208, stated:

"The general effect of the Order has been to antagonize the individual and the communities dependent

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[91] Memorandum, Wilbur A. Nelson to Howard I. Young, April 30, 1943.

on gold mining, and caused large losses to the operators. To repeal it would not calm the situation, but would stir up increased resentment from the many who have lost their livelihood, relinquished leases, forfeited equity in equipment, or sold equipment in anticipation of no further need for the duration.

"However, from the administrative standpoint, and to alleviate exceptional and unreasonable hardship in cases where such relief would not affect our war effort, it is felt that amending of this order to permit limited production and employment is desirable and justifiable."

[fol. 2192] Rott, to stress his point, said that there had been 187 appeals from Order L-208, of which number, 137 had been granted, principally on the basis of financial hardship, possible recovery or development of strategic metals, or to provide employment for elderly and physically handicapped men who would not be used elsewhere in the mining industry. Many of the appeals had been granted within a few weeks after L-208 was issued, when Wilbur Nelson, T. Munford Boyd, Mining Division Attorney, and Allen Buchanan of the Labor Production Division were designated by the General Counsel's office to act as an appeal board. Others were granted by the Appeals Board when the process was formalized.

Modification of L-208 was again considered during the summer of 1943. However, with a copper shortage once more threatening because of lack of labor at the mines, WPB had again requested the War Department to furlough soldiers to the mines. History was viciously repeating itself when the Under Secretary of War wrote:

"Men with hard rock mining experience, I am told, are still engaged in mining gold, silver and other non-critical metals. I know of the arguments that are used in an effort to justify these operations, but the fact remains that their contribution toward prosecution of the war is very small. I submit that there is no warrant for asking that soldiers be turned over to work in copper mines as long as men with the very

experience required for mining copper are permitted to work these nonessential mines."[92]

With modification of Order L-208 tantamount to a refusal by the Army to furlough soldiers, WPB decided to continue the order.

On November 17, 1943, Representative Clair Engle of California introduced a bill in the House of Representatives, proposing repeal of Order L-208. The bill was referred to the House Committee on the Judiciary, and to date no further action has been taken thereon.

[fol. 2193] IV. Administration and Results of Order L-208

In summary, it would appear that the slow crystallization of opinion that gold mining was not essential to the war effort, and that it did consume labor and equipment that might be more effectively used elsewhere, made ultimate closing of the gold mines inevitable. The closing of the gold mines represented a definite victory for the military point of view that all production not immediately essential to the prosecution of the war should be eliminated. The fact that this industry was the *test case*—the *guinea pig*—for such policy and that *similar non-essential industries* were not shut down, throws emphasis on the controversy as to the method of closing the gold mines, a controversy that otherwise might be lightly passed over.

The main arguments that arose, and are still continuing, derive from questions as to whether it would have been better to allow the industry to strangle slowly as a result of tightening of priority restrictions under Order P-56; or whether it was more effective to shut down the mines at one swift stroke. These conflicting questions presuppose still others: Was the real purpose of closing the gold mines conservation of equipment, was it release of labor, or was it both.

It is generally admitted that the priority restrictions under P-56 had curtailed gold production, by the time of the issuance of Order L-208, to a point considerably under

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[92] Letter, Under Secretary of War Robert P. Patterson to Harry O. King, Director of the Copper Division, June 13, 1943.

1941 gold production. It is likewise admitted that some of the smaller gold mines welcomed L-208 as an opportunity to stop unprofitable operation.

With regard to the question as to whether or not the results achieved by L-208 compare favorably with the results anticipated at the time the order was issued, the answer would appear to be in the negative. The actual benefits in labor and equipment obtained through closing the gold mines were small in proportion to the economic distress and individual hardship that ensued. Considerable confusion prevails as to the exact number of men transferred to essential nonferrous metal mines, but the number seems in any case to be very small. Here, again, it is impossible to weigh the exact advantages, because many of the released gold miners, while they did not go into other metal mines, did engage in occupations, such as lumbering, that were beneficial to the war effort. Nevertheless, some did not go into any other occupation, and remained idle. There are opposing claims as to the amount of equipment saved, and the amount of equipment transferred elsewhere, by the closing of the gold mines.

However, when all the claims and counter-claims are sifted and weighed, it is possible to arrive at some fairly accurate general conclusions. These fall into three categories: (1) Labor released and transferred; (2) Equipment released and transferred; and (3) Results on community economy.

[fol. 2194] *Effects of Order L-208 on Labor.*—At the meeting of the gold mine operators held in Washington on October 1, 1942, the industry developed statistics showing that if all gold mines and dredges in the United States were closed, approximately 3,270 men would be released, of which 896 would be miners and muckers. It was further estimated that about 10 percent, or 300, of the total released would actually remain in the mines to operate them on a standby basis.

There has been general agreement that approximately 3,200 men, including both placer and lode miners, were released by the closing of the gold mines.[93] As of Janu-

[93] Raw Materials Section, Labor Production Division, WPB, "Effect of Order L-208 (Gold Order) on Production

ary 1944, the War Manpower Commission reported that 2,600 of these had

> "registered with the United States Employment Service. About 2,100 were referred by the United States Employment Service to essential activities; metal mines received 1,200 of the referrals.
>
> "Many displaced gold mine workers found jobs in mines and other activities without ever contacting the United States Employment Service. Moreover, many of the workers recorded as displaced returned to gold mine operations when these operations were resumed either pending or subsequent to an appeal to the War Production Board for permission to continue production; hence, they never became really available for placement elsewhere." [94]

It is in the failure to distinguish between "gold mine workers" and "gold miners", or between underground miners and muckers and surface laborers, maintenance crews, and mechanics, that the first confusion arises. If the industry statistics as presented on October 1 were accurate (and it is here presumed that they were), no more than 896 underground workers were made available for employment elsewhere.

The second confusing point arises from that fact that no adequate record has been kept on the number of men who accepted the jobs to which they were referred by USES, or how long they remained at jobs when they did accept them. It has been variously stated that the men [fol. 2195] worked for a few days, or a few weeks in a new operation, and then either moved on to the more lucrative construction or defense jobs, or returned to their homes, hoping to return to their former positions should the gold mines be reopened following WPB's granting of appeals. Spot checks of major mines to which the men

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of Strategic Metals", no date; Edward H. Rott, "Report on Gold Mine Order L-208, Its Effect and Accomplishments", May 24, 1943, p. 4; letter, Paul V. McNutt to Representative Harry L. Englebright of California, April 19, 1943.

[94] Memorandum, E. Frankel, War Manpower Commission, to the writer, January 10, 1944.

were referred indicate that few of them remained for any length of time.

The Raw Materials Section, Labor Production Division, of the War Production Board compiled statistics in April 1943 showing the number of referrals made to specific nonferrous western mines. A cross-section of such referrals may be compared for what the comparison is worth, with statistics reported by the Deputy Administrator of Order L-208 on the number of transferred miners who remained in their new jobs for any length of time.

Company	Type of Mine	Men Referred from Gold Mines: Reported as referred by Labor Prod. Div. of WPB	Men Referred from Gold Mines: Reported as Placed by Wilbur Nelson April 1943	Number of Transferred Miners, who remained on mine payrolls
Anaconda	Copper	238	91	119 (11-19-42)
Gray Eagle	Copper	102		28 (4-30-43)
Consolidated Copper Mines	Copper	44	36	15 (4-30-43)
Climax	Molybdenum	125 *		10 (4-30-43)

* Only 60 actually came to the mine, 6 were physically unfit, 44 quit.
Source: Edward A. Rott, "Report on Gold Mine Order L-208", May 23, 1943.

Figures which tend to indicate that transferred gold miners remained on the job for brief periods only must, of course, be used with great caution, since the turnover for labor from all sources was exceedingly high in the nonferrous mines.

Of the 3,217 men displaced, 1,288 came from three mines:

Homestake Mining Company	1,018
Empire North Star Mines	150
Idaho-Maryland Mines	120
Total	1,288

[fol. 2196] Even allowing a 10-percent labor reserve left in the mines for stand-by operations in addition to the number of men released by L-208, the total employment of these mines shows a sharp drop from 1941, when the employment was:

Homestake Mining Company	2,085
Empire North Star	293
Idaho-Maryland Mines	425
Total	2,803

A steady decline in employment had been occurring in gold and silver mines (as well as all other nonferrous metal mines) since the beginning of 1942, as is indicated in Appendixes B and C. The monthly decline in workers in gold and silver mines from January to October 1942 averaged 1,300, in view of which the release of 3,200 men presents no startling accretion to the labor available to other nonferrous metal mines, all of which had suffered proportionate rates of out-migration. The closing of the gold mines for the sake of obtaining additional labor becomes even less justifiable in the light of a development that occurred shortly after Order L-208 was issued.

One of the primary reasons for loss of labor at the copper mines had been a drainage of labor by high-wage inducements of the Army construction projects. Less than a week after the gold mines had been closed, largely because of the insistence of the Army, the Army ski-tow construction project at Pando, Colorado, was completed. In the period October 15 to November 1, 1942, some 7,000 workers were released. This project was located only twenty miles from the Climax Molybdenum mine, one of those particularly in need of employees. It has been alleged, and records would seem to substantiate the allegation, that few of the 7,000 workers released by the completion of the project returned to the mines from which they had originally come.[95] There was thus allowed to be dissipated a labor force more than double that which conceivably could have been obtained by the closing of the gold mines.

It is generally agreed by the WPB divisions concerned with mining activities that a very small percentage of the released gold mine workers actually were employed by other mines. A majority of them probably went into work of greater value to the war effort than gold mining, such as lumbering, agriculture, construction, shipbuilding, air-[fol. 2197] craft manufacture;[96] but the fact remains that

[95] Memorandum, Wilbur Nelson to H. W. Dodge, November 24, 1942; Minutes, Interdivision Meeting of Divisions Concerned with Mineral Production, November 23, 1942.

[96] A partial analysis based on the records of the Social Security Board, indicates that the released gold mine work-

the primary justification for closing the gold mines was to get labor for the production of the strategic metals. Wilbur Nelson, Arthur S. Knoizen, present Director of the Mining Division, and F. H. Hayes, Chief of the Primary Production Branch of the Copper Division, concur in the statement that the number of gold mine workers who went into other mines and remained there for a year or more was not over 100.[97]

From the foregoing, it may be concluded that since the number of gold miners actually re-employed was negligible, their contribution in increased production of copper, lead, zinc, etc., was likewise small, and probably was counterbalanced by the loss of such metals as are normally produced as by-products of gold mining.

Effects of Order L-208 on Mining Equipment.—There is considerable controversy on the amount of equipment released and reutilized, and on the amount of new equipment saved because the potential demand was suddenly cut off. The Mining Equipment Division states that the "potential dema. d of gold mines operating in 1941 in the United States and Alaska for materials for repair, maintenance and operating supplies" amounted to $15,000,000 per year.[98] Theoretically, this was eliminated by the closing of the gold mines under Order L-208. Actually, however, as priority restrictions under P-56 had been in effect all during 1942, this demand must have fallen to a considerable extent. This figure of $15,000,000 is higher than estimates of mining engineers associated with the industry, who place the potential demand at $11,000,000. Nevertheless, with all gold

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ers went into a wide variety of occupations, including in addition to those mentioned in the text, coal mining, steel working, communications, transportation, and many others; they scattered, in short, through a fair cross-section of American industry. Letter, John J. Corson, Director, Bureau of Old Age and Survivors Insurance, Social Security Board, to Stacy May, October 22, 1943.

[97] Wilbur Nelson and Arthur S. Knoizen, in interviews with the writer, March 7, 1944; F. H. Hayes in an interview with writer, March 4, 1944.

[98] Edward H. Rott, "Report on Gold Mine Order L-208", May 23, 1943.

mines in the United States except Homestake operating at one-third capacity by September 1942, it may be presumed that even this figure is high.

Edward H. Rott states:

[fol. 2198] "Closing of gold mines under Order L-208, in the brief period of less than a month, promptly created a great reservoir of used equipment estimated to exceed $75,000,000 in value, including, in addition to that normally recognized as essentially mining equipment—tractors, draglines, and trucks. This equipment and idle inventories of material has been moving into channels leading to essential work at the rate of approximately $82,600 per week since November 19th."[99]

In April and May 1943, this transfer was accelerated to the rate of $100,000 per week. The disposition of equipment transferred from gold mines is indicated in Appendix I. Rott reports further:

"These transfers have accelerated strategic metal development, coal and non-metallic development. Construction and military needs have been met without delay. However, very little of this was transferred from the three principal operators from which manpower was released by the order. How rapidly this equipment would have moved into strategic metal production if Order L-208 had not been issued is pure speculation, but we know it was under way. How much of the millions in used equipment still idle will remain so, cannot be estimated."[100]

Effects of Order L-208 on Individual and Community Economy.—The effects of the closing of the gold mines on community and individual economy have been great. Gold mining was a major industry in many western states; state taxes on gross value of gold mine output constituted a considerable proportion of the state revenue. The State of Idaho normally collected not only ad valorem taxes and income taxes, but a 3 percent tax on the gross output of the

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[99] *Ibid.*

[100] *Ibid.*

mines. South Dakota normally imposed a 6 percent severance tax on the gross value of mineral production, with an exemption of the first 100,000 tons of ore per year in order to lift the burden from small enterprises. This tax, borne chiefly by the Homestake Mining Company, accounted for nearly 7 percent of total State revenue. Utah, Arizona, New Mexico, Montana, and Idaho likewise imposed smaller gross production or severance taxes. In California the net income tax was proportionately heavier to make up for the absence of a gross production tax. Alaska imposed a 3 percent gross production tax on precious metals, whereas other mining operations paid a net income tax. It is necessary only to compare the total gold production in 1941 and 1942 in these states to arrive at conclusions as to the serious effect the closing of the gold mines had on state revenue.[101] However, the South Dakota state treasury reports that ore tax payments to the state by Homestake in 1943 amounted to only $98,929 compared with $1,200,000 in 1941.

[fol. 2199] It is not necessary to go into any detail on the losses suffered by individual gold mine operators. Homestake, the largest gold producer in the United States, is a case in point. The net profit for this company for 1943 is revealed as $304,000 in contrast to a profit of $5,682,999 for 1941, the last full year in which the mine was operated at capacity.[102] This profit was obtained because, after the gold mines were ordered closed, Homestake was granted an appeal allowing it to operate on a reduced basis to complete milling ore already broken. In June 1943, the mine was completely shut down. Actual return from the sales of gold in 1943 was $1,504,043, but since operations ended in June, $1,200,000 was deducted for depreciation, property taxes, and maintenance costs for the entire year. When the gold mines were closed, the Homestake operators turned to the development of strategic metal deposits: tungsten, in the Black Hills; vanadium, in Wyoming; and manganese, in Southern California. The tungsten development was ordered closed by the government at approximately the time the mine was just coming into capacity operation,

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[101] See Appendixes D and E.

[102] "Homestake Gold Mine Reports Year's Profit", *Engineering and Mining Journal*, December 1943, p. 116.

because the tungsten situation had eased. The Mining Division of WPB states that it is costing Homestake $100,000 a month and the labor of 210 men simply to keep the mine in standby condition, and to prevent flooding. In December 1943, the *Engineering and Mining Journal* reported that "The Company [Homestake] still employs about 800 men in maintenance work, in essential jobs in the foundry at Lead, and in the lumber mill at Spearfish, South Dakota." Idaho-Maryland is spending approximately $75,000 a month to keep its mine in standby condition, and even despite this expenditure, subterranean swelling and the pressure of ore bodies that cannot be removed are crushing the mine timbers and threatening to make the mine forever unusuable. An appeal on this case is now in process.

It is impossible to estimate the loss to the individual miner and home-owner in affected mining communities, but appeals and protests against the relinquishing of leases and the necessity for forfeiting equity in equipment are on file in the War Production Board. Several bills have been introduced into both Houses of Congress for relief of gold mine operators forced out of production by Order L-208. Through the winter of 1942-43, the legislatures of Nevada, California, South Dakota, and Alaska passed resolutions calling for withdrawal of Order L-208. The basis for these various resolutions was mainly damage to community economy, and individual inequity, and the resolutions cited facts that had been adduced at the Senate hearings prior to issuance of L-208. "Fifty-seven percent of the entire revenue of Teller County, Colorado, which embraces the Cripple Creek district, arises from the production tax [on gold], and ninety-five percent of the total revenue of Teller County comes either directly or indirectly from gold mining", it was stated.[103] Further, the old arguments that the [fol. 2206] age of the miners precluded their effective transfer to other mines were again advanced with scattered evidence that the miners had not transferred to other mines.

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[103] Statement of David Strickler, President, Cripple Creek Development Company, Colorado Springs, Colorado. U. S. Senate, 74th Cong., 2nd Sess., Subcommittee of the Special Committee on the Investigation of Silver, *Hearings*, May 5, 1942, p. 642.

"The average age of the miners of the Cripple Creek District is about 48 years. The miners . . . own their own homes. I think it can be fairly stated as a general proposition that once a gold miner, always a gold miner. . . . By the very nature of their work, they have disqualified themselves from becoming efficient in any other occupation."[104]

Despite the economic casualties admittedly caused by the closing of the gold mines, the War Production Board declined to amend Order L-208 when the question arose in May 1943. The reasoning behind this refusal was stated by Dr. Gustav Peck, Labor Advisor to the Chairman:

> "I questioned the need and method of L-208 when it was brought up before the Manpower Commission. Practically all the arguments now being made against the continuation of the Gold Order were made before the Order was issued. However, the decision having been made, we are now confronted with quite a different situation. . . . We knew before the Order was issued that it would be costly to the companies affected and to some communities.
>
> "Waiving the question as to whether the Gold Order should have been issued in the first instance, I believe it would be poor policy to revoke it now, since the forces it has accelerated are generally in the right direction . . . .
>
> " . . . hundreds of workers formerly employed in the gold mines are now employed away from home in non-ferrous mining or other necessary war work and . . . if the gold mines were generally reopened there would be a strong temptation for them to return home . . . .
>
> "From the point of view of the War Production Board it seems to me there is only one course to follow, now that the Gold Order is in existence and there is an escape clause in it under which exceptions can be made . . . .
>
> "In other words, I would continue the closing order but handle appeals on a more liberal basis."[105]

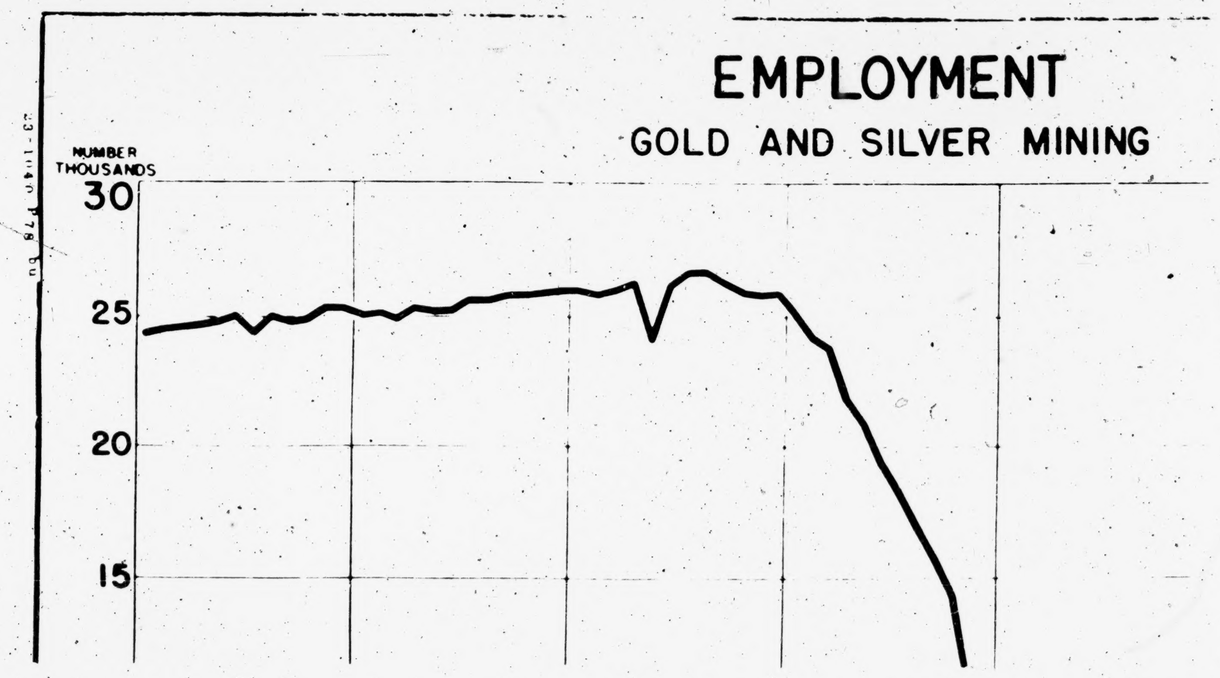
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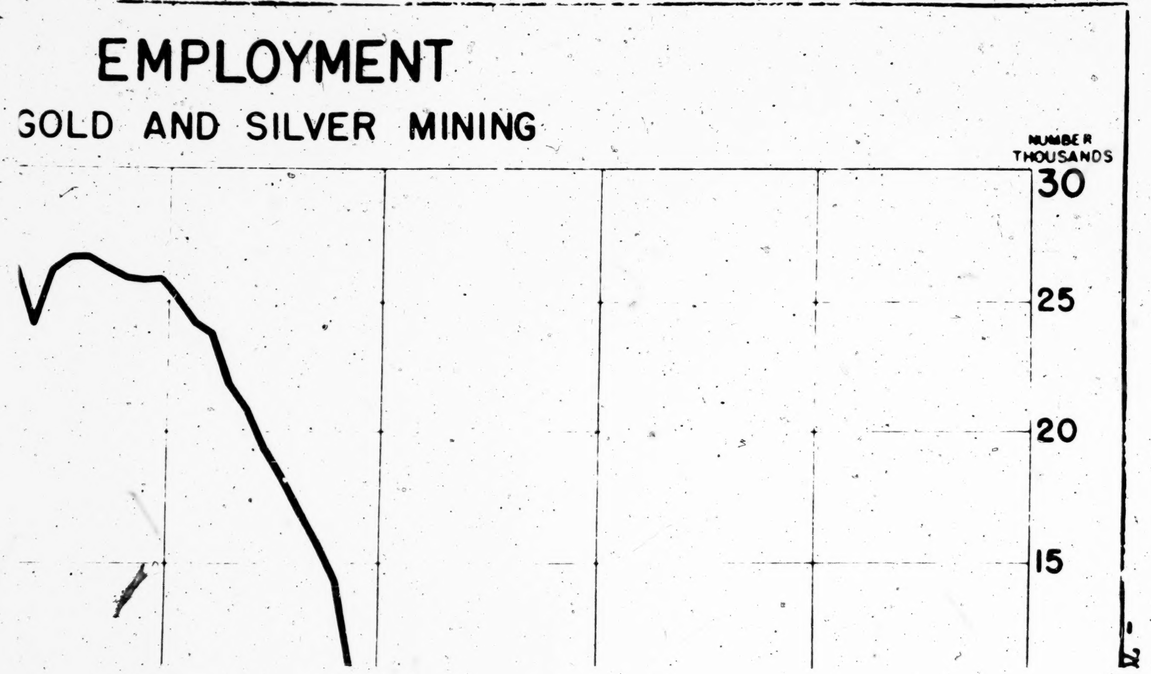
[104] Ibid., p. 643.

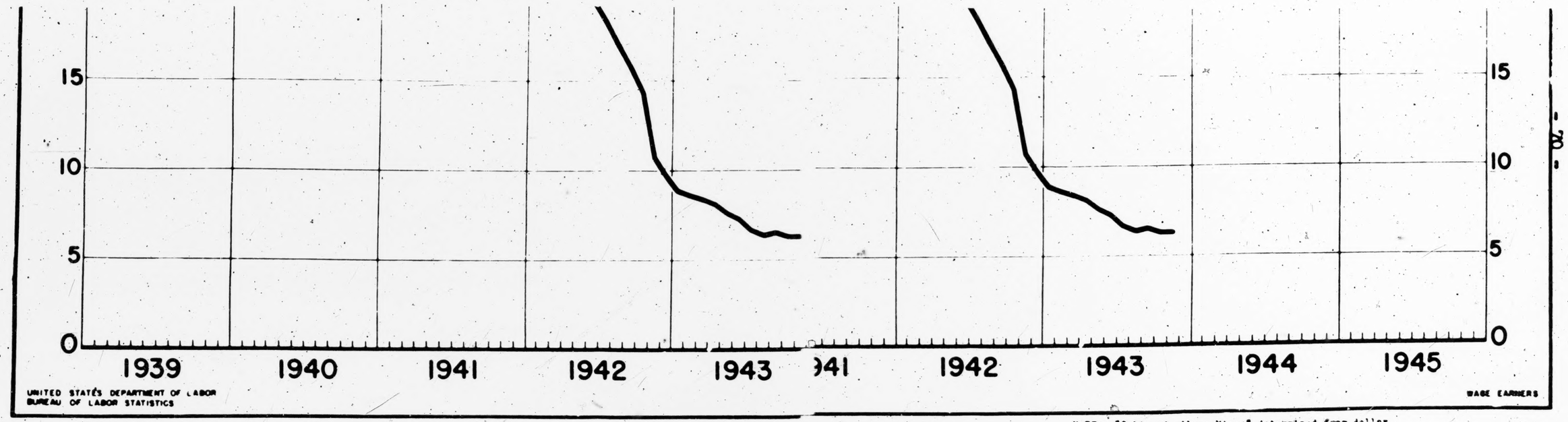
[105] Memorandum, Gustav Peck to William L. Batt, May 28, 1943.

EMPLOYMENT

GOLD AND SILVER MINING







UNITED STATES DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS

NOTE: "Gold and
value of m
Classifica
of ore pro
dence "gol
includes
or "zinc"

NOTE: "Gold and Silver Mines" determined from dollar value of metals produced (Bureau of Census Classification) rather than from actual tonnage of ore produced (Bureau of Mines Classification) hence "gold and silver mines" as used here includes some mines classed as "copper", "lead" or "zinc" by the Bureau of Mines.

[fol. 2201] Since that time the losses to communities and individuals asmitted in May have been aggravated considerably. Mining Division officials believe that few except the very largest gold mining companies can, or will, much longer bear the burden of keeping the mines in stand-by condition with no indication of any future return. The mines are beginning to deteriorate; if they are once allowed to cave or flood to any appreciable extent, subsequent dewatering and reopening operations costing millions of dollars may prove prohibitive. This situation obviously poses the policy question of whether, if the mines are ever to be restored to active production, positive action in this direction can be much longer delayed. If the broader aspect of the gold problem,—the belief that "a reduction in gold mining should be envisaged for the post-war period" [106] holds, then the problem of curtailment on a world wide scale must be faced. The efforts of the United States to induce other countries to cut gold production have been only slightly successful, the decline in gold production in both Canada and South Africa being due principally to labor and equipment shortages. South African gold production for 1943 was down to the 1939 level; Canadian gold production for the same period was 28.4 percent under the 1939 level; United States gold production was 75.5 percent under the 1939 total.

Since the beginning of 1944, there has been a slight increase in the supply of labor available to mining in Canada; a few gold mines have resumed operations and some exploratory and development work has been undertaken. In South Africa, gold mining companies are rapidly taking up options on new gold fields in the Orange Free State; development work is being accelerated, with the government fostering experiments in the possibility of mining gold below the 8,500 foot level.

Dr. J. F. Walker, Deputy Minister of Mines for British Columbia, Canada; commenting on the decline in value of Canadian mine output for 1943 (a decline due in large part to the decreased operations of the gold mines) declared:

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[106] Letter, Milo Perkings, Executive Director, Economic Defense Board, to Donald M. Nelson, December 19, 1941.

"The decline in value of mine output is only the reflection of a serious situation that is imperiling the future of the mining industry in the Province. . . . This is what finally shut down so many gold mines—production during the war or to permit competition in means that the physical condition of many of the mines that have shut down, and of some of those still operating is not what it should be, either to maintain production during the war or to permit competition in [fol. 2202] the post war period. If production is to be maintained, more men must be diverted to the mining industry, and if we are to be able to compete in the postwar world, still more men must be found so that our mines can be put back into the condition they were in when the war started. We appreciate to the full the necessities of war, and the demands on labor and materials, but we believe that labor can be made available to our mining industry." [107]

The political and economic factors underlying the continuance of foreign gold mining are recognized, but a long-range view of the domestic situation raises the issue of whether the domestic gold mining industry may be facing extinction while foreign gold mining anticipates an early return to pre-war status.

[fol. 2203] APPENDIX A

Chronology

1941

July 29. Preference rating Order P-23 issued, providing blanket rating of A-3 for deliveries of material required for production of mining machinery.

September 17. Preference Rating Order P-56 issued; assigning preference ratings to metal mines, based on serial number classification system. Rating of A-8 assigned to maintenance and repair equipment for mines in general. Gold placer mines excluded from priority benefits.

November 8. Joint Economic Committee, United States and Canada, resolves that gold mining and refining in-

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[107] *Engineering and Mining Journal*, January 1944, p. 117.

1941

dustry in general be treated as a non-defense industry but that where curtailment through priorities would cause prospective deficit in dollar exchange, such prospective deficit be avoided.

November 18. Supply, Priorities and Allocations Board asked to consider promulgation of policy on gold mining.

November 30. Preference Rating Order P-23 scheduled to expire: expiration date advanced to December 31, 1941.

December 2. SPAB considers gold mining problem, requests Donald M. Nelson to obtain official opinion on matter from State and Treasury Departments, Federal Reserve Board, and Board of Economic Warfare.

December 18. Preference Rating Order P-22 (under which gold placer mines had been permitted to obtain low ratings) replaced by more stringent Order P-100, virtually shutting off gold placer mines from obtaining equipment.

December 23. Donald M. Nelson reports consensus of governmental finance authorities that gold is not essential to war effort. SPAB agrees that in granting priorities and export licenses for gold mining machinery and equipment, no materials be allowed for expansion of production but minimum amounts for maintenance and repair be granted.

[fol. 2204] December 31. Preference Rating Order P-23 expires, and is replaced by Order P-56-a, providing rating of A-3 for essential mining machinery, assigning serial numbers on basis of essentiality. New Machinery for gold mines placed at bottom of list.

1942

February 11. E. R. Stettinius, Jr., Lend-Lease Administrator, suggests that WPB adopt policy of denying nitroglycerin and hardened steel for gold mining companies for duration of the war.

March 2. In view of shortage of mining equipment, Order P-56 amended to uprate priorities on machinery for essential mines. Any mine more than 30 percent of the production of which in dollar value consists of gold and/or silver was excluded from priority ratings.

March 12. Meeting held at University of Nevada, West-

1942

ern Senators, State Governors, and mining representatives; protest inequity of 30 percent exclusion clause.

May 5, 6, 8. Series of hearings held before Senate Special Silver Committee to protest 30 percent exclusion clause.

May 15. Order P-56 amended to eliminate 30 percent exclusion clause. Power to assign serial numbers vested in Director of Industry Operations, who declares that mines producing primarily gold and or silver have not been and will not be granted serial numbers.

May-June. Labor shortage develops in western nonferrous metal mines.

July. Meeting of representatives of government agencies interested in the mine labor problem called by Manpower Branch, Army Services of Supply. It recommended that WPB issue order curtailing gold production, and that War Manpower Commission take steps to see that labor released through WPB action be transferred to essential nonferrous metal mines.

[fol. 2205] 1942

July 31. Richard A. Lester, Labor Production Division, WPB, proposes progressive curtailment of gold mining on percentage basis; submits draft plan.

August 3. Wilbur Nelson, Mining Branch, WPB, declares Lester plan would seriously curtail production of nonferrous metals and disrupt smelter practice.

August 20. First draft order closing gold mines prepared. Order proposes to close all non-essential mines, "non-essential mines" being defined as "any mining enterprise in which gold is produced, unless the operator of such mining enterprise is the holder of a serial number for such enterprise issued under Preference Rating Order P-56 as amended". Shutdown date to be thirty days after issuance of the order; mines producing less than 1,200 tons of commercial ore in 1941 exempted from order.

September 1. Chief of Copper Branch questions feasibility of tying gold closing order with P-56.

1942

September 3. Wilbur Nelson replies that mines possessing P-56 serial numbers are those that also produce critical minerals needed in war effort.

September 3-9. A. I. Henderson directs Miscellaneous Minerals Branch to prepare order closing all gold mines in which total value of production of gold is 50 percent or more of total value of all metals produced.

September 9. Wilbur Nelson protests that if 50 percent basis is used, result will be temporary shutdown of many mines producing essential fluxing ores; requests that August 20 draft order be used.

September 11. J. M. Scribner, Operating Assistant to A. I. Henderson, reports that after conferences with Wilbur Nelson and others, "it was determined to be most practical that the order not be divorced from P-56." Mining Division proposes to cancel, where possible, mine serial numbers assigned to mines producing 50 percent or more of gold in dollar value.

[fol. 2206] 1942

September 15-16. Miscellaneous Minerals Branch declares closing of gold mines outside its jurisdiction; preparation of order turned over to Mining Division.

September 17. J. M. Scribner advises Mining Branch to clear order with all branches concerned, but withhold issuance pending instruction from office of Donald M. Nelson.

September 19. W. L. Batt requests Wilbur Nelson to determine measures calculated to slow down South African gold production and to consider advisability of calling labor-management representatives of gold mines to Washington meeting.

September 22. Mining Branch informs J. M. Scribner that it has added a few minor verbal changes to the gold closing order, for purposes of clarity, and will hold the order until further directions are given.

September 23. At W. L. Batt's suggestion, Wilbur Nelson, Labor Production Division and War Manpower Commission representatives meet to discuss feasibility of bringing gold mines representatives to Washington. Wilbur Nelson believes it should be done; Labor Production Division and WMC disagree. No decision reached.

1942

September 24. Batt holds meeting on gold mine closing order, with General McSherry of WMC in attendance. Batt states his belief that the order should be issued, but agrees to hold it up at McSherry's request pending settlement of wage dispute by War Labor Board.

September 25. Batt informs A. I. Henderson of conclusions reached at September 24 meeting.

September 25. At meeting of WPB branches concerned with mineral production, resolution is unanimously passed requesting that gold mine companies be called to Washington before order is issued.

September 28. Wilbur Nelson reports at Interbranch meeting that Batt had turned down the resolution; group reaffirms earlier stand.

[fol. 2207] 1942

September 29. Batt agrees to necessity of calling gold mine operators to Washington; Wilbur Nelson telephones invitation to largest gold mine operators to meet in Washington on October 1.

September 30. Meeting held in Batt's office with Senators interested in gold closing order.

October 1. Meeting held with gold mine operators. Statistics developed at meeting reveal that approximately 3,270 men will be released by closing the gold mines, of which 896 are miners and muckers.

October 2. At conference of Donald M. Nelson, W. L. Batt and Wilbur Nelson, it is agreed that new order would be drawn giving gold mines six months in which to close, during which period they would have to operate at 50 percent of average 1941 production.

October 2. Robert P. Patterson, Undersecretary of War, writes Donald M. Nelson that the longer the delay in closing the gold mines the further off will be the relief of the copper shortage.

October 5. Patterson and Forrestal jointly request Donald M. Nelson that "prompt action be taken" and "half-measures avoided".

October 6. Donald M. Nelson brings matter of closing the gold mines before the War Production Board. General Somervell declares that in view of Army agreement to fur-

1942

lough 4,000 soldiers for work in copper mines, "failure to stop [gold] production immediately would be inexcusable". WPB agrees that order be issued stopping all non-essential domestic gold mining operations within 60 days, and thereafter permitting only minimum maintenance operations.

October 6. Draft of gold mine closing order prepared by Wilbur Nelson and Frederick M. Eaton, Assistant General Counsel of WPB.

October 7. Meeting held by WPB mining and labor representatives with War Manpower Commission representatives on mechanisms to channel released labor into nonferrous metal mines.

[fol. 2208] 1942

October 8. Limitation Order L-208 issued, without prior circulation, or submission to Clearance Committee. Operators of all lode and placer gold mines prohibited from proceeding with breaking ore or any development work or new operations after October 15, 1942, and within sixty days from October 8, 1942, from carrying on any except minimum operations incident to maintaining mines in standby condition.

October 8. War Manpower Commission Directive No. 13 issued, instructing employers not to hire in Alaska or any state west of the Mississippi River any released gold mine labor without certification by United States Employment Service.

1943

January-April. Appeals for relief or modification of L-208 pour in to WPB. State legislatures pass resolutions calling for its withdrawal; bills are introduced into Congress requesting relief for gold mine operators forced to suspend operations under L-208.

May 24. Thirty Senators from Western states appeal to WPB to rescind or modify L-208.

May 24. Edward Rott, Deputy Administrator of L-208 declares that general effect of the order has been to antagonize individuals and communities dependent on gold min-

ing and cause large losses to operators. He suggests modification of L-208 by an amendment.

June 13. Patterson states that as gold miners are still at work in some gold mines, there is no warrant for asking that soldiers be furloughed for work in copper mines.

June 15. WPB unanimously votes to continue Order L-208 with exceptions allowed on appeal only if value of essential metals produced by mine outweighs use of critical materials involved, or if necessary labor can be obtained without drawing upon essential war activities.

November 17. Representative Engle of California introduces Bill into House of Representatives proposing repeal of Order L-208.

[fol. 2209]

APPENDIX B

Estimated Employment in Gold and Silver Mines,
January 1939 to February 1944 [1]

	1939	1940	1941	1942	1943	1944
Jan.	24,400	25,000	26,000	25,200	8,900	6,400
Feb.	24,500	25,100	25,800	24,200	8,600	6,500
Mar.	24,600	24,900	26,000	23,800	8,400	
Apr.	24,700	25,300	26,300	21,900	8,100	
May	24,800	25,200	24,100	20,900	7,500	
June	25,000	25,200	26,200	19,400	7,200	
July	24,400	25,600	26,700	18,400	6,400	
Aug.	25,000	25,600	26,700	17,100	6,500	
Sept.	24,800	25,800	26,300	15,700	6,500	
Oct.	24,900	25,800	25,900	14,300	6,300	
Nov.	25,300	25,900	25,800	10,700	6,300	
Dec.	25,300	26,000	25,900	9,700	6,400	
Average	24,800	25,450	26,000	18,400	7,270	

Source: Bureau of Labor Statistics

[1] "Gold and silver mines" determined from dollar value of metals produced (Bureau of Census Classification) rather than from actual tonnage of ore produced (Bureau of Mines Classification). Hence, "gold and silver mines" as used here includes a few mines classed as "Copper", "Lead", or "Zinc" by the Bureau of Mines.

[fol. 2211]

APPENDIX D

Mine Production of Gold in the United States, By States, 1940–1943 (in terms of recoverable metal)

State Or Territory	Fine Ounces 1940	1941	1942	1943
Western States and Alaska:				
Alaska	755,970	690,649	487,621	106,890
Arizona	294,807	315,000	253,651	173,000
Calif.	1,456,671	1,411,880	847,997	148,000
Colo.	367,336	377,503	268,627	136,128
Idaho	146,480	150,000	95,020	32,000
Montana	272,602	246,500	146,892	59,500
Nevada	383,933	372,300	295,112	138,000
New Mexico	35,943	28,469	14,961	5,713
Oregon	113,402	94,600	46,233	1,000
So. Dak.	286,662	610,223	522,098	113,352
Texas	312	325	236	5
Utah	355,494	347,784	391,544	381,763
Washington	82,136	81,569	75,396	66,200
Wyoming	740	482	23	2
Total	4,851,488	4,727,204	3,442,411	1,361,553
Eastern States:				
Alabama	5	35	1	—
Georgia	961	300	30	10
No. Car.	1,943	3,117	4,077	120
Penna.	1,840	2,675	2,499	2,225
So. Car.	13,076	15,400	7,824	147
Tenn.	173	228	159	257
Va.	458	245	109	10
Total	18,456	22,000	14,699	2,769
Philippine Is.	1,114,201 [1]	1,109,659 [1]	[2]	[2]
Puerto Rico	13 [1]	8 [1]	[2]	[2]
Total U. S.	5,984,163	5,858,871	3,457,110	1,364,322

[1] Refinery receipts.
[2] Philippine Islands and Puerto Rico excluded.
Source: U. S. Bureau of Mines, Mineral Industry Surveys.

[fol. 2212]

APPENDIX E

Mine Production of Gold in the United States, by States, 1940–1943
(in terms of value of recoverable metal)

State Or Territory	Fine Ounces 1940	1941	1942	1943
Western States and Alaska:				
Alaska	$26,458,950	$24,172,715	$17,066,735	$3,741,150
Arizona	10,318,245	11,025,000	8,877,785	6,055,000
California	50,948,485	49,413,000	29,679,895	5,180,000
Colorado	12,856,800	13,212,605	9,401,945	4,764,480
Idaho	5,126,800	5,250,000	3,325,700	1,120,000
Montana	9,541,070	8,627,500	5,141,220	2,082,500
Nevada	13,437,655	13,030,500	10,328,920	4,830,000
New Mexico	1,258,005	996,415	418,635	199,955
Oregon	3,969,070	3,311,000	1,618,155	35,000
South Dakota	20,533,170	21,357,805	18,273,430	3,967,320
Texas	10,920	11,375	8,260	175
Utah	12,442,290	12,172,440	13,704,040	13,361,705
Washington	2,874,760	2,854,915	2,638,860	2,317,000
Wyoming	25,900	16,870	805	70
Total	169,802,080	165,452,140	120,484,385	47,654,355
Eastern States:				
Alabama	175	1,225	35	x
Georgia	33,635	10,500	1,050	350
North Carolina	68,005	109,095	142,695	4,200
Pennsylvania	64,400	93,625	87,465	77,875
South Carolina	457,660	539,000	273,840	5,145
Tennessee	6,055	7,980	5,565	8,995
Virginia	16,030	8,575	3,815	350
Total	645,960	770,000	514,465	96,915
Philippine Is.	38,997,035 [2]	38,838,065 [1]	[2]	[2]
Puerto Rico	455 [2]	280 [1]	[2]	[2]
Total U. S.	$209,445,705	$205,060,485	$120,998,850	$47,751,270

[1] Refinery receipts.
[2] Philippine Islands and Puerto Rico excluded.
Source: U. S. Bureau of Mines, Mineral Industry Survey.

[fol. 2213]

APPENDIX F

Value of Mineral Products of the United States, By States, 1940

States	Total Value Mineral Products	Gold Value	Silver Value	Copper Value	Lead Value	Zinc Value
Alabama	64,998,018	105	2	—	—	—
Alaska	28,724,221	23,685,795	191,679	12,430	77,900	—
Arizona	85,277,347	10,318,245	5,031,264	63,544,194	1,326,600	1,947,456
Arkansas	37,479,135	—	—	—	5,500	55,440
California	455,672,038	50,948,485	1,678,063	1,454,988	177,200	9,954
Colorado	63,188,421	12,856,760	6,905,393	2,746,352	1,147,600	637,560
Connecticut	3,914,177	—	—	—	—	—
Delaware	457,326	—	—	—	—	—
District of Columbia	640,480	—	—	—	—	—
Florida	14,854,206	—	—	—	—	—
Georgia	16,932,335	33,635	448	2,848	—	—
Idaho	40,799,920	5,126,800	12,481,593	756,874	10,483,400	8,895,726
Illinois	277,943,011	—	3,389	—	150,800	607,068
Indiana	58,975,110	175	—	—	—	—
Iowa	26,006,904	—	—	—	—	—
Kansas	130,859,896	—	—	—	1,192,700	7,186,032
Kentucky	131,974,410	—	—	—	36,000	161,028
Louisiana	189,153,312	—	—	—	—	—
Maine	4,374,976	—	—	—	—	—
Maryland	12,605,171	—	—	—	—	—
Massachusetts	7,573,122	—	—	—	—	—
Michigan	124,774,581	—	63,045	10,214,748	—	—
Minnesota	128,571,690	—	—	—	—	—
Mississippi	7,239,647	—	—	—	—	—
Missouri	50,324,566	—	185,112	154,810	17,205,200	1,600,578

APPENDIX F—Continued.

Value of Mineral Products of the United States, By States, 1940

States	Total Value Mineral Products	Gold Value	Silver Value	Copper Value	Lead Value	Zinc Value
Montana	79,487,873	9,541,070	8,790,080	28,564,366	2,303,600	6,625,962
Nebraska	4,692,146	—	—	—	—	—
Nevada	42,570,529	13,437,655	3,680,660	17,730,604	749,900	1,490,958
New Hampshire	1,605,337	—	—	—	—	—
New Jersey	33,653,732	—	—	—	—	13,121,911[1]
New Mexico	80,696,723	1,258,005	4,001,130	15,785,648	382,200	3,819,438
New York	76,119,505	—	25,401	—	197,300	4,496,436
North Carolina	21,112,732	68,005	4,608	—	—	—
North Dakota	2,987,351	—	—	—	—	—
Ohio	130,655,129	—	—	—	—	—
Oklahoma	235,494,159	—	—	—	2,124,000	20,529,810
Oregon	11,229,670	3,969,070	155,813	19,888	3,500	—
Pennsylvania	618,347,805	64,400	9,290	—	—	—
Rhode Island	994,997	—	—	—	—	—
South Carolina	5,305,597	457,660	5,722	90	—	—
South Dakota	23,528,825	20,533,170	124,810	1,356	700	—
Tennessee	42,683,407	6,055	27,456	—	57,300	4,384,296
Texas	725,005,009	10,920	943,040	6,780	20,500	—
Utah	104,392,989	12,442,290	8,655,857	52,401,264	7,568,800	5,517,288
Vermont	6,979,772	—	—	—	—	—
Virginia	50,003,672	16,030	193	—	228,500	2,132,802
Washington	28,090,188	2,874,760	259,680	2,172,312	255,500	1,456,560
West Virginia	329,891,960	—	—	—	—	—
Wisconsin	13,553,683	—	—	—	44,500	727,020
Wyoming	43,073,533	25,900	81	452	—	—
Total (Approximate)	5,614,800,000	210,108,700	49,483,189	205,453,000[1]	43,307,000[1]	74,338,000[1]

[1] Sales Value

Source: U. S. Bureau of Mines "Statistical Summary of Mineral Production", *Minerals Yearbook*, 1941

[fol. 2215]

APPENDIX G

World Gold Production, 1938–1943
(fine ounces)

	1938	1939	1940	1941	1942	1943
United States	5,008,478	5,559,139	5,919,928	5,858,781	3,457,110	1,364,322
Canada	4,725,117	5,094,379	5,311,145	5,328,314	4,841,306	3,649,671
South Africa	12,161,392	12,821,507	14,037,741	14,386,361	14,120,617	12,800,021
Total World	38,030,782	39,485,250	40,907,034	40,827,209	37,000,000 [1]	([2])

[1] Estimated
[2] Data not available

Sources: Data for 1938–1941 inclusive—American Metal Market, "Metal Statistics, 1943"; data for Canada, 1942–1943, Dominion Bureau of Statistics, "Canada, 1944—Official Handbook of Present Conditions and Recent Progress"; United States and South Africa, 1942–1943, U. S. Bureau of Mines.

[fol. 2216]

APPENDIX H

Quantity and Value of Lead, Copper, and Zinc Recovered from Ores Containing 30% or More Gold and Silver by Values, 1940

	Copper		Lead		Zinc		Total
	Pounds	Value	Pounds	Value	Pounds	Value	Value
Arizona	998,773	$ 98,877	5,118,178	$ 255,909	—	$ —	$ 354,786
California	12,874,300	1,287,420	3,502,600	175,310	52,000	3,276	1,465,826
Colorado	24,304,000	2,430,401	22,952,000	1,147,601	10,113,481	637,149	4,215,151
Idaho	5,407,838	540,785	24,211,642	1,210,582	—	—	1,751,367
Montana	1,235,671	123,567	14,380,055	731,202	—	—	854,769
Nevada	456,900	45,690	2,692,100	134,605	—	—	180,295
New Mexico	101,766	10,177	713,769	35,688	—	—	45,865
Oregon	176,000	17,600	70,000	3,500	—	—	21,100
Utah	9,990,393	999,039	141,337,357	7,566,862	87,551,100	5,515,719	14,081,620
Washington	19,222,977	1,922,297	26,836	1,689	—	—	1,923,986
Total	74,758,618	$7,745,853	215,004,537	$11,262,768	97,716,581	$6,156,144	$24,894,765

Source: United States Senate, 77th Cong., 2nd Sess., Subcommittee of the Special Committee on the Investigation of Silver, *Hearings*, p. 663 (May 28, 1942). Table prepared by Industrial West Foundation from data by U. S. Geological Survey, U. S. Bureau of Mines, and State bureaus of mines.

[fol. 2217] APPENDIX I

Equipment Released Under Order L-208

Type of Use	Number Of Releases	Estimated Used Equipment Value	Remarks
Metallic Mining	65	$749,102	Principally tungsten, zinc, copper, mercury and arsenic.
Non-Metallic Operations	14	165,864	
Coal Mining	3	278,100	One dragline 14 cu. yds. $270,000 will greatly accelerate production of an anthracite coal project. Production of project to be 10,000 tons per day.
Construction	26	224,015	Canada to Mexico.
Military	18	325,494	Principally Alaska and West for construction.
Used Equipment Dealers	20	348,556	For release to holders of serial numbers under Orders P-56, P-58 and P-73.
All Others	25	59,349	Principally agriculture.
Total	171	$2,147,480	

Source: Edward H. Rott, "Report and Gold Mine Order L-208, Its Effect and Accomplishments," May 24, 1943.

[fol. 2218] PLAINTIFF'S EXHIBIT 3

Title 32—National Defense

Chapter IX—Office of Production Management

Subchapter B—Priorities Division

Part 959—Materials for the Production of Mining Machinery and Equipment Specified Herein

Preference Rating Order No. P-23

Producer's Serial No. ——

To: _____ _____
(Name of Producer) (Address)

959.1 Preference Rating Order. For the purpose of facilitating the acquisition of Material for the production of Defense Products, a preference rating is hereby assigned

to deliveries to the above-named Producer and to deliveries to his Suppliers, upon the following terms:

(a) *Definitions.* For the purposes of this Order:

(1) "Producer" means the specific person to whom this Order is addressed above.

(2) "Defense Products" means the following mining machinery and equipment to be produced by the Producer:

(i) Machinery and equipment directly necessary for underground and open-cut production of (a) coal, and (b) any materials produced with a view to extracting their metallic content; and

(ii) Machinery and equipment for all customary processes necessary for beneficiation and preparation for shipment of the coal and materials specified in (i) above.

(3) "Supplier" means any person with whom a contract or purchase order has been placed for delivery, to the Producer or to another Supplier, of Material which will enter directly or indirectly, at any stage, into the production of the Defense Products.

(4) "Material" means any commodity, equipment, accessories, parts, assemblies or products of any kind.

(b) *Assignment of Preference Rating.* Preference Rating A-3 is hereby assigned to deliveries of all Material which will enter directly or indirectly, at any stage, into the production by the Producer of the Defense Products; *provided, however, that the preference rating may be applied only to deliveries of Material included under the current Priorities Critical List as amended from time to time;* and provided further that such rating shall not apply to deliveries to a Supplier of machinery or equipment used in the manufacturing process by a Supplier.

(c) *Persons Entitled to Apply Preference Rating.* The preference rating hereby assigned may be applied by:

(1) The Producer;

[fol. 2219] (2) Any Supplier who has been furnished with a signed copy of the Order in the manner specified in paragraph (d).

(d) *Application of Preference Rating.* The Producer or any Supplier who has been so furnished with a signed copy

of this Order, in order to apply the preference rating to deliveries to him must:

(1) Execute a copy of this Order by signing the acceptance at the end thereof, and file such signed copy with the Director of Priorities; and

(2) Furnish one additional copy of the Order, signed by him in the same manner, to each of his Suppliers with whom he has placed a contract or order for Material to the delivery of which he elects to apply the preference rating. After he has furnished one such copy to a particular Supplier, he need furnish no additional copy to that Supplier to cover any subsequent deliveries of Material entering into the Defense Products. The Producer or Supplier who has applied the rating shall identify subsequent purchase orders which are covered by the rating by specifying thereon the number and serial number of this Order and the preference rating hereby assigned.

(e) *Restrictions on Use of Rating.* The rating shall not be applied:

(1) Unless the Material to be delivered cannot be secured when required without such rating;

(2) To obtain deliveries greater in quantity or on dates earlier than required for the delivery on schedule of the Defense Products or of Material entering into the Defense Products.

(f) *Reports and Information:*

(1) The Producer and each Supplier who applies the preference rating hereby assigned shall keep and preserve for a period of at least two years accurate and complete records and information concerning:

(i) All applications of such preference rating, including the kinds, values, quantities and delivery dates of Material covered by each such application, together with the name and address of each Supplier to whose deliveries of Material the rating has been applied.

(ii) Inventories and stocks on hand of Material of the kind covered by each application of the rating.

(iii) Contracts and Orders on his books, including de-

livery schedules, for Defense Products or for Material which is to enter directly or indirectly at any stage, into the production of Defense Products.

[fol. 2220] (2) The Producer and each Supplier who applies the preference rating shall file reports containing such information concerning the matters specified in paragraph (f)(1) above, and concerning any other pertinent matters, with the Division of Priorities, Office of Production Management, as shall from time to time be required by said Division. No reports are to be filed by the Producer or any Supplier until so requested and until forms therefor are prescribed by the Division of Priorities.

(3) The Producer and each Supplier who applies the preference rating, shall submit from time to time to an audit and inspection by representatives of the Division of Priorities concerning the matters specified in paragraph (f)(1) above.

(g) *Use of Higher Preference Ratings.* If any delivery entitled to be rated under this Order is assigned a higher preference rating by an individual preference rating certificate or by any other order issued by the Director of Priorities, the Producer or Supplier may use the higher rating instead of the rating assigned by this Order.

(h) *False Statements.* Any person who wilfully falsifies records to be kept, or information to be furnished, pursuant to this Order may be prohibited by the Director of Priorities from receiving further deliveries of any Material subject to allocation by the Director of Priorities, and the Director of Priorities may also take any other action deemed appropriate, including a recommendation for prosecution under section 35 of the Criminal Code (18 U.S.C. 80).

(i) *Revocation or Modification.* This Order may be revoked or amended by the Director of Priorities at any time as to the Producer or any Supplier. In the event of revocation, or upon expiration of this Order, deliveries already rated pursuant to this Order shall be completed in accordance with said rating, unless the rating has been specifically revoked with respect thereto. No additional applications of the rating shall be made to any other deliveries by the Producer or Supplier affected by said revocation or expiration.

(j) *Effective Date.* This Order shall take effect on the

29 day of July, 1941; and, unless sooner revoked, shall expire on the 30 day of November, 1941. (O.P.M. Reg. 3, March 7, 1941, 6 F. R. 1596; E. O. 8629, January 7, 1941, 6 F. R. 191; Sec. 2(a), Public No. 671, 76th Congress, Sec. 9, Public No. 783, 76th Congress.)

Issued this 29 day of July, 1941.

E. R. Stettinius, Jr., Director of Priorities.

[fol. 2221] Acceptance

To Be Signed by an Authorized Official of the Producer or Supplier before Applying the Rating Assigned by the Foregoing Order.

(Before signing this Acceptance read carefully sections (c), (d), and (e) of the foregoing Order.)

The Producer or Supplier named below hereby accepts the foregoing Order and certifies to the Director of Priorities of the Office of Production Management that he is entitled to apply the preference rating assigned by the foregoing Order in accordance with its terms.

Dated this ——— day of ———, 1941.

———,
Legal Name of Producer or Supplier.

By: ———,
Name and Title of Authorized Individual.

(Section 35 of the Criminal Code, 18 U.S.C. 80, makes it a criminal offense to make a false statement or representation to any Department or Agency of the United States as to any matter within its jurisdiction.)

Additional copies of this Order may be secured from the Division of Priorities, Office of Production Management, Washington, D. C., or photostatic copies may be made and used by persons entitled to apply the preference rating.

[fol. 2222] PLAINTIFF'S EXHIBIT 4

Title 32—National Defense

Chapter IX—Office of Production Management

Subchapter B—Priorities Division

Part 982—Mines

Maintenance, Repair, and Supplies

Preference Rating Order No. P-56

982.1 Preference Rating Order. For the purpose of facilitating the acquisition of material for the maintenance and repair of the property and equipment of, and for supplies for Mines, preference ratings are hereby assigned to deliveries of such material upon the terms hereinafter set forth, until such time as the Office of Production Management certifies specific quantities of such material to which the preference ratings herein assigned may be applied.

(a) *Definitions.*

(1) "Person" means any individual, partnership, association, corporation, or other form of enterprise.

(2) "Mine" means any plant physically situated within the limits of the United States, its territories and possessions, and actually engaged in the extraction by surface, open-pit or underground methods, or in the beneficiation, concentration or preparation for shipment of the products of mining activity.

(3) "Mine Operator" means any person operating a Mine to whom a Mine Serial Number has been issued in accordance with the provisions of paragraph (b).

(4) "Supplier" means any person with whom a purchase order or contract has been placed by a Mine Operator or another Supplier for material.

(i) required by a Mine Operator for maintenance, emergency repair, emergency inventory, or operating supplies of a Mine, or

(ii) to be physically incorporated in other material so required by a Mine Operator.

(5) "Material" means any commodity, equipment, accessories, parts, assemblies, or products of any kind.

(6) "Maintenance" means minimum upkeep necessary to

continue the working condition of the essential operating equipment of a Mine at its then current rate of production.

(7) "Emergency Repair" means a restoration of Mine property which is necessary to re-establish Mine Operation after a breakdown or suspension of operations because of damage, wear and tear, destruction of parts, or the like.

[fol. 223] (8) "Emergency Inventory" means minimum inventory of material required to make reasonable advance provision for emergency repair of a Mine.

(9) "Operating Supplies" means material which is essential to and consumed in the operation of a Mine and which is generally classified as "mine supplies" or "mine stores."

(b) *Certification of Mines.* The agency designated by the Governor or other chief executive officer of each state, territory or possession shall furnish in duplicate to the Office of Production Management a certificate setting forth the names of the persons operating within such state, territory or possession a recognized mining enterprise actually engaged in the extraction by surface, open-pit, or underground methods, or in the beneficiation, concentration or preparation for shipment, of the products of mining activity, (but not including that form of mining known as "gold placer mining"). The Office of Production Management will thereupon issue to each such Person who may be approved by the Director of Priorities, through such state agencies, a Mine Serial Number. Any person aggrieved by failure or refusal of a state agency to certify him as a Mine Operator may apply in writing to the Director of Priorities for issuance of a Mine Serial Number. The Director of Priorities may thereupon take such action as he deems appropriate.

(c) *Assignment of Preference Ratings.* Subject to the terms of this Order, the following preference ratings are hereby assigned, but nothing herein contained shall prevent the use of any other or higher rating to which any person may be entitled by reason of any other Preference Rating Certificate or Order.

(1) A-1-a to deliveries to a Mine Operator of material essential for emergency repair of a Mine, as approved by the Office of Production Management pursuant to paragraph (c)(1).

(2) A-3 to deliveries to a Mine Operator of material required for emergency inventory or for operating supplies or for maintenance of a Mine.

(3) A-3 to deliveries to a Supplier

(*a*) of material required by a Mine Operator for maintenance, emergency repair, emergency inventory or operating supplies of a Mine, and

(*b*) of material to be physically incorporated in other material so required by a Mine Operator.

(d) *Persons Entitled to Apply Preference Ratings.* The preference ratings hereby assigned may be applied by a Mine Operator or by any Supplier making to a Mine Operator or another Supplier deliveries of the kinds specified in paragraph (c) which have been rated pursuant to this Order.

(e) *Application of Preference Ratings.*

(1) A Mine Operator, in order to apply the A-1-a preference rating assigned by paragraph (e)(1), must communicate with the Office of Production Management, describing the material essential for emergency repair and the nature of the emergency necessitating such repair. [fol. 2224] The Office of Production Management will notify such Mine Operator whether, and to what extent, his application is approved, and a copy of such notification shall be furnished by the Mine Operator to his Supplier to evidence the A-1-a rating.

(2) A Mine Operator or a Supplier, in order to apply the A-3 preference rating assigned by paragraph (c)(2) and (3), must endorse the following statement on the original and all copies of each purchase order or contract for material, the delivery of which is entitled to such preference rating:

"Purchase order for Materials for a Mine rated pursuant to Preference Rating Order P-56, Mine Serial No. ——. Rating A-3. This application of the rating is made pursuant to the terms and conditions of that Order, with which the undersigned is familiar.

—— —— (Name of Mine Operator or Supplier) By:
—— —— (Authorized Signature)"

Such purchase order or contract so endorsed shall be delivered to the seller of such material. Such endorsement shall constitute a certification to the Office of Production

Management that the Mine Operator or Supplier is entitled to apply such rating to such delivery pursuant to this Order. Such purchase order or contract must be in writing and shall not include any material, the delivery of which is not rated pursuant to this Order.

(3) A Mine Operator or Supplier placing any such rated purchase orders or contracts and the Supplier selling the material covered thereby, must each retain endorsed copies of such purchase orders, contracts, notifications and other relevant documents segregated from all other purchase orders or contracts for a period of two years from the date thereof for inspection by authorized representatives of the Office of Production Management.

(f) *Restrictions on Application of Rating.* The preference ratings hereby assigned shall not be applied

(1) unless the material to be delivered cannot be secured when required without such rating;

(2) to obtain deliveries greater in quantity or on dates earlier than required for the operation, maintenance or repair of Mine property or equipment;

(3) by a Supplier to obtain material for a delivery by him which has not been rated pursuant to this Order.

(g) *Restrictions on Inventory.* No Mine Operator shall accept deliveries (whether or not rated pursuant to this Order) of operating supplies or other material which will increase such Mine Operator's inventory of such operating supplies or other material to an amount greater than the minimum necessary for the efficient operation of his business, and the ratio of inventory to current production shall in no event exceed the ratio of average inventory to average production for the years 1938, 1939, and 1940.

[fol. 2225] (h) *Resale of Operating Supplies and Other Material Prohibited:* Except with specific permission of the Director of Priorities, no Mine Operator shall resell any operating supplies or other materials (whether or not obtained pursuant to rating assigned by this Order) except to another Mine Operator.

(i) *Conservation and Standardization.* Every person affected by this Order shall use his best efforts to effectuate conservation of materials by elimination, simplification or standardization of types, sizes, or forms, or otherwise, and to cooperate in any program developed for such purpose by

the Office of Production Management. The Director of Priorities may from time to time issue specific directions as to conservation, elimination and standardization.

(j) *Relief.* In case the productivity or sound working condition of any Mine is adversely affected by any provision or application of this Order or by inability to obtain essential operating supplies or other materials, such Mine may apply for relief to the Director of Priorities. The Director of Priorities may thereupon take such action as he deems appropriate.

(k) *Records, Audit and Reports.* Each Mine Operator and each Supplier shall keep and preserve for a period of not less than two years accurate and complete records of all transactions affected by this Order and shall submit from time to time to audit and inspection by duly authorized representatives of the Office of Production Management. Each Mine Operator and each Supplier shall execute and file with the Office of Production Management or other designated agency, such reports and questionnaires as the Office of Production Management shall from time to time require. Until otherwise directed, each Mine Operator shall file with the designated state agency on or before the 10th day of each month, beginning October 10, 1941, a report of purchases made during the preceding month pursuant to the ratings granted by this Order.

(l) *Violations.* Any person affected by this Order who violates any of its provisions or a provision of any other Order, regulation or other directive of the Office of Production Management may be deprived of priorities assistance, or subjected to such other or further action as the Director of Priorities may deem appropriate.

(m) *Revocation or Modification.* This Order may be revoked or modified by the Director of Priorities at any time as to any Mine Operator or Supplier. In the event of revocation, or upon expiration of this Order, deliveries already rated pursuant to this Order shall be completed in accordance with said rating, unless the rating has been specifically revoked with respect thereto. No additional applications of this rating to any other deliveries shall thereafter be made by the Mine Operator or Supplier affected by said revocation or expiration.

(n) *Revocation of Prior Order.* The provisions of Preference Rating Order P-22, insofar as they relate to Mines are hereby revoked.

[fol. 2226] (o) *Effective Date.* This Order shall take effect immediately, and unless sooner revoked shall expire on the 30th day of April, 1942.

(P.D. Reg. 1, Aug. 27, 1941, 6 F.R. 4489; OPM Reg. 3, March 8, 1941, 6 F.R. 1596; E.O. 8629, Jan. 7, 1941, 6 F.R. 191; E.O. 8875, Aug. 28, 1941, 6 F.R. 4483; sec. 2(a), Public No. 671, 76th Congress, Third Session, as amended by Public No. 89, 77th Congress, First Session; sec. 9, Public No. 783, 76th Congress, Third Session.)

Issued this 17th day of September, 1941.

Donald M. Nelson, Director of Priorities.

[fol. 2227] PLAINTIFF'S EXHIBIT 5

Office of Production Management
Priorities Division

Preference Rating Order No. P-56-a

Material Entering into the Production of Mining Machinery and Equipment

To:
Name of Producer:
Address:
Serial No. Date:

PREFERENCE RATING ORDER. For the purpose of facilitating the acquisition of certain Material in the public interest and to promote the national defense, a preference rating is hereby assigned to deliveries to the above-named Producer and to deliveries to his Suppliers, upon the following terms:

(a) *Definitions.*

(1) "Producer" means the specific person to whom this Order is addressed above.

(2) "Supplier" means any person with whom a contract or purchase order has been placed for delivery of Material to the Producer or to another Supplier.

(3) "Material" means any commodity, equipment, accessory, part, assembly or product of any kind.

(b) *Assignment of Preference Rating.* Preference Rating A-3 is hereby assigned:

(1) to deliveries to the Producer by his Suppliers of those quantities and kinds of Material entering into the production of the following products, which may be specifically authorized for rating by the Director of Priorities from time to time on Form PD-25A: Mining machinery and equipment, and parts thereof, of the types set forth in Schedule A attached.

(2) to deliveries to any Supplier, of Material which will ultimately be delivered by him or another Supplier to the Producer under the rating assigned above, or will be physically incorporated into Material which will be so delivered; or which will be used, within the limitations of paragraph (d) (2) hereof, to replace in such Supplier's inventory Material so delivered.

(c) *Persons Entitled to Apply Preference Rating.* The preference rating hereby assigned may, in the manner and to the extent hereby authorized, be applied by:

(1) the Producer;

[fol. 2228] (2) any Supplier of Material to the delivery of which the preference rating has been applied as provided in paragraph (e).

(d) *Restrictions on Use of Rating.*

(1) *Restrictions on Producer.*

(i) The Producer may apply the rating only to those quantities and kinds of Material specifically authorized for such rating by the Director of Priorities as indicated on the copy of Form PD-25A returned to the Producer, and only to purchase orders and contracts placed by him prior to the termination of the period specified on said Form.

(ii) The Producer may not apply the rating to obtain delivery of Material on earlier dates than required to enable him to maintain his production schedules.

(2) *Restrictions on Supplier.*

(i) No Supplier may apply the rating to obtain Material in greater quantities or on earlier dates than required to enable him to make on schedule a delivery rated hereunder or, within the limitations of (ii) and (iii) below, to replace in his inventory Material so delivered. He shall not be deemed to require such Material if he can make his rated delivery and still retain a practicable working minimum inventory thereof; and if, in making such delivery, he reduces his inventory below such minimum, he may apply the rating only to the extent necessary to restore his inventory to such minimum.

(ii) A Supplier who supplies Material which he has in whole or in part manufactured, processed, assembled or otherwise physically changed may not apply the rating to restore his inventory to a practicable working minimum unless he applies the rating before completing the rated delivery which reduces his inventory below such minimum.

(iii) A Supplier who supplies Material which he has not in whole or in part manufactured, processed, assembled or otherwise physically changed may defer applications of the rating hereunder to purchase orders or contracts for such Material to be placed by him until he can place a purchase order or contract for the minimum quantity procurable on his customary terms; *provided*, that he shall not defer the application of any rating for more than three months after he becomes entitled to apply it.

(f) *Application of Preference Rating.*

(1) The Producer or any Supplier, in order to apply the preference rating assigned hereunder to deliveries to him must

[Fol. 2229] (i) Furnish one copy of Preference Rating Order No. P-56-a, with the attached form of acceptance thereof unsigned, to each of his Suppliers with whom he places a contract or purchase order for Material to the delivery of which he elects to apply the preference rating. After one such copy, regardless of Serial Number, has been furnished to a particular Supplier, no additional copy need be furnished to that Supplier to cover any subsequent application of the preference rating assigned hereunder; and

(ii) endorse on each purchase order or contract which is covered by the rating assigned hereunder, a statement in the following form, manually signed by an official duly authorized for such purpose, specifying the rating assigned and the appropriate Serial Number or Numbers:

> "Preference Rating A-3 is applied hereto under Preference Rating Order No. P-56-a, Serial No(s). ———, with the terms of which Order the undersigned is familiar
>
> ——— (Name of Producer or Supplier), By ——— (Duly Authorized Official).

Such endorsement shall constitute a representation to the Office of Production Management and the Supplier with whom the purchase order or contract is placed that such purchase order or contract is duly rated in accordance herewith. Such Supplier shall be entitled to rely on such representation, unless he knows of has reason to believe it to be false. Any such purchase order or contract shall be restricted to Material the delivery of which is rated in accordance herewith.

(2) A Supplier who has received from two or more Producers or Suppliers endorsed purchase orders or contracts for Material to the delivery of which the same rating has been applied in accordance with this Order, may (within the limitations of paragraph (d) hereof) include in a single purchase order or contract any or all of the Material which he in return requires to make such rated deliveries, but must specify in the endorsement on such single purchase order or contract all of the Serial Numbers contained in the purchase orders or contracts which have been so received by him and to fill which he is applying the preference rating.

(3) In addition to the foregoing requirements, a Supplier (but not a Producer), before he first applies the preference rating assigned hereunder to deliveries to him, must accept Preference Rating Order No. P-56-a by executing the form of acceptance attached at the end hereof, and file it with the Office of Production Management. No additional acceptance need be filed for any subsequent application of [fol. 2230] Preference Rating Order No. P-56-a, regardless of the Serial number under which or of the name of the Producer to whom it is issued.

(f) *Records.* In addition to the records required to be kept under Priorities Regulation No. 1, the Producer, and each Supplier placing or receiving any purchase order or contract rated hereunder, shall each retain, for a period of two years, for inspection by representatives of the Office of Production Management, endorsed copies of all such purchase orders or contracts, whether accepted or rejected, segregated from all other purchase orders or contracts or filed in such manner that they can be readily segregated for such inspection.

(g) *Reports.* The Producer, and each Supplier who applies the preference rating assigned hereunder, shall file such reports as may be required from time to time by the Office of Production Management. Until further notice each Producer shall file quarterly reports of material purchased on Form PD-25-a and each Supplier shall file quarterly reports on Form PD-81 (or, at his election, Form PD-81-a accompanied by copies of all endorsed purchase orders or contracts for Material to which the preference rating has been applied by him during the preceding quarter).

(h) *Communications to Office of Production Management.* Acceptance of this Order, all reports required to be filed hereunder, and all communications concerning this Order, shall, unless otherwise directed, be addressed to:

"Office of Production Management, Washington, D. C. Ref: P-56-a."

(i) *Violations.* Any Person who willfully violates any provision of this Order or who by any act or omission falsifies records to be kept or information to be furnished pursuant to this Order may be prohibited from receiving further deliveries of any Material subject to allocation, and such further action may be taken as is deemed appropriate, including a recommendation for prosecution under Section 35(A) of the Criminal Code (18 U.S.C. 80).

(j) *Revocation or Amendment.* This Order may be revoked or amended at any time as to the Producer or any Supplier. In the event of revocation, deliveries already rated pursuant to this Order shall be completed in accordance with said rating, unless the rating has been specifically revoked with respect thereto. No additional applica-

tions of the rating to any other deliveries shall thereafter be made by the Producer or Supplier affected by such revocation.

(k) *Applicability of Priorities Regulation No. 1.* This Order and all transactions affected thereby are subject to the provision of Priorities Regulation No. 1, as amended from time to time, except to the extent that any provision hereof may be inconsistent therewith, in which case the provisions of this Order shall govern.

(l) *Effective Date.* This Order shall take effect on the date specified in the heading hereof, and shall continue in [fol. 2231] effect until revoked.

(P.D. Reg. 1, Aug. 27, 1941, 6 F.R. 4489; O.P.M. Reg. 3 Amended, Sept. 2, 1941, 6 F.R. 4865; E.O. 8629, Jan. 7, 1941, 6 F.R. 191; E.O. 8875, Aug. 28, 1941, 6 F.R. 4483; sec. 2(a), Public No. 671, 76th Congress, Third Session, as amended by Public No. 89, 77th Congress, First Session; sec. 9, Public No. 783, 76th Congress; Third Session)

Issued this 31st day of December, 1941.

Donald M. Nelson, Director of Priorities.

[fol. 2232] Supplier's Acceptance of Preference Rating Order No. P-56-a

Material Entering into the Production of Mining Machinery and Equipment

(Before signing this acceptance, read carefully the terms of the foregoing Order).

To: Office of Production Management, Washington, D. C. Ref. P-56-a

The undersigned has received a purchase order or contract containing an endorsement in the form provided in Preference Rating Order No. P-56-a. For the purpose of applying to deliveries to the undersigned the rating assigned by said Order, the undersigned hereby accepts said Order and agrees to be bound by the terms and conditions thereof.

Dated this —— day of ——, 194

————, Legal Name of Supplier, By —— ——, Signature of Duly Authorized Official, Title, —— ——, Address of Supplier, —— ——

(Section 35(A) of the Criminal Code (18 U.S.C. 80) makes it a criminal offense to make a false statement or representation to any Department or Agency of the United States as to any matter within its jurisdiction).

INSTRUCTIONS

The requirements for furnishing copies of the foregoing Order to Suppliers and for execution of the above form of acceptance by Suppliers are set out in detail in paragraph (e) of the Order. Copies may be obtained for such purpose from the Office of Production Management, Washington, D. C.; or Producers or Suppliers required to furnish the copies may make them by photo-offset or similar photographic process. Such copies must be identical in size and every other respect with the Order and acceptance as issued by the Office of Production Management.

Copies furnished to Suppliers by Producers or other Suppliers, pursuant to the requirements of paragraph (e) of the foregoing Order, should have the form of acceptance left blank for execution by the Suppliers to whom they are furnished.

[fol. 2233] Schedule "A"

As to all machines listed below, the rating provided herein likewise applies to equipment items, accessories, and tools customarily sold with such machines.

Aerial tramway equipment.

Air compressors for mine use.

Air distribution equipment.

Assaying and testing laboratory equipment at the mine.

Ball-casting machines.

Boxcar loaders.

Cages and skips.

Car dumpers—rotary or end.

Cleaning plants and equipment, including design, construction, and erection.

Concentrating plants and equipment, including design, construction, and erection.

Conveyors—shaking, belt, chain, or gravity type, including duckbills and other self-loading heads.

Cutting machines—cable reel and self-propelling transportation trucks therefor.

Diamond core drilling machines.
Dragline dredges, excavators, and scraper units.
Dredges—continuous bucket, including pumps.
Drills and drilling machines, power driven, and reconditioning equipment therefor.
Dust control equipment.
Electrical equipment for mine transportation and power.
Hoists—including room hoists and car pullers.
Hydraulic monitors, with feed pipe and fittings.
Jacks for lifting and roof support.
Lamps—mine, miners', safety, and ore-exploration types.
Locomotives for mine use.
Loaders, mobile, including mucking machines.
Milling plants and equipment, including design, construction, and erection.
Mine cars, track or trackless.
Pit-car loaders and elevating conveyors.
Preparation plants and equipment, including design, construction, and erection.
Pumps, pipe, and fittings for mine drainage or material transport.
Rock dusting equipment.
Safety and defense equipment.
Sand dryers.
Scraper loaders.
Sheaves and sheave blocks.
Shovels, power.
Shuttle cars, track or trackless.
Slusher hoists and scrapers.
Steel sections for support of mine openings.
Storage batteries for mine use.
Tanks and bins for storage of mine products.
Tipples and head frames, including design, construction, and erection.
Track and track accessories for mine transportation.
Treating plants and equipment, including design, construction, and erection.
Trucks, tractors, and trailers for mine use.
Ventilation equipment.
Waste disposal equipment.
Weighing equipment, including automatic devices.
Wire rope for haulage and hoisting.

[fol. 2234] PLAINTIFF'S EXHIBIT 6

Title 32—National Defense

Chapter IX—War Production Board

Subchapter B—Division of Industry Operations

Part 982—Mines

Preference Rating Order P-56

(As Amended to March 2, 1942)

Section 982.1 is hereby amended to read as follows:

982.1. PREFERENCE RATING ORDER. For the purpose of facilitating the acquisition of material for continued and expanded operation of Mining Enterprises in the public interest and to promote the national defense, preference ratings are hereby assigned to deliveries of such material upon the terms hereinafter set forth:

(a) *Definitions.*

(1) "Person" means any individual, partnership, association, business trust, corporation, governmental corporation or agency, or any organized group of persons whether incorporated or not.

(2) "Mining Enterprise" means

(i) any plant actualy engaged in the extraction by surface, open-pit, or underground methods, or in the beneficiation, concentration, or preparation for shipment of the products of mining activity, but not including any plant more than 30 per cent of the production of which in dollar value consists of gold and/or silver;

(ii) any plant wholly engaged in the processing and burning of refractories;

(iii) any prospecting enterprise for the discovery or exploration of new or additional mining projects.

(3) "Operator" means any person operating a Mining Enterprise, who holds a Serial Number issued in accordance with the provisions of paragraph (b).

(4) "Supplier" means any person with whom a purchase order or contract has been placed for delivery of material to an Operator or to another Supplier.

(5) "Material" means any commodities, equipment, accessories, parts, assemblies, or products of any kind.

(6) "Maintenance" means minimum upkeep necessary to continue the working condition of equipment used by an Operator in the operation of a Mining Enterprise at its then current rate of production or operation.

(7) "Repair" means the restoration of property or equipment used by an Operator in the operation of a Mining Enterprise to a sound working condition after wear and tear, damage, destruction, or failure of parts or the like have made the property or equipment unfit or unsafe for service.

[fol. 2235] (8) "Operating Supplies" means material which is essential to and consumed in the operation of property and equipment used by an Operator in the operation of a Mining Enterprise and which is generally carried as Operator's stores and charged to operating expense account. The term does not include raw materials which enter into or form part of the finished product

(b) *Certification of Mining Enterprises.*

(1) *Domestic Mining Enterprises.* The agency designated by the Governor or other chief executive officer of each State, territory, or possession of the United States, including the Commonwealth of the Philippines, shall furnish to the War Production Board a certificate setting forth the names of the persons operating Mining Enterprises within such State, territory, or possession. The War Production Board will thereupon issue a Serial Number or Numbers to each such person who may be approved by the Director of Industry Operations. Any person aggrieved by failure or refusal of a State agency to certify him as an Operator may apply in writing to the Director of Industry Operations for issuance of a Serial Number. The Director of Industry Operations may thereupon take such action as he deems appropriate. Serial Numbers may be cancelled by the Director of Industry Operations in appropriate cases.

(2) *Foreign Mining Enterprises.* The Director of Industry Operations may, in his discretion, issue a Serial Number or Numbers to a person operating a Mining Enterprise outside the limits of the United States, its territories, and possessions and may cancel any such Serial Number.

(3) *Standards.* In issuing, denying, or cancelling Serial Numbers, the Director of Industry Operations will consider the importance to National defense of the present and prospective output of materials to be produced, the consumption of essential materials by the Mining Enterprise in its operations, the necessity to the Mining Enterprise of obtaining priorities assistance, and the available alternative methods of obtaining such assistance.

(c) *Assignment of Preference Ratings.* Subject to the terms of this Order, the following preference ratings are hereby assigned; provided, that no preference rating is assigned to the delivery of any machinery or equipment, or repair parts therefor, unless such machinery and equipment are used primarily to maintain or to increase the existing production of the Mining Enterprise, and not primarily to reduce operating costs. Nothing herein contained shall prevent the use of any other or higher rating to which any person may be entitled by reason of any other Preference Rating Certificate or Order.

(1) *As to Deliveries to an Operator.*

(i) A-1-a to deliveries of material for repair of property and equipment used in and essential to the operation of a Mining Enterprise, when and only when there has been an actual breakdown or suspension of operations because of damage, wear and tear, destruction or failure of parts, or the like, and the essential material is not otherwise available.

~~(ii)~~ A-1-c to deliveries of repair parts for machinery and equipment of the types listed in Schedule A hereto; provided, that such repair parts are for use in a Mining [fol. 2236] Enterprise less than 30 percent of the production of which in dollar value for the previous calendar quarter was derived from any one or more of the following:

Sand (except foundry sand), gravel, crushed stone, and slag, including all commercially recognized forms of these products;

Clay of all types, except those used for refractories and ceramics for electrical use;

Building and ornamental stone of all types;

Gypsum, talc, soapstone, slate (except for electrical

use), and all raw material for the manufacture of lime and calcareous cements.

Such ratings shall be applied by any Operator only to deliveries in any calendar quarter of a quota consisting of such dollar value of repair parts as may be expressly authorized by the Director of Industry Operations after application by such Operator in form prescribed by the Director of Industry Operations. For the first calendar quarter of 1942 such quota shall be the dollar value of repair parts which bears the same ratio to the dollar value of repair parts delivered to the Operator in the last calendar quarter of 1941 as the dollar value of the Operator's production in the first calendar quarter of 1942 bears to the dollar value of the Operator's production in the last calendar quarter of 1941.

(iii) A-1-c to deliveries of repair parts for essential productive facilities to other Mining Enterprises and or for other types of machinery and equipment up to the minimum required to make reasonable advance provision to avert an actual breakdown or suspension as described in paragraph (c)(1)(i),

(iv) A-8 to deliveries of material for other repairs to, for maintenance of, and for operating supplies for, property and equipment used in and essential to the operation of a Mining Enterprise.

(v) to deliveries of essential machinery and equipment, whether or not included in Schedule A, such preference ratings as the Director of Industry Operations may from time to time assign to particular orders for such equipment submitted to him for approval in the manner described in paragraph (c)(2) below.

(vi) A-10 to deliveries of material for all other repairs, maintenance and operating supplies.

(2) *As to Deliveries to a Supplier.* Deliveries of material which will be delivered (or physically incorporated into material which will be delivered) to an Operator under any preference rating assigned by or pursuant to paragraph (c)(1) are assigned the same preference rating as that assigned to the delivery to the Operator.

(d) *Persons Entitled to Apply Preference Ratings.* The preference ratings hereby assigned may be applied by

(1) An Operator, or

(2) A Supplier to enable it to make to an Operator or to another Supplier deliveries on purchase orders or contracts endorsed or otherwise identified pursuant to paragraph (e).

[fol. 2237] (e) Application of Preference Ratings.

(1) Application of A-1-a or A-1-c Rating by Operator. An Operator, in order to apply the A-1-a preference rating assigned by paragraph (c)(1)(i) or the A-1-c preference rating assigned by paragraph (c)(1)(iii) must communicate with the War Production Board, Washington, D. C., Ref: P-56, describing the material needed for emergency repair and the nature of the emergency, or the reasons why advance provision is necessary to avert breakdown or suspension, and such other information as may be required. The Director of Industry Operations will notify such Operator, whether, and to what extent, its application is approved, and a copy of such notification shall be furnished by the Operator to its Supplier to evidence the A-1-a or A-1-c rating.

(2) Application of Ratings by an Operator to Deliveries of Machinery or Equipment. An Operator, in order to apply the ratings assignable under paragraph (c)(1)(v), must communicate with the War Production Board, Washington, D. C., Ref: P-56, describing the machinery or equipment needed and the reasons why such machinery or equipment is essential for the proper operation of the Mining Enterprise. The Director of Industry Operations will notify such Operator whether its application is approved, and if approved, shall assign a Preference Rating thereto; a copy of such notification and assignment of rating shall be furnished by the Operator to his Supplier.

(3) Standards. In acting on any application pursuant to paragraph (e)(1)(2), the Director shall consider the importance to national defense of the material to be produced by the machinery, equipment, or other material for which rating is requested, and the consumption of scarce materials rating assigned by paragraph (c)(1)(ii), the A-8 preference

(4) *Application of Other Ratings by Operator or Supplier.* An Operator in order to apply the A-1-c preference

rating assigned by paragraph (c)(1)(ii), the A-8 preference rating assigned by paragraph (c)(1)(iv), or the A-10 rating assigned by paragraph (c)(1)(vi), or a Supplier in order to apply any preference rating assigned by paragraph (c)(2), must endorse the following statement on the original and all copies of the purchase order or contract for such material, signed by a responsible official duly designated for such purpose by such Operator or Supplier:

> "Materials for a Mining Enterprise, Rating A—— under Preference Rating Order P-56, Serial No. —— and in compliance therewith.
>
> ——, (Name of Operator or Supplier), By ——, (Authorized Signature)"

If the material is for export outside the limits of the United States, its territories and possessions, the Commonwealth of the Philippines, or the Dominion of Canada, such endorsement shall also contain the sentence:

> "This material is for export and is covered by Export License No. ——, dated ——."

[fol. 2238] Such purchase order or contract so endorsed shall be delivered to the Supplier of such material. Such endorsement shall constitute a representation to the War Production Board and the Supplier with whom the purchase order or contract is placed that such purchase order or contract is duly and properly rated in accordance herewith. Such Supplier shall be entitled to rely on such representation, unless he knows or has reason to believe it to be false. Any such purchase order or contract shall be restricted to material the delivery of which is rated in accordance herewith. With respect to any purchase order or contract for such material placed before the effective date of this Order, such preference rating may be applied by delivering to the seller a duplicate copy of such purchase order or contract so endorsed.

(5) An Operator or Supplier placing any such rated purchase order or contract, and the Supplier of the material covered thereby, must each retain endorsed copies of all such purchase orders or contracts, and certificates and notifications made or received pursuant to this paragraph

(e), for a period of two years from the date thereof, for inspection by authorized representatives of the War Production Board.

(6) *Restrictions on Deliveries by Supplier.* No Supplier shall deliver machinery, equipment, or repair parts to an Operator or another Supplier under any rating

(i) unless such Supplier has received from such Operator or such other Supplier all certificates and notifications required by paragraph (e).

(ii) if such Supplier knows or has reason to believe that such material is not properly rated under the terms of this Order.

A Supplier must report forthwith to the War Production Board the details of any such attempt to apply any rating in violation of the terms of this Order.

(f) *Restrictions on Application of Rating.*

(1) The preference ratings hereby assigned shall not be applied

(i) unless the material to be delivered cannot be secured when required without such rating;

(ii) to obtain deliveries greater in quantity or on dates earlier than required for the operation, maintenance, or repair of the property or equipment used by an Operator in and essential to the operation of a Mining Enterprise;

(iii) by a Supplier to obtain material in excess of the amount necessary to make rated deliveries.

(g) *Restrictions on Inventory.* No Operator shall accept deliveries (whether or not rated pursuant to this Order) of operating supplies or other material which will increase such Operator's inventory of such operating supplies or other material to an amount greater than the minimum necessary for the efficient operation of his business, and the ratio of inventory to current production shall in no event exceed the ratio of average inventory to average production for the years 1938, 1939, and 1940.

[fol. 2239] (h) *Resale of Operating Supplies and Other Material Prohibited.* Except with specific permission of the Director of Industry Operations, no Operator shall resell any operating supplies or other materials (whether or not obtained pursuant to rating assigned by this Order) except to another Operator.

(i) *Conservation and Standardization.* Every person affected by this Order shall use his best efforts to effectuate conservation of materials by elimination, simplification, or standardization of types, sizes, or forms, or otherwise, and to cooperate in any program developed for such purpose by the War Production Board. The Director of Industry Operations may from time to time issue specific directions as to conservation, elimination, and standardization.

(j) *Relief.* In case the productivity or sound working condition of any Mining Enterprise is adversely affected by any provision or application of this Order or by inability to obtain essential operating supplies or other materials, the person operating such Mining Enterprise may apply for relief to the Director of Industry Operations. The Director of Industry Operations may thereupon take such action as he deems appropriate.

(k) *Records, Audit, and Reports.* Each Operator and each Supplier shall keep and preserve for a period of not less than two years accurate and complete records of all transactions affected by this Order and shall submit from time to time to audit and inspection by duly authorized representatives of the War Production Board. Each Operator and each Supplier shall execute and file with the War Production Board or other designated agency, such reports and questionnaires as the War Production Board shall from time to time require. Until otherwise directed, each Operator shall file with the designated State Agency on or before the 10th day of each month a report on form PD-119 of purchases made during the preceding month pursuant to the ratings granted by this Order.

(l) *Violations.* Any person affected by this Order who violates any of its provisions, or a provision of any other Order, regulation, or other directive of the War Production Board may be deprived of priorities assistance, or subjected to such other or further action as the Director of Industry Operations may deem appropriate.

(m) *Revocation or Modification.* This Order may be revoked or modified by the Director of Industry Operations at any time as to any Operator or Supplier. In the event of revocation, or upon expiration of this Order, deliveries already rated pursuant to this Order shall be completed in accordance with said rating, unless the rating has been

specifically revoked with respect thereto. No additional applications of this rating to any other deliveries shall thereafter be made by the Operator or Supplier affected by said revocation or expiration.

(n) *Amendment of Prior Order.* The provisions of Preference Rating Orders P-22 or P-100 shall not apply to deliveries to which a preference rating is assigned by this Order.

(o) *Effective Date.* This Order shall take effect immediately and shall continue in effect until revoked.

Issued this 2nd day of March, 1942.

J. S. Knowlson, Director of Industry Operations.

[fol. 2240] Schedule "A"

As to all machines listed below, the rating provided herein likewise applies to equipment items, accessories, and tools customarily sold with such machines.

Aerial tramway equipment
Air compressors for mine use
Air distribution equipment
Assaying and testing laboratory equipment at the mine
Ball-casting machines
Boxcar loaders
Cages and skips
Car dumpers—rotary or end
Equipment for Cleaning plants
Equipment for Concentarting plants
Conveyors—shaking, belt, chain, or gravity type, including duckbills and other self-loading heads
Cutting machines—cable reel and self-propelling, transportation trucks therefor
Diamond core drilling machines
Dragline dredges, excavators, and scraper units
Dredges—continuous bucket, including pumps
Drills and drilling machines, power-driven, and reconditioning equipment therefor
Dust control equipment
Electrical equipment for mine transportation and power
Hoists—including room hoists and car pullers
Hydraulic monitors, with feed pipe and fittings
Jacks for lifting and roof support

Lamps—mine, miners', safety and ore-exploration types
Locomotives for mines use
Loaders, mobile, including mucking machines
Equipment for Milling plants
Mine cars, track or trackless
Pit-car loaders and elevating conveyors
Equipment for Preparation plants
Pumps, pipe and fittings for mine drainage or material transport
Rock dusting equipment
Safety and defense equipment
Sand dryers
Scraper loaders
Sheaves and sheave blocks
Shovels, power
Shuttle cars, track or trackless
Slusher hoists and scrapers.
Steel sections for support of mine openings
Storage batteries for mine use
Tanks and bins for storage of mine products
Tipples and head frames
Track and track accessories for mine transportation
Equipment for Treating plants
Trucks, tractors, and trailers for mine use
Ventilation equipment
Waste disposal equipment
Weighing equipment, including automatic devices
Wire rope for haulage and hoisting

[fol. 2241] (P. D. Reg. 1, amended December 23, 1941, 6 F.R. 6680; W.P.B. Reg. 1, Jan. 26, 1942, 7 F.R. 561, M.O. 9024, Jan. 16, 1942, 7 F.R. 329; E. O. 9040, Jan. 24, 1942, 7 F.R. 527; sec. 2(a), Public No. 671, 76th Congress, Third Session, as amended by Public No. 89, 77th Congress, First Session)

[fol. 2242] PLAINTIFF'S EXHIBIT 7

Title 32—National Defense

Chapter IX—War Production Board

Subchapter B—Division of Industry Operations

Part 982—Mines

Amendment No. 2 to Preference Rating Order P-56
As Amended March 2, 1942

Paragraph (a)(2)(i) of Section 982.1 is hereby amended to read as follows:

"any plant actually engaged in the extraction by surface, openpit, or underground methods, or in the beneficiation, concentration, or preparation for shipment of the products of mining activity;"

Issued this 15th day of May, 1942.

J. S. Knowlson, Director of Industry Operations.

[fol. 2243] PLAINTIFF'S EXHIBIT 10

Minutes SPAB November 18, 1941 Doc. 12d

Status of Gold-Mining

I. THE PROBLEM

(1) Repair, Maintenance and Supplies Order

Gold-mining has been treated as part of the mining industry in all priority actions, with the exception of Order P-56. The benefits of that Order, which granted an A-8 rating, were extended to lode gold mining for maintenance, repairs and supplies, but gold placer mining was excluded. The latter was left under Order P-22, which grants an A-10 rating on repairs and supplies to mines not included in Order P-56. This discriminatory treatment raises a question of policy.

(2) New Machinery Order

Order P-23 provided a blanket rating of A-3 for concerns making new machinery for coal and metal mines. It expires on November 30. Machinery for gold operations has been made by at least ten of the companies which have been given serial numbers and allowed to use ratings under this Order. Presumably such new equipment for gold mines of any type will not be authorized in the future, unless specific directions are issued to manufacturers.

(3) PD-1 Application

It is possible for individual gold mines to apply for ratings on a PD-1 form. It is reported that no applications for equipment and supplies—at least recognizable as such—have been made up to the present time. This may or may not be accurate. However, it is important that the treatment of such applications in the future be uniform.

(4) Foreign and United States Territorial Mines

a. Foreign

Foreign mines are permitted, under Order P-56, to apply for help from the Division of Priorities by seeking permission to order supplies and parts in the United States with the A-8 rating. Mines in Canada and in South America, as well as Central America will be the principal beneficiaries. In Canada gold-mining is of great importance. At the present time the Division of Priorities, using its discretionary authority under the Order, has decided *not* to issue serial numbers to any foreign gold mines. Discussions of the resulting status of Canadian gold-mining are now being conducted by the Joint Economic Committees of the United States and Canada.

b. Territorial

Under Order P-56, lode gold mines located in the territorial possessions of the United States will receive serial numbers and be allowed to use the A-8 rating. Gold-mining is of particular importance in Alaska and the Philippines. But placer-mining, excluded from the A-8 rating, accounts for 70 percent of Alaska's output. Under Order P-23, new

machinery has been freely shipped to Alaskan producers, but this privilege will expire when the Order dies. The question arises whether Alaska and/or the Philippines should be given more favorable treatment than other regions, for the reason that they produce one-th.. d of our annual gold output and that gold production is of great importance in their respective economies.

Answers to the foregoing questions will be suggested after a survey of relevant data.

[fol. 2244] II. The Size of the Industry

(1) Output

The gold-mining industry is commonly measured in terms of the value of its output. Careful checks are made by the Bureau of Mines annually, in cooperation with the Bure..u of the Mint, to determine the actual output of gold in continental United States and in the territorial possessions. The analysis for 1940 shows the following totals, by states or territories.

State or Territory	Ounces of Gold Produced	Value (at $35)
California	1,408,700	$49,304,500
Philippine Islands*	1,079,896	37,796,360
Alaska	765,200	26,782,000
South Dakota	592,936	20,752,760
Colorado	368,798	12,907,930
Nevada	367,400	12,859,000
Utah	352,770	12,346,950
Arizona	292,500	10,237,500
Montana	275,700	9,649,500
Idaho	145,000	5,075,000
Oregon	112,700	3,944,500
All other	143,452	502,082
Totals	5,905,052	$206,676,820

* Not included in American totals except in this table.

Of the total output, exactly 65 percent comes from two territorial possessions and from two states—California and South Dakota.

Value of gold produced is in one sense a misleading measure of the entire industry. In many areas—particularly in Utah, Arizona, Nevada and Montana—gold is a by-product of copper production. The value of the gold alone is thus no indicator of the scope of the mining operations conducted, although in some cases its extraction may pro-

vide the margin of profit and its importance not therefore be truly reflected by statistics. Nor is value of output an index of the investment or employment in the industry of any given state, for methods of mining vary widely between areas. This problem will be discussed more in detail below.

(2) Employment

Census data show a relatively small employment in the gold-mining industry in the continental United States, exclusive of the Territory of Alaska and the Philippines. Approximately 15,000 individuals seem to have been employed in lode and placer mines which were classified as gold mines, in 1939. Obviously the portion of employment in several large copper mines, which could be assigned to their gold output, is not included.

[fol. 2245] The most interesting aspect of employment in gold mines is the large number of individuals who have sporadically engaged in small-scale placer operations during the past decade. Prior to the depression years, and the increase in the price of gold, hand placer mining had almost vanished, so that in 1929 less than 1,000 persons were reported by Census as engaged in all placer enterprises, including the larger mechanized developments. But in 1935-36, as evidenced by a study made by the National Research Project of the WPA, the number had vastly increased. This field survey reported 28,000 individuals engaged in small placer locations, earning an average of $72 per year per person. Their total output of gold in the year 1935 was less than 5 percent of the United States total, and has almost certainly declined since that date because of the reemployment of part-time miners in more customary pursuits. To the extent that these people were covered by Census surveys in 1939 and 1940, they have been included in the figure given above for total employment in the industry. Nearly all of those surveyed were transient and part-time workers and had entered the field since 1932.

If the individuals directly dependent upon the maintenance of gold-mining industry are added—i.e., those engaged in making equipment, furnishing supplies, and engaged in service trades in exclusively gold-mining communities—the total of employment involved would only be 30,000 as a maximum.

Characteristics of the Industry

A sharp line must be drawn between lode-mining and placer-mining of gold, because policy toward materials used in the two branches may vary greatly. Placer-mining is the derivation of gold from gravels or other stream-borne materials which have been displaced or carried away from original ore bodies. Lode-mining extracts gold from ores in their original location; the ores may be solely gold-bearing, or be complex mixtures yielding copper (most commonly), silver, lead and other metal. Gold recovered from ores which are mined primarily for their content of other metals is probably about 15 percent of the American-Alaskan output. This is a difficult figure to determine accurately.

In 1939 and 1940, about 30 percent of total gold output in Alaska and the United States has been from placer mines. This percentage has grown rapidly since 1933; prior to that year, placering either by machine or hand-methods was almost non-existent. There are important regional differences. In Alaska, placer-mining accounts for 70 percent of total output, and there are over fifty substantial dredging operations. In California, about 125 large dredge operations and many small placer mines account for one-half the State's large output. But Idaho and Oregon are the only other states where placering is important.

Lode-mining is closely similar to other underground mining in technique and equipment; it may be surface stripping in a few cases. The problems encountered are those found in other branches of the mining industry. Placer-mining, however, is distinctive in that special equipment has been designed and put in use for large operations, and in that it has on the other extreme a large number of small hand-labor enterprises which would not be profitable in recovering any other metal.

A further distinction has been drawn between the two types of gold-mining. Most lode mines are underground, and consequently subject to the hazards of rapid de- [fol. 2246] preciation if they are shut down. Flooding by water is the chief hazard. Though not all lode-mining is deep enough to suffer seriously if a shut-down occurs, continuity of operation is clearly desirable to prevent depreciation of installed equipment and structures. On the other

hand, placer operations can be discontinued (and often are, seasonally) without injuiry to equipment. This was the basis of the decision excluding placer mines from the benefits of Order P-56.

There are about 9,500 distinguishable gold-mining enterprises in Alaska and the United States, of which about 4,100 are placer operations. Here again not all the small-scale placer undertakings are fully covered, since many were operated for only a few weeks in the year or did not occupy the full time of even a single operator. Otherwise the count is fairly accurate.

But in contrast to this fairly large total number of enterprises is the fact that only 30 large mines produce *over half* the total gold output. Of this group only five are large-scale placer enterprises. Six others are primarily copper-producing enterprises, and recover large amounts of gold as a by-product. Included in this leading group are such well-known large corporations as Homestake Mining (the largest enterprise), U. S. Smelting, Refining and Mining, Utah Copper, Alaska Juneau, Phelps Dodge, Howe Sound, Consolidated Coppermines, Nevada Consolidated Copper, and New Jersey Zinc.

Equipment and Supplies Used in the Industry

In lode-mining, underground drilling and blasting operations, loading and transport, elevation and crushing of ores, are similar to the same operations in non-ferrous metal-mining or even in coal. The same concerns supply drills, explosives, jacks, loaders, mine cars, locomotives, hoists, cages, screens and crushers as supply the mining industry generally. In separation of the gold, however, distinctive operations are necessary. Flotation concentration, amalgamation and cyanidation all require distinctive equipment and supplies. Among the latter, mercury, sodium or calcium cyanide, and zinc dust are important. Rough estimates indicate that at least 50,000 pounds of mercury, 100,000 pounds of zinc dust, and several million pounds of cyanides are consumed annually by the gold-refining industry. Although many supplies could be obtained without any rating whatever, it is probable that lack of mercury or zinc dust, and of alloy steel and electrical repair parts would gradually strangle the industry.

Within less than ten years, a great deal of new and relatively expensive equipment has been put into service in large placer mines, reaching a probable average total of $7,000,000 in the past two or three years. Large dredges with continuous-connected buckets are the most spectacular development. They handle enormous quantities of gravel which is washed usually in floating plants, so that the whole operation progresses along a stream. The second prevalent type of equipment is the dragline bucket dredge, usually reaching far into a stream bed to transfer material to stationary plant. These, and numerous variations on the latter principle, use heavy equipment and motive power which requires a great deal of alloy steels, copper, diesel or electrical power equipment, and also requires frequent repairing. Buckets in particular must be made of alloy steels and wear out rapidly under the abrasive action of gravel or sand. In total quantities, placer mining probably consumes more equipment than lode mines, despite its smaller output.

[fol. 2247] Taxation of Gold-mining

In a number of Western States mining operations are either taxed on the basis of the gross value of output, or of the income of mining operations. Whichever the method, the revenues of a few mining states have come to depend heavily on the collections from this source. Probably the most notable example is South Dakota in which there is a 6 percent severance tax on the gross value of mineral production, with an exemption of the first 100,000 tons of ore per year in order to lift the burden from small enterprises. According to recent estimates, this tax (which is borne chiefly by the Homestake Mining Company) accounts for nearly 7 percent of total State revenue. There are much smaller gross production or severance taxes in Utah, Arizona, New Mexico, Montana and Idaho. In other states, such as California, the net income tax is proportionately heavier to make up for the absence of a gross production tax. In Alaska there is a 3 percent gross production tax on the precious metals, whereas other mining operations pay a net income tax. In recent years there has been an effort to raise the tax on gold production to 8 percent of gross output, as well as 8 percent on net income. There seems little doubt that a decline in gold output would have serious

results on the revenues of Alaska and to a lesser extent of South Dakota, California and Idaho.

Gold Mining in North and South America

Mexico produces about 20 percent as much gold as the United States and all of South and Central America together about one-third as much. Canada, as is well-known has produced slightly more than the United States in the past few years. Among South American countries, Colombia is the leader, but all of the small nations have a substantial production.

There will undoubtedly be a demand from all producing countries in the Western Hemisphere for permission to buy mining repair parts and supplies in the United States. New equipment will also be needed in many instances. The need in Canada for such privileges has been under discussion in the Joint Economic Committees for the past few weeks. The intimate connection between gold output and monetary policy will undoubtedly lead to a particular emphasis on maintaining operations of gold mines in these countries. The direct value of gold in maintaining a supply of foreign exchange in the United States is an obvious basis for claiming special consideration.

The Incidence of Government Monetary Policy on Gold Production

Our present stocks of gold are so large that the net additions made by the purchases each year from producing mines are relatively very small. The total output of the United States and Canada and South American countries will scarcely amount to 1½ percent of the existing supply in the year 1941. Thus, even if all operations were suspended for a period of two or three years, the potential loss in our gold supply would be less than 5 percent. This is the most effective answer to the argument advanced by gold-mining executives that a continued increase of gold supply is necessary to future monetary policy.

On the other hand, maintenance of a free gold purchasing policy by the Treasury at $35 an ounce implies to many leaders of the mining industry that the industry is to be encouraged to the full. It would seem highly contradictory, [fol. 2248] in their opinion, to take any steps which would

cripple gold production unless its monetary position were at the same time officially changed. This attitude is and will be reflected in attitudes of political leaders in the mining states. And theoretically it must be recognized that maintenance of the gold standard implies unlimited purchases of newly mined metal. That obligation, however, need not be construed to include a corollary obligation to protect gold mining. Maintenance of the policy does not depend on specific accretions to the already large supply.

Steps Taken by OPM Affecting Gold-mining

1. The right to manufacture new gold-mining equipment with an A-3 rating, under Order P-23, will expire with that Order. On November 30, Order P-23 will not be continued, but certain of its provisions will presumably be made a part of Order P-56 (Mine Repairs and Supplies). Under that Order, with proposed amendments, the Director of Priorities may in his discretion forbid the use of A-ratings for manufacture of gold-mining machinery.

2. Gold-placer mines, as indicated above, were excluded from the operations of Order P-56, which granted an A-8 rating on mine supplies and repairs generally. Lode mines, on the other hand, have been given the right to use the A-8 rating. The placer mines, however, may still use A-10 under the general repair order, P-22.

3. The Division of Priorities has refused to grant serial numbers under Order P-56 to gold mines outside the United States and its territorial possessions. This has been done under the discretionary authority in the Order to extend the A-8 rating on supplies and repairs to such mines. The Policy Committee of the Economic Defense Board has protested this refusal in three specific cases in which the Committee claims that political and good neighbor considerations are important.

III. Considerations

1. A general announcement of policy toward gold-mining is needed. Otherwise, specific *administrative* actions will be questioned by the mines as unfairly discriminatory. This is particularly necessary if the purchase of new machinery for gold production is to be virtually prohibited after November 30. A necessary preliminary to such a declaration

would be a request to the Treasury for an immediate formal opinion on the significance of new gold production to monetary policy. It is to be emphasized that from a consumption of scarce materials standpoint, this whole issue is a minor one. Only about $7,000,000 of equipment, not including a lesser amount for repairs and maintenance, is involved annually at a maximum. Such importance as the issue possesses is largely political. It is political from two opposing standpoints—that of popular reaction to the continuation of an industry widely regarded as unnecessary (to the point of jocularity), and contrari-wise, that of the regional interests delineated in the report.

2. The continuation of the right of lode gold mines to use the A-8 rating under Order P-56 could be made entirely discretionary with the Director of Priorities. The guiding principle might be established by SPAB of requiring their [fol. 2249] purchases to be held to the bare minimum necessary to prevent disastrous shut-downs. SPAB might also wish to establish a separate test of eligibility in terms of the amount of other more useful metals that are produced jointly with gold. For example, if the selling value of the essential metals is 25 percent and that of gold produced 75 percent, the mine might be permitted to buy machinery and supplies on the same basis as other essential metal producers. Or the minimum ratio might be set at 40 percent in the value of other metals, and 60 percent gold. The intent would be to avoid any discouragement to production of the essential metals.

3. An alternative, and more drastic, policy would be to eliminate all domestic gold mines, whether lode or placer, from Order P-56 and also from the general repair Order, P-22. Gold mine operators would thus be forced to buy repairs and supplies without A-ratings, but could apply for special help on Form PD-1. It is quite possible that only very gradual declines in output and employment would result, because of managerial ingenuity. Here again, exceptions could be made for mines producing other metals.

4. In lieu of any blanket privileges to foreign mine operators, all foreign mine needs could be reviewed continuously with the Economic Defense Board, so that considerations of inter-American and British American policy could be consistently applied to decisions authorizing or forbidding ship-

ments of gold-mining machinery and repair parts. No serial numbers authorizing several purchases would be issued, but applications for individual shipments would be entertained. Here again, the specific quantities of burdened material (which are not large) are not the issue, but the political considerations involved and the question of treating non-essential industries consistently are paramount. In the special case of Canada, the Joint Economic Committees could secure all relevant statistical data.

5. Some special basis of treatment might be worked out for Alaska, where gold-mining assumes the proportions of a major industry. To cut off suddenly all shipments of new equipment needed for replacement, and to make it unduly difficult to secure supplies, might have several effects upon employment in Alaska, and upon the revenues of the Territory. The Labor Division might be asked for a formal opinion on the probable impact upon employment in the Territory of the restrictions suggested in this report. The Territorial Government could also be asked for a formal report on the importance of gold-mining, with all relevant statistical data.

[fol. 2250] PLAINTIFF'S EXHIBIT 12

Minutes SPAB, December 23, 1941, Document 19h.

Economic Defense Board

Washington, D. C.

December 19, 1941.

Mr. Donald M. Nelson, Executive Director
Supply Priorities and Allocations Board
Washington, D. C.

DEAR MR. NELSON:

In response to your recent request, I am attaching hereto a statement on priorities for gold mining machinery.

Sincerely yours, Milo Perkins, Executive Director.

Attachment

Because of the rush request, I haven't had a chance to check this with the V.P., but I feel sure he would agree.

[fol. 2251] December 17, 1941.

Statement on Priorities for Gold Mining Machinery

The demand of foreign gold producers for gold mining equipment raises two issues. The first is specific, and relates to the criteria of policy for issuing priorities on gold mining equipment. The second issue is broader, and concerns the desirability, from the point of view both of the efficient conduct of the war and of a satisfactory post-war order, of allowing the continuance of gold production at present levels in the major producing countries.

The constituents of a correct policy in issuing priorities on gold mining equipment are the following:

1. The demands of foreign gold producers should not be allowed under any circumstances to divert to the production of gold mining equipment more machine tool facilities than in the past, and preferably should be satisfied on a basis which involves a successive reduction in the allocation of such facilities.

2. Equipment should be made available in the first instance for mines whose ores contain, in addition to gold, a large percentage of metals useful for defense or civilian purposes.

3. Equipment should be made available readily only when adequate proof has been provided that the refusal of such equipment will entail large economic dislocation because of the absence of alternative openings for employment of men and resources now engaged in gold mining. In such cases equipment should be made available only for the purposes of repair and replacements.

The granting of licenses for gold mining equipment might be made conditional on the submission of satisfactory evidence that:

a. Past imports of equipment are not adequate to cover production requirements for the next two or three years;

b. The high-grade ore mines rather than low-grade ore mines are being exploited.

It needs to be borne in mind that since the depreciation of currencies which began in 1931, there has been an increasing shift in gold mining from high-grade to low-grade ores. This is true of most gold production which is not based on alluvial deposits but on mine ores, and is es-

pecially the case with South Africa. The factor responsible for this shift is the fact that the depreciation of the [fol. 2252] currency brought about an increase in the monetary value of gold while leaving unchanged operating costs. Most producers have found it profitable, therefore, to shift to lower grade ores, and save their high-grade ore mines for the future. The shift was inspired or approved by the government, especially so in South Africa.

Even if the prerequisites listed above are satisfied in full, a unilateral American policy on priorities may turn out to be ineffective if the foreign producer who is refused American equipment succeeds in persuading his own government to allow the manufacture of such equipment at home. Influential producers may well succeed in inducing their own governments to permit the allocation of industrial plants engaged in defense work, or capable of being so engaged, to manufacturing gold mining equipment. In order to make the American policy on priorities effective, it is necessary, therefore, to bring in the foreign governments into some arrangement whereby they will implement decisions taken by the authorities engaged in issuing the priorities. This can perhaps, be done best by adopting a system whereby the individual requests of foreign gold producers are submitted to the American authorities through a competent agency of their own government, and to require such agencies to pass on, or to certify, in each particular case the urgency or need of the request. The certification of the degree of urgency or need should specify as to whether the request would promote defense efforts, employment, or the general national interest in providing necessary foreign exchange. Such a system would place the full responsibility for requests for equipment on foreign governments and would, at the same time, make possible a system of checking which would be incomplete or ineffective if carried out solely through American authorities.

The system of priorities on gold mining equipment was devised as part of the general effort to economize on scarce facilities and thereby to maximize the joint war effort of the nations fighting for the democratic cause. But in dealing solely with the question of gold mining equipment there is a danger of losing an opportunity both to solve the

longer-ferm aspects of the gold problem and to maximize the joint war effort. Such an opportunity exists now. The United States can and should use the power that it derives from being practically the sole buyer of the yellow metal in order to initiate a program of a gradual reduction in gold production. Such a program would contribute to a maximization of the joint war effort and, at the same time, would facilitate a solution of the post-war gold problem.

The present gold situation is characterized by two outstanding features. The first is that considerable resources in men and materials continue to be tied up in the production of a metal which serves no defense purpose. Secondly, the present output of gold is, in view of the fundamental changes that have taken place in currency systems of the world, also highly in excess of any possible future requirements. Gold has been divorced from any specific tie to the domestic monetary supply in most countries. The yellow metal has been relegated to its actual, and only desirable function, which is to meet deficits in national balances of payments. These deficits are not, nor are likely to be, such as to require world gold holdings largely in excess of those at present in existence. The gold stocks of the world amount now to over thirty billion dollars. This gold stock properly redistributed should be adequate for the future, even on the assumption that at the end of the war all the national currencies of the world are put on a gold basis similar to that in practice before the outbreak of the war.

It is essential, therefore, that a reduction in gold mining should be envisaged for the post-war period. It is, however, obviously impossible to effect a cessation of gold production overnight because of the enormous dislocation it would involve in the national economies of the more important gold producing countries. The purchase of gold in the ground leaves the problem unsolved, and merely adds to the difficulties of the immediate post-war period. A program of gradual reduction and final cessation of all new gold production spread over a period of fifteen to twenty years is the only satisfactory solution to the general gold problem. This is the moment to insfitute such a program. Further, the United States possesses the necessary powers to initiate such a program. Being practically

the only buyer of the yellow metal, the United States is in a position to demand that its future purchases will be on an increasingly restricted scale. The lend-lease and other arrangements further permit the United States to tide over the producing countries during the initial stages of the shift of production away from gold to other metals and to articles satisfying human needs. Its present powers also permit the United States to specify the direction in which the receivers of lend-lease aid shall shift the resources and men now engaged in gold production. This direction is, in the first instance, towards the production of defense articles or to the local production of those goods which it is no longer possible to acquire from normal sources on account of the war-time scarcity of shipping and other transport facilities.

[fol. 2254] PLAINTIFF'S EXHIBIT 13

War Production Board

Washington, D. C.

May 26th, 1943.

Mr. A. S. Knoizen
Director, Mining Division
Administrator, Order L-208
War Production Board
Washington, D. C.

DEAR MR. KNOIZEN:

I am transmitting herewith, "Report on Gold Mine Order L-208, Its Effect and Accomplishments".

This report was prepared in response to your recent request that my report of April 7th be brought up to date.

Very truly yours, Edward H. Rott, Deputy Administrator, Limitation Order L-208, Mining Division.

Attachment

[fol. 2255] Report on Gold Mine Order L-208

Its Effects and Accomplishments

by

Edward H. Rott

May 24th, 1943.

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Resources Section, Mining Division, War Production Board

[fol. 2256] Report on Gold Mine Order L-208
Its Effect and Accomplishments

by

Edward H. Rott

May 24th, 1943.

Introduction

This report has been prepared to present a general picture of the gold mining industry and the effect of Limitation Order L-208. The writer has been in close touch with the industry, both domestic and foreign, since January, 1942. During the earlier part of this period, his work was chiefly on matters relating to priority assistance to gold mines, but since October 8, he has taken an active part in the administration of Limitation Order L-208 and measures to curtail the flow of materials to foreign gold mines.

History

On September 17, 19 ., Preference Rating Order P-56, to provide priority assistance to mines, was issued. This marked the recognition of the importance of control by specialists in mining, over the flow of materials and equipment to the mining industry. Shortage of materials and difficulty in getting delivery of fabricated items rapidly forced development of a strong distinction between essential and non-essential mines, with gold mines at the bottom of the list. December, 1941 and January, 1942, were marked by activity in collecting information as to requirements of gold mines for continued operations. Restriction on priority assistance was increased.

Preference Rating Order P-56 was issued on March 2, 1942; outstanding was the provision which provided for the exclusion of:

> "any plant more than 30% of the production of which in dollar value consists of gold and/or silver"

The issuance of this amended order precipitated the cancellation of 373 serial numbers held by mines producing gold. To date, approximately 144 of the cancelled numbers have been reinstated, leaving a total of 229 of those mines

classed as "non-essential", which were privileged to operate until L-208 was issued, October 8, 1942. Restricted priority assistance for maintenance, repair and operating supplies was allowed on PD-1A applications. Only five of the reinstatements occurred since October 8, but these are offset by ten cancellations during the same period. A detailed review of gold mines operating under serial numbers is in progress, which when completed, will be made an appendix to this report. The essentiality of the reinstated mines was based on the amount of strategic metals produced along with the gold or the necessity of the production of the mine for smelter flux. On May 15, Order P-56 was amended to remove the "30% clause", to which strenuous objection was raised by the operators of mines producing complex ore and by our Western legislators, but no change was made in the method of treating these mines.

[fol. 2257] Priority assistance to the non-serialized gold mines was severely restricted. Gold mines curtailed operations; some closed down and others were preparing to close, due to difficulties in securing material, labor shortage and those economic factors always adverse to gold mining when there is a general rise in commodity prices and labo cost. High wages in war industries and Selective Service, were rapidly syphoning manpower from the mines, even the better gold mines were finding it difficult to operate. It is this writer's personal belief, that the lack of a clause in Order P-56 restricting priority assistance to gold mines, stimulated some Divisions of the War Production Board and other agencies of our Government, to agitate for more forceful measures to release labor from gold mines.

Limitation Order L-208 was issued on October 8, 1942, at a time when all large gold mines in the United States were operating on a greatly reduced basis. The provision of this order applies to all mines producing gold which do not have a serial number under Order P-56, except certain small producers indicated in the order. Mines covered by the order are designated as "nonessential".

Under the provisions of L-208, all "nonessential" mines were required to cease operations, as provided for in the order. Immediately, appeals for relief from its provisions, based on need for additional time to get in standby condition, financial hardship, possible recovery or development

of strategic metals, or to provide employment for elderly and physically handicapped men who would not be used elsewhere in the mining industry, poured into this office.

Including all of the above categories of reasons on which appeals were based, 187 appeals had been processed by May 15. Some of these have been reappealed, two and even three times. Many other cases, not clearly appeals, were handled informally. The following tabulation indicates the action taken on appeals and distribution of the grants made among the different types of gold mining operations:

Action Taken on L-208 Appeals

Denials				17
Cases Closed Informally and Expired Grants				33
Grants Made To:	Lode Mines	Tailings Operations	Hydraulic and Other Placers	
	24	4	109	137
Total Number of Cases Processed				187

[fol. 2258] Employees Provided for by Grants in Effect

Employed within the Forty-Eight States	1019
(Includes 210 at Homestake Mine and Mill, and approximately 335 by Golden Cycle Corporation at Cripple Creek, and at their mill in Colorado Springs, in handling and treating gold ore, and by shippers from Cripple Creek and Boulder County to Golden Cycle Mill.)	
Employed in Alaska (150 in two operations)	468

Under existing procedure, appeals are analyzed in the office of the administrator; action is recommended and the case is referred to the Appeals Board for final approval. No grant is recommended until we are reasonably well assured that men under fifty-five years of age will not be employed, unless it is felt they are so handicapped that they could not find suitable employment elsewhere. In addition, each grant carries a provision which permits the War Manpower Commission to secure release of any employee, if the operator steps out of line by employing men who are needed elsewhere in the mining industry.

The Gold Mining Industry

Manpower

To really appreciate the effect on gold mining of our "all-out" effort to equip and produce for war, we must survey briefly, its status during previous years. The accompanying tabulation, "Employment in Gold Mines in 1941 and 1942", indicates the position of gold mining as an employing industry, and its trend toward curtailment in 1942 over 1941.

The records presented, indicate the average employment throughout the year. However, when we look at the figures furnished by the War Manpower Commission, as to actual number of men employed in gold mining and those displaced by the closing of mines under Limitation Order L-208, we get a very different picture. Their findings are contained in the tabulation: "Effect of War Production Board Order L-208 on employment in the Gold Mining Industry by States". (In the writer's opinions, "gold mine worker" would be a more appropriate term than "gold miner", which is used in the tabulation.)

Mr. Edward T. Dickinson, Jr., Executive Director of the Planning Committee, in his memorandum on "Effect of Gold Mining Curtailment Order L-208", prepared in April for Mr. William Batt, Vice Chairman of the War Production Board, estimated that Order L-208 only effected about 6,500 workers in gold mines. This estimate is closely in accord with the figures arrived at through independent analyses of employment in the gold mining industry made by Dr. Wilbur Nelson and the writer.

fol. 2259]

Employment in Gold Mines 1941–1942

	1941		1942*	Lode Mines Producing 1,200 Ton or More Annually 1941**			
	Number of Operations	Employees	Estimated Employees	Number of Operations	Employees	% of Total Employees	Estimated Employees 1942
Gold Mines (1)	2,845	18,522	14,890	270	11,406	62	9,232
Gold-Silver Mines (2)	435	2,815	2,171	38	1,040	37	781
Mills (Gold)	.....	3,146	2,360	.....	.....	..	.....
Mills (Gold-Silver)	.....	388	291	.....	.....	..	.....
Placer Mining (Dredging, Hydraulic and Other)	3,349	14,000	10,500	.....	.....	..	.....
Total	.....	38,771	30,152	308	12,446	..	10,013

* Estimate from preliminary tabulation of partial reports. Number of operations involved not estimated.

** From tabulation by Miscellaneous Minerals Division of the War Production Board.

(1) Gold Mine is any mine that produces ore in which the principal value is in gold, and the copper, lead or zinc value is too low for the one to be classified as a copper, lead, zinc or mixed ore.

(2) Gold-Silver Mine is one that produces an ore in which the metal of lower value in the bi-metal classification is equal to or over one quarter of the combined value of gold and silver.

[fol. 2260] Effect of War Production Board Order L 208 on Employment in the Gold Mining Industry by States

State	Number of employees engaged in gold mining operations (not all of these employees affected by L-208)	Total number of gold miners displaced	Total number of gold miners placed in other nonferrous metal mines by U. S. E. S.
	September, 1942	Between October 8, 1942 and February 27, 1943	
Total	12,286	3,217	1,156
Alaska	(1)	277	118
Arizona	800	29	9
California	3,871	1,350	296
Colorado	981	180	97
Idaho	1,000	17	4
Montana	365	140	88
Nevada	890	209	147
New Mexico	190	(1)	(1)
Oregon	150	91	3
South Dakota	2,459	919	393
Utah	1,500	5	1
Washington	80	(1)	(1)

1 Data not available.

Their accomplishment in placing manpower displaced, is briefly summarized in the following:

Of 3217 employees displaced, 2564 registered with the U.S.E.S.
Of 1571 referred to metal mines, 1156 were placed.
Of 894 referred to other industries, 515 were placed.
280 indicated dissatisfaction with subsequent job opportunities by refusing to accept referrals.

This leaves 524 referrals not reported on and 99 of the total registered, for whom suitable openings apparently have not been found. The displacements may be 10 or even 20% low, due to shifting of men, with failure to report them as displacements, incomplete canvass or other reason. Never-the-less, they are significant. There may be controversy as to accuracy of figures presented, but this seems, to a degree, to be dependent on classification of employees and difference in date of taking records. This is more of a point for controversy that cannot be adjusted in the limited time available, than one warranting the thorough analysis [fol. 2261] necessary to determine the reasons for differences.

These figures would indicate that there was a very rapid decline in employment by mines of the class that comes under the provisions of L-208 from January to October, 1942. From this, it is only reasonable to conclude that the steps being taken to restrict priority assistance to gold mines and the natural factors of high prices for commodities and higher wages, were effectively curtailing operation of such mines.

Of the total displacements of 3217 men, three mines supplied 1288.

Homestake Mining Company	1,018
Empire North Star Mines	150
Idaho-Maryland Mines Corp	120
Total	1,288

The magnitude of the effect of this order is very great, with but extremely limited accomplishment. The losses entailed by all mines through forced closing under Order L-208, promptly became potential claims for post war adjustment. Those claims are cumulative.

Considerable controversy exists as to the accuracy of the figures presented by the War Manpower Commission. If we review figures furnished to Dr. Wilbur Nelson by four mine operators, the accomplishments of the order in securing manpower for non-ferrous mines appears more dubious:

Men Referred from Gold Mines

Name of Company	Reported by W. M. C. to Labor Prod. Bd. of W. P. B. as referred	Reported by W. M. C. to W. A. Nelson April, 1943 as placed	Workers released from gold mines after October 8, 1942, still on payroll
Anaconda	238	..	119 (11-19-42)
Gray Eagle Copper	102	91	28 (4-30-43)
Cons. Coppermines Corp	44	36	15 (4-30-43)
Climax Molybdenum Co	125*	..	10

* Only 60 came to mine, 6 physically unfit, 44 quit.

The order has been administered to accomplish the end for which it was proposed, namely: to release manpower. Our policy of conserving materials through restricted priority assistance which was in effect prior to the issuance of L-208, has been continued toward small operators not under the order, and those mines operating under grants.

[fol. 2262]. Idle Equipment

Closing of gold mines under Order L-208, in the brief period of less than a month, promptly created a great reservoir of used equipment estimated to exceed $75,000,000 in value, including, in addition to that normally recognized as essentially mining equipment—tractors, draglines and trucks. This equipment and idle inventories of material has been moving into channels leading to essential work at the rate of approximately $82,600 per week since November 19th. During the past six weeks, releases for transfers have averaged over $100,000 per week. The following tabulation indicates the disposition of the equipment transferred:

Equipment Transferred from Gold Mines
(To May 13th, 1943)

Type of Use	Number of Releases	Estimated Used Equipment Value	Remarks
Metallic Mining	65	$749,102	Principally Tungsten, Zinc, Copper, Mercury and Arsenic
Non-Metallic Operations	14	165,864	
Coal Mining	3	278,100	One Dragline 14 Cu Yds. $270,000 will greatly accelerate production of an anthracite coal project. Production of project to be 10,000 tons per day.
Construction	26	221,015	Canada to Mexico.
Military	18	325,494	Principally Alaska and West for construction.
Used Equipment Dealers	20	348,556	For release to holders of serial numbers under Orders P-56, P-58 and P-73.
All others	25	59,349	Principally Agriculture.
Total	171	$2,147,480	

[fol. 2263] These transfers have accelerated strategic metal development, coal and non-metallic development. Construction and military needs have been met without delay. However, very little of this was transferred from the three principal operators from which manpower was released by the order. How rapidly this equipment would have moved into strategic metal production if Order L-208 had not been issued is pure speculation, but we know it was under way. How much of the millions in used equip-

ment still idle will remain so, cannot be estimated. This would largely be dependent on the length of the war.

Strategic Metal Production

The loss in copper, lead and zinc production from mines closed under the provisions of Order L-208 was nominal, as indicated in the attached tabulation, "Production of Silver, Copper, Lead and Zinc from Gold Mines". This will be more than offset by the sustained or increased output from mines whose principal production is strategic metals, resulting from transfer of manpower and the utilization of gold mining equipment in the development of new strategic metal deposits. The order has had the effect of stimulating prospecting for and development of strategic metals. The loss in silver production from gold mines has been somewhat more alarming. The indications are that there will be a deficiency of at least 17% in domestic silver production for 1943, due to closing of mines under L-208.

Gold and Silver Production of United States and Alaska

	Gold	Silver
January Production, 1942	290,632 Ounces	5,118,934 Ounces
January Production, 1943	135,113 "	3,774,867 "

The importance of domestic silver to our war effort is a factor to be carefully weighed, in considering the future application of Order L-208. To administer the order and exclude mines producing silver is extremely difficult, since some of our large silver producers have a very low ration of silver to gold.

An analysis of ore shipments received by nine smelters operated by the American Smelting & Refining Company, led to the conclusion that there was only 20.4 ton loss in arsenic production in January, 1943 over September, 1942, which could be attributed to reduced shipments of gold ore from mines in the United States.

[fol. 2264] Production of Silver, Copper, Lead and Zinc from Gold Mines Within Specified Ranges of Percentage Value of Gold in Ores

Percentage of Total Value of Ore in Gold	Silver in Ounces	Copper in Pounds	Lead in Pounds	Zinc in Pounds
100%–75%	2,724,498	1,868,527	7,755,516	.....
75%–50%	2,445,893	1,355,298	4,748,825	99,094
50%–25%	5,869,476	21,976,047	21,950,571	15,120,319
TOTALS				
100%–75%	2,724,498	1,868,527	7,755,516	.....
100%–50%	5,170,391	3,223,825	12,504,341	99,094
100%–25%	11,039,867	25,199,872	34,454,912	15,219,413

Under present policy in applying L-208, practically all mines where gold values range from 75% to 100% of total, come under the provisions of the Order.

It is estimated that about 50% of those for which gold values range from 50% to 75% of total, will remain closed under the Order.

The Order does not include lode mines which produced less than 1,200 tons in 1941 and continue in production at rate not to exceed 100 tons per month, nor placer mines which produced less than 1,000 yards in 1941 and continue in production at not to exceed 100 yards per month.

[fol. 2265] Consumption of Material for Repair, Maintenance and Operating Supplies

Issuance of Order L-208 accelerated curtailment in consumption of materials for repair, maintenance and operating supplies. However, though consumption of such items may have been curtailed, purchases of materials and supplies by gold mines would not show a corresponding drop. A decrease in purchases was enforced on the industry as early as the spring of 1942, when it became necessary to restrict priority assistance to non-essential mines, in an effort to provide for needs of mines producing strategic materials and other essential industries. The War Manpower Commission's figures on employment in gold mines in September, 1942, when compared with 1941 employment, indicate the effectiveness of restricted priority assistance in curtailing mining activity. Some mines which continued operations, were only able to do so because they had large stocks of supplies on hand. Never-the-less, it is important to call attention to the annual *reduction in normal demand* on the sources of supply of material for the mining industry, through closing of gold mines. This is best illustrated in an analysis of the employment and production records of 270 mines producing 1200 tons of ore or more annually during 1941.

Analysis of Gold Mining Operation for 1941 Covering 270 Mines
(75% of Total Value of Product Represented by Gold)

Total Mine Employees	Tonnage of Ore Mined	Ounces of Gold Produced	Total Value of Gold	Estimated Labor Cost	Estimated Consumption—Materials and Supplies
11,406	15,131,977	2,256,805	$78,988,000	$23,940,800	$15,131,977

Estimate of materials and supplies consumed is based on the asumption that cost for such items averaged $1.00 per ton or ore mined and milled, which is believed to be conservative for gold mining. The item of $15,131,977, is significant in amount, but in actuality, the steps taken to restrict the flow of materials and supplies to gold mines, curtailment of operations due to labor shortage and information from operators, all indicates that this draft had been greatly reduced before Order L-208 was issued.

The above figures appear reasonable when compared with the estimate presented to Dr. Wilbur Nelson on January 6, 1942 by Mr. Merle Guise. Mr. Guise included in his estimate, the requirements of the placer mines too.

Estimate of Requirements of Gold Mines for 1942

	Production	Materials and Supplies			
		Capital	Maintenance	Operation	Total
Lode	94,692,170	5,000,000	$7,000,000	$8,000,000	$20,000,000
Placer	52,917,445	4,000,000	5,000,000	6,000,000	15,000,000
Total	$147,610,155	$9,000,000	$12,000,000	$14,000,000	$35,000,000

[fol. 2266] The estimate of $11,000,000 in maintenance and operating supplies for lode gold mines, furnished to Dr. Wilbur Nelson by the Homestake Mining Company and other mining engineers in the West, compares favorably with these figures.

Effect of the Order on Individaal, Com unity and Company

The general effect of the Order has been to antagonize the individual and the communities dependent on gold mining, and caused large losses to the operators. To repeal it would not calm the situation, but would stir up increased resentment from the many who have lost their liv-lihood, relinquished leases, forfeited equity in equipment, or sold equipment in anticipation of no further need for the duration.

However, from the administrative standpoint, and to alleviate exceptional and unreasonable hardship in cases where such relief would not effect our war effort, it is felt that amending of this order to permit limited production and employment is desirable and justifiable. It has been recommended that lode mines be permitted to operate when production does not exceed 200 tons per month, and that placers continue operation when not employing over five men, provided that, in neither case, men under the age of fifty-five are employed unless such employment is first approved by the War Manpower Commission. It is felt that larger operations cannot be effectively controlled by any blanket relaxation in the order. Limited relief by appeal is favored, when the following accomplishments are involved:

1. Employment is provided for aged and physically unfit, and any others whom the War Manpower Commission feels they cannot place elsewhere.
2. Development and or exploration of gold deposits to provide for prompt resumption and or expansion of existing operations or initiation of new operations, in the post war period.
3. Assist in meeting excessive standby costs.
4. The operation does not materially interfere with our war effort through use of manpower, critical material or transportation facilities.

Relief Needed for Gold Mines

The resources and assets of the mines must be preserved. A mine, in general, is not like an industrial plant, that can be converted to produce for war needs or locked up and left with merely the watchman. The deterioration of a mine is rapid in the in-operative state. There is constant [fol. 2267] heavy cost for repair and maintenance. Furthermore, utilities such as water supply and power, must be operated in many cases for the community and to permit carrying on of necessary maintenance and repair work. If this work is not properly carried out, not only the assets in buildings, equipment and development may be lost, but the resources, which are important to our post war econ-

Provisions should be made to assist the mines in meeting these expenses. This may be done by permitting operation on a curtailed basis or by providing a subsidy for the conduct of such work. In view of the fact that the order has been administered as written, and many operators have complied by closing down, sold equipment, went into other operations, or disbanded their staff and crew in good faith, assuming that gold mining was over for the duration; provision should be made to assist those, to preserve their assets and resources, as well as for the more fortunate operators who have been permitted to continue under grants or serial numbers. Any other action could too rapidly be seized upon by small business "as just another move to squeeze out the little fellow". The most equitable action would probably be to place all mines closed by the order, on a subsidy, to carry maintenance and repair. To relax the order further than already proposed, solely for the purpose of assisting the larger operators to meet standby costs, without provision to take care of those less able to sustain themselves under existing restrictions; would be, to say the least, favoring a select few. This is indicated by the following tabulation and can be further analyzed by reference to Appendix 3, "L-208 Grants in Effect May 15, 1943".

	Number of Employees			
	100 or more	25–50	6–24	Less than 5
U. S. A. (Lode Mines)	2	3		
U. S. A. (Lode & Placers)			29	29
Alaska (Lode & Placers)	1 (Lode)	1 (Placer)	17	55

It must be borne in mind, that many operators are not in a position to resume operation, because their equipment has been "sent to war". If we permit mines to operate to meet standby costs, we are faced with the question of replacing equipment for those who have sold theirs, or of providing other relief. The shortage of critical materials, the fact that the major portion of the items sold are those on which it is most difficult to secure delivery now, and that any attempt to replace those items with new, would further congest production facilities which are vitally needed for our war effort cannot be overlooked. The following points must be considered, if any further relaxation of Order L-208 is to be given:

1. Where home ties exist or the operator is able to offer competitive wages or advantages in living and or working conditions, a drain of employees from strategic metal mines and other essential work would be created.

[fol. 2268] 2. Replacement of material and equipment or other relief would be in order for those operators who shut down and disposed of equipment in good faith.

3. Pressure for relaxation of our policy of restricting the supply of materials to foreign gold mines would develop. Operation of foreign gold mines is dependent on materials generally, not labor, as in this country.

4. A new drain on critical materials and further congestion of our production facilities would be eminent, to meet demand for replacement of capital equipment and provide for repair and maintenance requirements.

5. The existing supply of used equipment and material which has been moving into channels where it will serve in vital war work, will be cut off to a large degree.

6. Sub-contract work now being done in machine shops at closed gold mines and by private industries which formerly served the gold mining industry, would be curtailed.

7. Operators who have lost their assets and resources through lack of financing to preserve them, certainly would not be happy over the situation after being led to believe that destruction of their assets was a necessary step to Victory.

Still, we have the problems peculiar to maintenance of a mine in the preservation of its assets and resources, to face. The War Production Board cannot justly do otherwise than request Congress to provide the necessary subsidy for relief and protection of the gold mine operator whose interest has been adversely effected by Limitation Order L-208.

EHR:M. Edward H. Rott.

[fol. 2269] Summary and Conclusions

Historical—Steps taken to curtail gold mine operation prior to issuance of Limitation Order L-208 and results.

1. September 17th, 1941, recognition of importance of control on flow of materials to mines by qualified experts in mining—Order P-56 issued.

2. Order P-56 amended to exclude gold and silver mines, March 2nd, 1942, but such mines were still permitted to operate. Limited priority assistance for maintenance, repair and operating supplies was available to them through the medium of PD-1A applications. However, the high priority ratings available to mines under Order P-56 were not allowed.

3. Of 373 serial numbers cancelled on March 2nd, 1942, approximately 144 have been reinstated. Only five reinstatements made after L-208 was issued, which are offset by ten cancellations in the same period.

4. Gold mining operations were steadily and effectively being curtailed during 1942, the number of employees having decreased in the lode mines from 18,522 (Bureau of Mines' figure) in 1941 to 12,286 (War Manpower Commission's figure) in September, 1942. The 18,522 does not include workers in gold-silver mines or in the mills treating gold or gold-silver ores, totaling in all, over 6,000 men. The above figures apply to the gold mining industry and not specifically, to mines coming under L-208.

Issuance of L-208—Its effect and accomplishments

5. Limitation Order L-208 was issued October 8th, 1942.

6. Mr. Edward T. Dickinson, Jr., Executive Director of the Planning Committee, in his memorandum on "Effect of Gold Mining Curtailment Order L-208", prepared in April for Mr. William Batt, Vice Chairman of the War Production Board, estimated that Order L-208 only effected about 6,500 workers in gold mines. This estimate is closely in accord with the figures arrived at through independent analyses of employment in the gold mining industry made by Dr. Wilbur Nelson and the writer.

7. One hundred eighty-seven appeals for relief from the provisions of Order L-208 have been processed. In the cases where relief was given, one hundred thirty-seven grants remain in effect. Eighty-four are small operations, employing from one to five men each. Forty-six employ from six to twenty men. Employment of not less than 1,487 men is provided for in the operations covered by these grants; 1,019 in the States and 468 in Alaska. Only seven grants are in effect, which permits the employment of more than twenty-five men.

[fol. 2279] 8. The War Manpower Commission reports: Closing of gold mines under Order L-208 displaced 3,217 men. Of these, 1,156 were placed in non-ferrous mines by February 27th, 1943 and 515 in other industries. These are official figures; their accuracy may be questioned, but the differences do not seem important, in view of the issue at stake.

9. Idle equipment valued at $2,147,480, of which it is estimated approximately one-third came from placer operations, was transferred: $749,102 to metal mines, $165,864 to non-metallic operations, $278,100 to coal mining and the balance of $954,414 to construction, military, dealers' stock, and miscellaneous uses. In all, 171 releases were made. During the past six weeks, transfers averaged in excess of $100,000 per week.

10. Losses in strategic metal production, excepting silver, due to the closing of gold mines, has been nominal. Manpower transferred from gold mines to strategic metal mines, helped stem the decline in production. The degree to which this manpower was effective, depends on whether we accept the War Manpower Commission's figure of 1,156 men transferred to other non-ferrous metal mines, as illustrative of accomplishments, or, Dr. Wilbur A. Nelson's estimate of approximately 500 men, based on spot check of various mines to which men were referred, as the number actually placed in metal mines, due to the gold mine closing order. Utilization of idle gold mining equipment accelerated new strategic metal producion. However, silver production was approximately 17% lower in January, 1943 than that for January, 1942.

11. Because of complexities involved, due to constant activity in new development and expansion in strategic metal production, the shifting of personnel, and depletion of existing deposits; it is impossible to estimate how much of the increase in strategic metal production, since issuance of Limitation Order L-208, might be attributed to manpower obtained from mines closed under the order.

12. Cessation of gold mining climaxed the gradual reduction in annual potential demand by lode mines for repair, maintenance and operating supplies amounting to more than $15,000,000 in a year such as 1941. The requirements of gold dredges, though somewhat smaller, is never-the-less, appreciable.

13. Limitation Order L-208 inflicted hardship and losses on a very large group, to accomplish the release of manpower from a source (gold mines), which had for the major part, already lost the best of their workers. In numbers, it is estimated that the total leaving gold mines prior to October 8th, 1942, at least equalled those effeced by Order L-208 and greatly exceeded those actually displaced.

Relief for Mines Under L-208

14. Relief by appeal should be based on the following accomplishments:

(a) That employment is provided for the elderly or physically unfit, whom the War Manpower Commission does not feel are needed elsewhere in essential work. [fols. 2271-2287] (b) Development and/or exploration work will favor post war operation.

(c) Assist in meeting excessive standby cost.

(d) The operations will not interfere with our effort through the use of manpower or critical materials.

15. Relief is needed for the gold mines, but it should not be in such form as to favor largely, the few who have been fortunate enough to sustain themselves and continue operations under a grant.

16. If general relaxation in the provisions of Order L-208 is made, the following points should be considered:

(a) A drain of employees from the strategic metal mines and other essential industries would be eminent.

(b) Replacement of material and equipment or other relief to those operators who shut down and disposed of equipment in good faith.

(c) Relaxation of our policy of restricting supply of materials to foreign gold mines.

(d) A new drain on critical material and equipment would be created.

(e) Pronounced reduction in the $100,000 weekly transfer of used equipment and materials from gold mines to essential uses.

(f) Curtailment in sub-contract work now being done in machine shops at gold mines and by private industries which formerly served the gold mining industry.

17. Steps should be taken to provide relief to the mines closed under Order L-208, which will be an actuality to all

and in no way interfere with our war effort. Congress should include in a law for relief to such mines, provisions for subsidy to carry maintenance and repair cost.

Edward H. Rott.

[fol. 2288] PLAINTIFF'S EXHIBIT 16

August 14, 1942.

Memorandum

To: Mr. H. O. King, Chief, Copper Branch.
From: Wilbur A. Nelson, Chief, Mining Branch.

The Mining Branch views with serious alarm the dissipating of the only appreciable reserve of highly competent mining labor through the hasty closing of the gold mines in the United States.

The gold and silver miners constitute the last reservoir of the skilled mining labor. We must, therefore, be certain that that labor is directed toward the most critical points before permitting it to be disbursed.

The present critical situation developed when copper, lead, zinc, mercury and other miners left their jobs and went to the west coast on shipbuilding and on aircraft jobs, and into the mountain areas in new war industries work.

If we close down the gold mines while these same opportunities are available for work at substantially high rates of pay in other war industries, the miners will not move to a copper, lead or zinc mine but will do just as their predecessors have done, move on to other more fruitful jobs on the coast.

Logic dictates this, for when a copper miner at Butte is willing to leave his home and go to the coast, I am sure that a gold miner, living in the excellent living conditions at Lead, is not going to leave his family and stop at Butte if he could go to the west coast.

I would suggest for your consideration the following:

1. An agreement among the principal non-mining defense industries on the west coast and the Rocky Mountain areas to discontinue hiring any men who have had mining experience. Perhaps this agreement should further prohibit the hiring of any labor outside of a stated area.

2. The immediate closing down of nonessential industries, such as paper and textile, within the area of labor shortage, particularly on the Pacific Coast. In this way, [fol. 2289] labor will be employed in its own locality. The creation of housing, transportation, and other piecemeal disruption which flow from permitting labor from afar to come into already congested areas will be avoided. Thus will be provided the necessary labor for the essential industries.

3. An agreement with the various unions involved to assist in the enforcement of the foregoing agreement.

4. An active campaign on the part of both management and labor in the gold mining areas to move the miners into the critical metal mines.

These steps can be taken in a very short period of time. When it becomes clear that the next labor which is free for employment in the critical metal mines would be obtained by closing down the gold mines, I think steps should immediately be taken to force gold mines to shut down except for skeleton crews to maintain them in a workable condition so that mining operations in these mines can be started again at the close of the war.

WAN:HO
cc: H. W. Dodge

[fol. 2290] PLAINTIFF'S EXHIBIT 17

September 1, 1942.

To: Dr. Wilbur A. Nelson, Room 1035, Temporary Building R

From: H. O. King, Room 1085, Temporary Building R

With reference to the Gold Mining Curtailment Order, the Labor Division have furnished me with some data on gold mines that have serial numbers, which I believe were obtained from the Mining Branch. It appears from this list that a number of mines that produce practically nothing but gold have serial numbers, and I wonder if the definition in the Gold Curtailment Order tying this to mines with serial numbers would be effective.

I realize the issuance of this order is a function of neither the Copper Branch nor the Joint Interdepartmental Com-

mittee, but the pressure for action is so great that I feel it advisable to call this to your attention, as I am continually called upon to answer questions as to when the curtailment order is to be issued.

With the continuing and increasing loss of production in copper mines, I feel that immediate action should be taken.

(Signed) H. O. King, Chief, Copper Branch.

[fol. 2291] PLAINTIFF'S EXHIBIT 21

September 15, 1942.

Memorandum.

To: Mr. Donald M. Nelson
From: M. Creditor

I have reviewed the proposed limitation order for the gold mining industry and I wish to raise certain points as to the soundness of such an order.

You will recall that we received a letter from Senator Gurney on August 31 in which he set forth the harmful effects that such an order would have on the economy of the State of South Dakota. In your reply you stated in effect that we were confronted with the manpower problem and something had to be done to overcome the losses of production which are being experienced in the mining of copper and other strategic materials through the shortage of experienced miners.

In the preamble of the limitation order no mention is made of manpower requirements. It simply states that the order is made necessary because of the shortage in the supply of critical materials which are used in the maintenance and operations of gold mines.

It would seem to me that if the order is based on the premise of critical materials alone, the question might be raised as to why such an order would not apply to materials being sent by this country to other gold mines in Canada, South America, and South Africa.

If the main purpose of this order is to divert miners from the gold mining industry to copper and other mining in-

dustries, it seems to me that there is no assurance that this order would accomplish the desired results. As Gustav Peck pointed out to you in his memorandum of September 9, it would be too bad to close the Homestake Mine, for instance, without the assurance that most of the miners will continue to practice their trades in the copper mines.

Would it not be more practical to accomplish the purposes by a freeze order similar to that which is now in effect for workers in the copper mines and the lumber industry. This may be more drastic but, on the other hand, may give better assurance that the miners in the gold mines would eventually find their way into the copper mines. Consideration might also be given to the idea of having the Army give indefinite furloughs to Service men who in the past were engaged in the mining of non-ferrous materials. [fol. 2292] Even aside from the possible dissipation of these skilled miners into other occupations, there is question whether the closing of all the gold mines will release any relatively large number of workers. As I understand it, in the case of Homestake Mine the proposed order would affect only about 450 miners. This is the largest gold mine and has from a third to a half of all the miners to be released. The Alaska-Juneau miners, incidentally, will be stuck in Alaska. Where are they expected to go?

I am sure that a great deal of thought has been given to the proposed limitation order on gold mining, but unless there is a high degree of assurance that the main purpose will be accomplished; namely, the diversion of these miners to the non-ferrous mines, I feel it is important to weigh the adverse effects it might have in other directions.

Actually, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, the preamble should give the real reason; which is to divert this labor to more necessary industries.

MCREDITOR:deo

[fol. 2293] PLAINTIFF'S EXHIBIT 22

Interdepartmental Committee on Non-Ferrous Metals,
Meeting September 8, 1942

H. O. King, Chairman

The following were present:

General McSherry, War Manpower Commission.
Mr. Allen Buchanan, War Production Board.
Major George L. Webber, Army & Navy Munitions Board.
Captain Russell W. Nauman, Services of Supply, War Department.
Major R. B. Coons, Selective Service System.
Mr. Robert Abelow, War Labor Board.
Mr. James Newman, Planning Committee, War Production Board.
Mr. W. H. McPherson, Planning Committee, War Manpower Commission.
Mr. Robert R. R. Brooks, Office of Price Administration.
Mr. Edwin V. Collins, Bureau of Mines, Department of the Interior.
Mr. Erwin Vogelsang, Lead Branch, War Production Board.
Mr. Herbert W. Woolley, Requirements Committee, War Production Board.
Mr. George C. Heikes, Zinc Branch, War Production Board.
Captain Sidney C. Sufrin, Services of Supply, War Department.
Mr. Richard J. Lund, Miscellaneous Minerals Branch, W.P.B.
Mr. Wilbur A. Nelson, War Production Board.
Mr. Marcellus H. Stow, Mining Branch, War Production Board.
Mr. Hugh R. Van Wagenen, Office of Price Administration.
Mr. Darrell D. Smith, War Manpower Commission.
Mr. N. E. Randolph, Ferro Alloys Branch, War Production Board.
Mr. F. D. Cannon, War Production Board.
Mr. Samuel Lipkowitz, War Production Board.
Mr. Louis Lister, War Production Board.

General McSherry acted as chairman of the committee in Mr. King's absence, due to illness.

Mr. Frank Cannon reported that the letters on manpower shortage had been sent to all but the molybdenum, tungsten and vanadium operators. General McSherry also reported that his letters to the mayors in mining communities had been sent.

Mr. Lister reported on the employment and labor requirements for smelters and refineries in the United States and [fol. 2294] distributed a set of tables giving summary and individual plant data. He stated that although data on labor requirements at 15 plants were not available, the reporting plants needed some 2,200 additional workers for the balance of 1942, and that 75 per cent of the total labor needs were in the far western states.

General McSherry then gave a detailed report on the employment stabilization order in the mining and lumber industry, which War Manpower Commission had issued on September 7. Copies of the order were distributed to those present. The provisions of the order were then discussed. General McSherry explained that enforcement of the order preventing mining and logging employees in Regions X, XI and XII from changing to jobs in other essential industries would be implemented by the Accounting Offices of the War Department, Navy Department, Maritime Commission and Procurement Division of the Treasury Department, which would be requested not to approve payroll disbursements to migrants from mines who had been hired by a Government financed project without certificates of separation from their jobs. He also pointed out the following: The machinery for executing the directive will consist of the U.S. Employment Service and local committees of the War Manpower Commission composed of two representatives from labor, two from management, and a chairman representing the Commission. Any employee can appeal from a decision of the Employment Service on not granting a certificate of separation and bring the appeal before the local Labor-Management Committee, whose recommendation is made to Industrial Area War Manpower Commission director, who makes a final decision. The members on the local committees are to be nominated at the local level by management and labor groups. The Re[illegible]onal Committees

are to select the local Committees from among these nominees.

[fol. 2295] In discussing the effect of the order upon labor morale, Mr. Heikes expressed his belief that the freezing of workers might create strong resentment and therefore steps should be taken to convey to workers the importance of the job they were doing and the need for such drastic action to keep up the production of zinc and copper. There was general agreement on this point and steps to this end which had already been taken were described.

On other actions taken, Captain Nauman reported two novel attempts to overcome the labor shortage in Arizona. Eighty women have been recruited in the Globe-Miami area for surface work in order to relieve manpower for underground operations. Because of the efforts of the Services of Supply, Phelps-Dodge properties had hired 100 Indians, and arrangements were made by the Company to provide transportation. It is understood that plans are in prospect to hire some 250 more Indians. General McSherry brought up the fact that one of the large mining companies in Arizona had refused to pay transportation costs for workers transferred from other states although they were willing to pay intra-state transportation costs.

Captain Nauman also reported that these recruiting efforts are being undertaken in conjunction with members of the U. S. Employment Service, especially detailed to the Globe-Miami area.

General McSherry expressed his belief that hiring specifications for new workers were too strict throughout the mining industry and that steps should be taken to reduce these standards. General McSherry indicated that a representative of the War Manpower Commission might report on discrimination at the next meeting of the Committee.

[fol. 2296] In a discussion of the proposed gold order it was the firm belief of the members of the Committee that gold mining was now an unessential industry and that even if the manpower released by the gold order was not directly transferred to copper, lead or zinc mining, it still might help relieve the shortage of labor in other war industries, such as aircraft and shipbuilding. There was impatience among some members of the Committee with the length of time which was being taken to promulgate a gold order. Mr. Lund, Chief of the Miscellaneous Minerals Branch, re-

ported that he was drafting an order which would curtail every mining operation whose gold production was over 50 per cent by dollar value but which would exempt those which produced less than 4,000 tons of ore per year. Mines which produced a mixed ore with an essential metal content and mines which produced dry and silicious ore necessary for fluxing, could appeal from the order. Dr. Nelson disagreed with the principle of a blanket curtailment because he believed that it would open the way to too many appeals. He favored his original gold curtailment proposal according to which a gold mine coming under Order P-56 could be shut down by being denied a serial number. He believed this was a more flexible instrument since the mines whose ores were necessary could be exempted from the terms of the order beforehand simply by being given a serial number. The Committee discussed the problem of the existing wage discrepancies between construction projects in the West and wages in the mines, even if the latter should be raised by the War Labor Board. It was suggested that the institution of the 48 hour week on these project might partly eliminate the discrepancy.

The members of the Committeee were asked to suggest topics for next week's agenda. It was suggested that (1) [fol. 2297] they would continue discussing the problem of wage discrepancies; (2) that they would like to hear a report by Mr. Joseph Tufts of the War Manpower Commission on housing and transportation problems in mining areas; (3) that they were expecting a report from Mr. Lund on the progress of his gold orders; and (4) they would like to hear a report from the War Manpower Commission on discriminatory hiring practices.

The meeting was then adjourned with the understanding that it would meet again next Tuesday at two o'clock.

[fol. 2298] PLAINTIFF'S EXHIBIT 23

War Production Board

Washington, D. C.

Office of: W. L. Batt, Vice Chairman.

Memorandum for Mr. Nelson

The more I study the gold mining situation, the more uncertain I am as to the form which a restriction of operations should take. Complete closing without exceptions will produce very serious economic dislocations, and the total possible gain in men is a small figure. If the question comes up in your press conference, I would suggest that you refer to the need for miners and the lack of need for gold, and say that the matter is being studied from all angles.

W. L. Batt.

Noted by DMN 11/1/42 before press conference.

[fol. 2299] PLAINTIFF'S EXHIBIT 24

War Production Board

Washington, D. C.

October 3, 1942

In reply refer to: Room 1035-R

Memorandum

To: W. L. Batt, Vice Chairman.
From: Wilbur A. Nelson.
Subject: Labor Statistics on Gold Mines in the United States.

It is estimated that of all of the gold mines and dredges in the United States be put on a stand by basis that there would be available the following men, including all types of workmen from the following listed areas.

Homestake Mining Company, Lead, South Dakota		1,373	
Cripple Creek, Colorado		338	
Idaho-Maryland California Mine, Grass Valley, California		69	
Empire, North Star, Pennsylvania Mines, Grass Valley, California		240	
Total		2,020	
Estimate of men available from other mines		500	
Total		2,520	
Dredge Operators in California	525		
Dredge Operators in other States	225	750	
Total from lode mines and dredges			3,270

From these figures we find that there are the following number of miners and muckers.

[fol. 2300]

Homestake Mining Company	421
Cripple Creek	100
Idaho-Maryland	45
Empire, North Star, Pennsylvania Mines	130
Total	696
Estimated additional miners and muckers from other small mines	200
Total number of experienced miners and muckers	896

Of these 896 miners and muckers a certain percentage of them would have to be left in the mines when the mines operate on a stand-by basis. Probably 300 of them would be needed for this purpose. This makes available about 600 miners and muckers for other mining enterprises provided they can all be induced to go into other mines.

If the gold mines are curtailed to 50% of the 1941 tonnage or to the tonnage they produced in September of this year where it is less than 50% of their 1941 tonnage, the only mine affected would be the Homestake Mine. If this mine reduces to 50% of its 1941 tonnage, it would probably have to reduce the men employees from 1876 on their payroll at the present time to around 1000, so that such action by WPB would release around 900 men of whom probably 200 would be miners and muckers.

There are 16,000 people residing in the county in which Homestake Mine is located, most of them in Lead and the nearby town of Deadwood. About 5000 people reside in the county in which Cripple Creek Mines are located. The number of people residing in Grass Valley, California, is not available.

Wilbur A. Nelson.

[fol. 2301] PLAINTIFF'S EXHIBIT 25

War Department
Office of the Under Secretary
Washington, D. C.

October 2nd, 1942.

Mr. William L. Batt,
War Production Board,
Washington, D. C.

DEAR BILL:

I hope that prompt and effective action will be taken with regard to gold mining. I need not call your attention to the urgent need for more miners in the production of copper and other non-ferrous metals as you know the situation as well as I do. The longer the delay in shutting down gold mining, the further off will be the relief of the copper shortage. The matter has hung fire for some time, and I trust that there will be no further delay.

If it is thought best to have the order approved by the War Department and the Navy Department, I will be glad to give the War Department's approval, and I believe that Mr. Forrestal will do the same for the Navy.

Sincerely yours,

Robert P. Patterson, Under Secretary of War.

rpp:lm

[fol. 2302] PLAINTIFF'S EXHIBIT 26

War Department
Washington

October 5th, 1942.

Memorandum to Mr. Donald M. Nelson:

Gold Mining

The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.

There are two thousand to three thousand hardrock miners engaged in gold mining, now of no use in war production. These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.

The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step and others will not give complete relief if nothing is done to transfer gold miners to copper mining.

The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half-measures be avoided.

Robert P. Patterson, Under Secretary of War.
James V. Forrestal, Under Secretary of the Navy.

[fol. 2303] PLAINTIFF'S EXHIBIT 33

War Production Board

Washington, D. C.

September 1, 1942.

DEAR SENATOR MCCARRAN:

Your letters of August 26 and 27 have been read with great interest.

The War Production Board has no plan, nor has it considered any plan, to close down silver mines in the United States of America.

A serious study has been and is being made of sources from which mine labor could be made available to the nonferrous metal mines. Naturally, our thoughts have included gold mines, but we have not at this time reached any conclusion thereon.

We quite agree that no legal power exists today by which workers may be forced to transfer to other mines. This accentuates the mine labor problem which faces us today.

Because of your experience in mining matters, and the factual evidence you secured in your recent hearings in the West, I am asking our people responsible for mine production to carefully consider your suggestions.

I appreciate very much the opportunity your letter affords me to have your views on these important problems.

Sincerely, (S.) Donald M. Nelson, Chairman.

The Honorable Pat McCarran, United States Senate, Washington, D. C.

[fol. 2304] PLAINTIFF'S EXHIBIT 34

To All Workers in Gold Mines:

At the present time the armed forces of the United States are in vital need of large quantities of copper, zinc and other nonferrous metals. These metals are used in carrying the war to our enemies and must be available in sufficient amounts if victory is to be assured.

Inadequate supplies of non-ferrous metals are reducing production of tanks and airplanes, ships and shells. Immediate production of these weapons of war in the amounts necessary is of the utmost importance. We are not mining enough of these critically needed metals. One reason for this is a shortage of hard-rock miners in the western states.

To meet our war production program with respect to these metals, it becomes necessary now to maneuver our manpower so that less essential mining can be diverted to vitally important operations. With this as our objective it has been determined that all gold mining shall be discontinued at the earliest possible moment.

It is realized that such an order must occasion considerable hardships. Nevertheless, at this juncture no other course is open and, accordingly, the shutdown will become effective in sixty days.

We urge all miners now working in gold mines to leave such work for jobs in mines producing the more essential non-ferrous metals. It is important that gold miners transfer to non-ferrous metal mines rather than to other war industries. This is imperative to meet the shortage of miners, and it will enable men now working in gold mines to make a most effective contribution to the national war effort.

Paul V. McNutt, Chairman, War Manpower Commission. Donald M. Nelson, Chairman, War Production Board.

[fol. 2305] PLAINTIFF'S EXHIBIT 36

December 2, 1941.

Memorandum

To: Mr. Donald M. Nelson.
From: Edwin B. George.
Subject: Status of Gold Mining (meeting held in the Department of State on November 24, 1941).

The foregoing meeting was called by Mr. A. A. Berle, Jr., Assistant Secretary of State, apparently in response to our request for an opinion on the position SPAB should take with respect to gold mining. Mr. Shaw Livermore attended this meeting as a member of your staff (SPAB). A memorandum is attached which seems to reflect in a clear and useful manner the attitude of those present.

During the course of the discussion it was brought out that the Treasury Department would do nothing to prevent a decline in domestic gold production within the next few years, as a result of shutting off supplies and repair parts. There was an undercurrent of opinion that it may be entirely possible, in a postwar reconstruction period, that the Treasury would limit its buying of newly mined gold.

Discussed at some length also was the position of South Africa whose gold production does not come directly to the United States but is used to bolster the dollar-exchange position of the sterling-bloc countries. Since this is the case the same attitude should be taken towards South African mines as toward Canada or Latin American mines.

If the opinions of the State and Treasury Departments as expressed herein become the official attitude of SPAB with respect to Canada and South Africa, it may be necessary to frame a specific policy for treatment of Philippine and Alaskan gold mining. The latter two territories were purposely omitted from this meeting because they did not pose problems of foreign exchange and the State Department felt that they did not lie within its jurisdiction.

Enclosure.

EBG: bd.

[fol. 2306] PLAINTIFF'S EXHIBIT 36A

Office of Production Management

Social Security Building

Washington, D. C.

November 27, 1941.

Memorandum

To: Mr. E. B. George.
From: Shaw Livermore.
Subject: Statuts of Gold Mining.

Meeting Held in the Department of State, November 24, 1941

I attended a meeting called by Mr. A. A. Berle, Jr., Assistant Secretary of State on November 24, 1941. This meeting was apparently called in response to a request from S.P.A.B. for the opinion of the State Department, as suggested in a document submitted to S.P.A.B. on November 19. The memorandum covering the attitude of those present at the meeting is attached.

During the course of the discussion it was brought out that the Treasury Department would do nothing to prevent a decline in domestic gold production within the next few years, as a result of shutting off supplies and repair parts. There was an undercurrent of opinion that it may be entirely possible, in a postwar reconstruction period, that the Treasury would limit its buying of newly mined gold.

Discussed at some length also was the position of South Africa whose gold production does not come directly to the United States but is used to bolster the dollar-exchange position of the sterling-bloc countries. Since this is the case the same attitude should be taken towards South African mines as toward Canada or Latin American mines.

The expressed opinions of the State and Treasury Departments, as embodied in the attached memorandum will probably become the official attitude of S.P.A.B. However, it will be necessary to frame a specific policy for treatment of Philippine and Alaskan gold mining.

Shaw Livermore.

[fol. 2307] PLAINTIFF'S EXHIBIT 36B

Department of State

Memorandum of Conversation

Financial Division

Date: November 24, 1941.

Subject: Priorities and Export Licenses for Gold Producing Machinery.

Participants: Mr. Frank V. Coe, Treasury Department; Mr. Walter R. Gardner, Mr. Charles P. Kindleberger, Federal Reserve System; Mr. L. A. Morrison, Mr. Dennis E. Pickens, Mr. Shaw Livermore, Office of Production Management.

Copies To: Mr. Berle, Mr. Wickerson, Mr. Stinebower and Mr. Livesey, State Department.

Mr. Berle opened with general remarks closely following his memorandum of November 24 entitled "Priority for Gold Mining Machinery" recognizing the actual unimportance of gold as a defense material but in relation to foreign gold production, which was the concern of the meeting, pointing also to the importance of gold as a balancing element in our accounts with Canada and South Africa and to its psychological and industrial importance to those countries.

The ensuing discussion brought out that general priority ratings have been refused but that individual licenses have been issued after careful scrutiny of need and of the use to be made of the machinery and of the local conditions where it was to be used, such as possibilities of alternative employment and of production of more essential strategic materials such as chrome and other alloys. Mention was made of the probability that in case supplies from the best qualified sources are refused, the gold producing territories would divert energies to the inefficient production of inferior substitutes within their own manufacturing capacity. The licensing of exports requires particular

care because outside the United States our licensing authorities do not have available facilities for inspection on the ground to assure that proper use is made of the exported machinery and that the licenses are not abused.

It appeared to be the consensus of the meeting that preference ratings for gold mining equipment should be granted only after careful scrutiny with a view to maintaining, at the very most, existing rates of output and to refusing equipment for any expansion of output; subject to exceptions in cases where extraordinary hardship might result—as in the case of isolated communities having no alternative forms of employment—preference ratings for exports of gold mining equipment should be made to depend on a showing that the maintenance of the present level of gold production is necessary (a) to supply dollars for an otherwise deficit dollar position in the balance of payments of the country (or in the case of South Africa, for the dollar position of the sterling area), or (b) for special political reasons; whenever the current gold mining is maintained mainly to prevent a dollar deficit and especially where the labor could be used for more direct contribution to defense production, this Government should endeavor to find other means of meeting this deficit such as lend-lease activities, purchase of gold "in the ground" for postwar delivery, and the like. To give effect to the foregoing conclusions, no general priority ratings for gold mining equipment, including repair and replacement parts, should be granted but individual consideration should be given to each application on its merits unless adequate periodic compliance investigations can be made (particularly in Canada) as is done in the United States.

[fol. 2308] PLAINTIFF'S EXHIBIT 37

War Production Board

Interbranch Meeting of Branches Concerned with Mineral Production

9 A. M.—September 25, 1942.

Present:

Mica-Graphite, M. H. Billings, S. A. Montague.
Mining, M. H. Stow, L. W. Hildreth.
Copper, Frank Ayer, F. H. Hayes.
Tin-Lead, C. A. Wright.
Zinc, G. C. Heikes.
Ferro-Alloys, E. F. Hatch, O. N. Rove.
Misc. Minerals, R. J. McEwen.
Office of Deputy, Director General, Wilbur A. Nelson.

Presiding:

Wilbur A. Nelson.

Access Roads. Mr. Nelson read a memorandum from Mr. A. I. Henderson announcing the establishment of the Access Roads Section of the Mining Branch, of which Mr. Neil Stull is now chief. Mr. Stull, however, will return to the Department of Interior, from which he is on leave, on October first, and after that date Mr. Hughey Hudson will head the Access Roads Section. All matters pertaining to access roads in connection with mining or lumber production will be handled through this Section, in order that the information given out, and the policies followed, will be uniform. Access roads appropriations cleared through this Section must then be certified by Mr. Maury Maverick. Mr. Nelson would like to have brought to his attention cases where access roads in connection with mine or lumber production are handled through other units or agencies.

Attendance Record. Dr. Stow mentioned the new administrative procedure in regard to attendance records. A detailed attendance record on each employee will be required hereafter, to be kept in the various Sections or Operating units within the branches.

Army Requirements. Mr. Nelson mentioned the discussion which took place at the Interdepartmental Meeting on Wednesday, September 23, of the Army's method of estimating its requirements. The Army has used figures based on an ideal program, rather than the amounts it will actually be able to make use of, taking into consideration fabricating facilities, etc. Moreover, when the amounts actually received and used during a certain period have fallen short of the estimate for that period, the Army has added the remainder of the estimate to its estimate for the following period, even though this remainder could not be used. This has meant that WPB has been trying to reach production goals based on false figures.

The meeting requested that some means be found to get official estimates, revised on the basis of actual requirements, of the Army's needs.

Major Chambers, at the Interdepartmental Meeting, stated that the change to steel cartridge cases will not affect the Army's requirements of copper and zinc. Major Chambers also stated that antimony sulphide ores of 65% or better content may be ground and used without processing in camouflage paint by the Army, and therefore such ores should be furnished to the Army without mixing with leaner ores.

South African Gold Mines. Mr. Nelson stated that at the [fol. 2309] Interdepartmental Meeting it was brought out that the South African gold mines have produced more gold during the first six months of 1942 than in any previous six-months' period in their history. These mines have been supplied, to some extent, through the British Army's military priorities. It was the feeling of the meeting that such expansion of production is out of line with the war effort, and that a certain amount of curtailment should be insisted upon, keeping in mind the South African political situation.

Financing of Drilling by Metals Reserve Co. Mr. DeWitt Smith, at the Interdepartmental Meeting, stated that the Metals Reserve Company will finance drilling on the recommendation of WPB, without going through the Bureau of Mines. This was mentioned by Mr. Smith specifically with reference to bauxite drilling in Arkansas. The meet-

ing requested Mr. Nelson to ascertain the exact procedure to be followed, including the following points:

1. The limit of the amount of money to be had for such purposes without long delay and red tape.
2. Whether the financing will be in the form of loan or gift, on the understanding that the branches would use care in their recommendations.
3. What are the legal angles? Will a warranty deed be required on the properties to be drilled?
4. Will this include exploration work aside from drilling, as in the case of mercury?

Mr. Nelson stated that the Minerals and Metals Division of the Department of Commerce has inaugurated a study of the impact of war on small business which depends on metals and minerals.

Gold Mining Limitation Order. The meeting was not in favor of the issuance of the Gold Mining Limitation Order L-208 until preparations are completed to channel the labor so released into strategic metal mining. Mr. Hayes stated that he had suggested to Mr. Henderson that this order be delayed until such channels were provided, and Mr. Henderson had said that the necessity of issuing the gold order was imminent, and it could not wait for the channeling of the labor into the strategic mines. Mr. Hayes then stated that the transferring of gold miners to the strategic mines was the main purpose of the order. Mr. Henderson replied that the conserving of materials, rather than labor, was the main purpose of the order.

The following resolution was proposed by Mr. E. F. Hatch, seconded by Mr. F. H. Hayes, and unanimously passed:

> Resolved that before the Gold Mining Limitation Order L-208 is sent to clearance that:
>
> 1. Representatives of the gold mining companies be called to Washington immediately to confer with Government officials on the gold order so that:
>
> A. Where possible, existing organizations may be utilized for important mining operations, or prospective operations, necessary in the war effort.

B. Labor, and especially experienced miners, can be made available to the mining industry, rather than lost to vital metal production.

This resolution was to be embodied in a memorandum to Mr. Batt from Mr. Wilbur Nelson.

The gold mining curtailment order, if issued, will not apply to mines having serial numbers under Order P-56. The Homestake Mining Company had its serial number withdrawn on March 2, 1942.

The meeting adjourned at 10:00 a.m. until Monday, September 28, at 9:00 a.m.

[fol. 2310] PLAINTIFF'S EXHIBIT 38

April 7, 1943

Revised April 17, 1943.

Memorandum

To: Mr. A. S. Knoizen, Director, Mining Equipment Division, Administrator, Order L-208.

From: Mr. Edward H. Rott, Deputy Administrator, Limitation Order L-208.

Subject: Proposed Plan for Amending Limitation Order L-208.

In the following paragraphs, suggested changes in the provisions of Limitation Order L-208 are presented. It is felt that these changes will make the order more practical from the standpoint of application and administration. These changes will liberalize the order to some extent, but we do not believe the operations permissible under the proposed provisions will effect our war effort.

To make the order practical from the standpoint of application, a "nonessential mine" should be redefined.

(a) Definitions.

(1) "Non-essential Mine" means any mining enterprise from which the principal product is gold, whether lode or placer, located in the United States, its terri-

tories or possessions, unless the operator of such mining enterprise is the holder of a serial number for that operation, which has been issued under Order P-56.

(2) "Principal Product" For the purpose of this Order, if the gold value exceeds 50% of the total dollar value of the recovered products of the mining enterprise, it will be considered the principal product.

To take care of misunderstandings and a loop hole in the Order which might permit considerable expansion of a given operation, the term "associate," has been introduced which should be defined as follows:

(3) "Associate", means any co-owner, partner, contractor, lessee actively engaged in the operation.

Section (b)(4) should be amended to liberalize the order to cover types of grants on which, with practically no exception, it has been the policy of this office to recommend and for the Appeals Board to grant, permission to continue [fol. 2311] operation. The proposed change is also desirable to make the order practical from the standpoint of the operator. 100 tons of ore per month is hardly a practical operation for two men. An increase in this tonnage to 200, might be of some benefit in increasing the supply of silicious flux to smelters. In the case of placer mines, the values are generally so low that a 100 yard per month operation is out of the question. It is more reasonable to limit such operations on a manpower basis. To avoid objection on the part of the War Manpower Commission, we have included in the proposed amendment, a provision similar to that contained in the grants made to permit continuance of such operations. The changes recommended are as follows:

b) 4. The provision of this order shall not restrict the operation of any lode mine which was in production in 1941, provided the rate of production after the effective date, shall not exceed 200 tons per month, employing not more than 3 men, nor to any hydraulic placer mine, or any other type of placer mine which was in operation in 1941, provided the number of employees working on such operation, after the effective date, does not exceed 5, including owner and associates. It

is further provided that no employee under the age of 55 shall be retained if the War Manpower Commission finds that he can be used elsewhere in the mining industry.

To Section (d), a paragraph might be added to clarify the situation as to priority assistance.

Any mill engaged in milling ores for the holder of a serial number under Order P-56, may be classed as a producer, as defined in that order, eligible to the same consideration with respect to issuance of a serial number and priority assistance. This provision may have some value in stimulating the conversion of idle mills to handling custom ore.

The restrictions on disposition of machinery and equipment can be administered more easily, and I believe will be received better by the industry, if conformed more closely to the provision of Order P-56, relative to transfer of equipment.

e) 1. On or before January 18, 1943, or within 60 days after the effective date, whichever is later, each operator of a nonessential mine shall file with the Mining Division, War Production Board, Washington, D. C., Reference: L-208, an itemized list of machinery and equipment of the types listed in Schedule A, signed by such operator or an authorized official, giving complete specifications and condition for each item and indicate those items available for sale or transfer.

[fol. 2312] 2. No person shall sell, otherwise dispose of or transfer any such machinery or equipment which has been used in a nonessential mine, and no person shall accept delivery thereof except with specific permission of the Administrator of the Order, unless the operation for which the machinery or equipment is to be used is covered by a serial number under Order P-56, P-58 or P-73. Any transfer to an operation covered by a serial number shall be reported, in accordance with instructions contained in Section (f).

The matter of reporting on transfers may be included under Section (f) as a first paragraph. It seems that by doing this and retaining the original Section (f) as the second

paragraph, the requirement for reporting transfer of equipment may be more effective.

(f) 1. Any operator who sells, otherwise disposes of, or transfers any item of the class listed in Schedule A in accordance with exception to the restriction contained in Section (e)(2), permitting transfer to an operation with serial number under Orders P-56, P-58 or P-73, shall immediately report such transaction to the Mining Division, War Production Board, Washington, D. C., Reference L-208, giving the following information:

(1) Name of company and mine from which transferred.
(2) Identity of items transferred
(3) Name of party acquiring equipment and serial number of operation for which equipment is acquired.

2. Same as original Section (f).

In Section (i) Violations, it seems that the last sentence should be revised in a manner that it would be applicable to the type of operation involved. The following is suggested:

In addition, any such person may be prohibited from continuing operations or obtaining any further deliveries of material, supplies or equipment under priority control for conduct of his operation and may be deprived of further priority assistance.

Edward H. Rott.

[fol. 2313] PLAINTIFF'S EXHIBIT 43

June 7, 1943.

Memorandum

To: Mr. Donald M. Nelson
From: M. Creditor

Under the Gold Order, L-208, most of the permits which allow many of the companies to operate will expire on June 8. Since Howard Young understands that you will

probably take up Order L-208 at tomorrow's meeting of the War Production Board, he has authorized the administrator of the Order to extend their present permits for a period of 60 days, I believe.

I also understand that our Appeals Board, headed by Dr. Holcomb, has received instructions from Mr. King that the extension will be permitted for one week instead of 60 days.

If it is likely that Order L-208 will not be taken up at tomorrow's meeting of the Board, it may be necessary for practical purposes to make sure that the extension is authorized for a longer period than one week so that there will be no possibility of companies having to shut down or of being in violation if they continue to operate. I believe it is generally understood by the operating companies that until a final determination is made by the War Production Board they are going to be allowed to operate under the restrictive terms of the present Order.

You may wish to take up at the top staff meeting this afternoon the question of the extension of time.

M. C.

[fol. 2314] PLAINTIFF'S EXHIBIT 45

Memorandum from the desk of Donald M. Nelson

8-26-42

Aug. 27, 1942, 9:35 A. M.

H. W. Dodge
4406nRRB

Please prepare a reply for my signature.

Donald M. Nelson.

[fol. 2315] United States Senate

Committee on Appropriations

Carter Glass, Va., chairman; Kenneth McKellar, Tenn.; Carl Hayden, Ariz.; Elmer Thomas, Okla.; Millard E. Tydings, Md.; Richard B. Russell, Ga.; Pat McCarran, Nev.; John H. Overton, La.; John H. Bankhead, Ala.; Joseph C.

O'Mahoney, Wyo.; Harry S. Truman, Mo.; Theodore Francis Green, R. I.; Francis Maloney, Conn.; Dennis Chavez, N. Mex.; James M. Mead, N. Y.; Wall Doxey, Miss.; Burnet R. Maybank, S. C.; Gerald P. Nye, N. Dak.; Styles Bridges, N. H.; Henry Cabot Lodge, Jr., Mass.; Rufus C. Holman, Oreg.; Wallace H. White, Jr., Maine; Chan Gurney, S. Dak.; C. Wayland Brooks, Ill.; Everard H. Smith, Clerk; J. W. R. Smith, Asst. Clerk.

August 26, 1942

Mr. Donald Nelson, Chairman
War Production Board
Room 5055, Social Security Building
Washington, D. C.

My Dear Mr. Chairman:

From all over the country there come to my desk protests from patriotic Americans against what has been termed a proposal that your Board will direct the closing down of gold and silver mines in the United States to direct the flow of manpower toward the production of other strategic and critical metals and minerals.

I beg leave to call to your attention what appear to me to be important considerations in this program of production in the war effort, and several factors enter into my strong conviction that any order closing down gold and silver mines would be most unwise.

In the first place, the transfer of necessary labor from closed gold and silver mines to mines producing copper, lead, zinc, etc., would be negligible, due to the fact that very few operations exist today where only gold and silver are mined, and in these districts (mainly, the Homestake Mining activity in South Dakota and the Mother Lode Mining district in California), the number of men who could be so transferred is small. Many of the usual workers have joined the armed forces; many are familiar only with the routines of this type of mining and cannot be successfully transplanted. Thus little good would result and great hardships would be inflicted upon affected families and communities.

Secondly, there is no rule or procedure by which such workers could be legally forced to transfer to other mines. The labor that would be denied employment by reason of

the shutting down of the mines producing gold and silver would most likely go to the places where they would receive higher wages than are paid in mines.

Also, gold and silver mines are largely the sources of fluxing ores, without which copper production would be greatly impeded if not altogether halted.

All in all, I cannot too strongly urge that no order be issued which would lead to the closing down of gold and silver mines.

[fol. 2316] If the aim of such an order would be to increase production of war essentials and strategic and critical metals and minerals, may I respectfully suggests that your Board investigate the possibility of increasing mine production by constructive measures, which have presented themselves to me forcefully as Chairman of a Subcommittee holding hearings in the west recently on the subject of mining.

Tremendous evidence was presented to my Committee in these hearings by mine owners, superintendents, and workers, pointing to the fact that the solution to the lack of production lay in certain factors which could be remedied through government action. These factors centered, in brief, around the following points:

1. Take the ceiling price off war essential and strategic metals.

2. Make government assistance promptly obtainable to existent and potential metal producing mines by way of loans authorized by existing law but buried in delay and complexities.

3. Accord mining operations the same allowance as to depletion in revenue laws as is accorded in oil operations.

4. Compute the base-period income of a mining operation on the basis of three out of four base-period years, obtaining the average by dividing by three.

5. Make adequate allowance to mining operation so a reserve fund, non-taxable, for development of new mines and ore bodies may be encouraged.

6. Eliminate the excise tax on freight.

7. Give to the producer of copper, lead, and zinc the full and proper value of $1.29 per fine ounce for silver and $35 per ounce for gold which he produces in combination with the copper, lead, and zinc.

I respectfully draw these details to your attention, with the urgent request that you do not approve any order bringing about the closing of gold and silver mines as I feel the results will be destructive to the welfare of the war effort.

Respectfully, Pat McCarran.

[fol. 2317] PLAINTIFF'S EXHIBIT 46

May 6, 1943.

Memorandum

To: Mr. A. S. Knoizen
Director, Mining Division
Administrator, Limitation Order L-208

From: Mr. Edward H. Rott
Deputy Administrator
Limitation Order L-208

Subject: Proposed Plan for Amending Limitation Order L-208 (Revised May 6, 1943)

In the following paragraphs, suggested changes in the provisions of Limitation Order L-208 are presented. It is felt that these changes will make the order more practical from the standpoint of application and administration. These changes will liberalize the order to some extent, but we do not believe the operations permissible under the proposed provisions will effect our war effort.

To make the order practical from the standpoint of application, a "nonessential mine" should be redefined.

(a) Definitions.

(1) "Non-essential Mine" means any mining enterprise from which the principal product is gold, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for that operation, which has been issued under Order P-56.

(2) "Principal Product" for the purpose of this Order, if the gold value exceeds 50% of the total dollar value of the recovered products of the mining enterprise, it will be considered the principal product.

To take care of misunderstandings and close loop holes in the order which might permit considerable expansion of a given operation, the following terms should be defined:

(3) "Operation" for the purpose of this order, should include the mining and or treating of ore or placer material, development work or prospecting, excepting contract drilling.

(4) "Associate" means any co-owner, partner, contractor, lessee actively engaged in the operation.

[fol. 2318] Section (b)(4) should be amended to liberalize the order to cover types of grants on which, with practically no exception, it has been the policy of this office to recommend and for the Appeals Board to grand permission to continue operation. Justification for the continuance of such operations is that they provide employment for elderly, feeble, physically handicapped, less skilled men, and that they can continue without consuming any appreciable quantities of critical materials, new or salvaged. The proposed change is also desirable to make the order practical from the standpoint of the operator. One hundred tons of ore per month is hardly a practical operation for two men. Also, an increase in this tonnage to two hundred, might be of some benefit in increasing the supply of silicious flux to smelters. In the case of placer mines, the values are generally so low that a one hundred yard per month operation is out of the question. It is more reasonable to limit such operations on a manpower basis. The omission of the amount of production in 1941 for both lode and placer mines, permits the larger operator to take advantage of this production for clean-up and selective mining by maintenance crew. To avoid objections on the part of the War Manpower Commission, we have included in the proposed amendment, a provision similar to that contained in the grants made to permit continuance of such operations. The changes recommended are as follows:

b) 4. The provision of this order shall not restrict the operation of any lode mine which was in production in 1941, provided the rate of production after the effective date, shall not exceed 200 tons per month; nor of any placer mine which was in operation in 1941, provided the number of employees working on such operation, after the effective date, does not exceed five, including owner and associates who

are actively engaged in the operation. It is further provided that no employee under the age of fifty-five shall be employed unless such employment has been approved by the local office of the War Manpower Commission, and that no critical materials other than those on hand will be required.

Section (d) should be revised to clarify the situation as to priority assistance.

Priority assistance under Order P-56 is not available to a nonessential mine, except when applied for in accordance with Section (c). The District General for Operations, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in paragraph (b)(3) above.

[fol. 2319] Any mill engaged in milling ores for the holder of a serial number under Order P-56, may be classed as a producer, as defined in that order, eligible to the same consideration with respect to issuance of a serial number and priority assistance. This provision may have some value in stimulating the conversion of idle mills to handling custom ore.

The restrictions on disposition of machinery and equipment can be administered more easily, and I believe will be received better by the industry, if conformed more closely to the provision of Order P-56, relative to transfer of equipment.

c) 1. On or before January 18, 1943, or within 60 days after the effective date, whichever is later, each operator of a nonessential mine shall file with the Mining Division, War Production Board, Washington, D. C., Reference: L-208, an itemized list of machinery and equipment of the types listed in Schedule A, signed by such operator or an authorized official, giving complete specifications and condition for each item and indicate those items available for sale or transfer.

2. No person shall sell, otherwise dispose of or transfer any such machinery or equipment which has been used in a nonessential mine, and no person shall accept delivery thereof except with specific permission of the Administra-

tor of the Order, unless the operation for which the machinery or equipment is to be used is covered by a serial number under Orders P-56, P-58 or P-73. Any transfer to an operation covered by a serial number shall be reported, in accordance with instructions contained in Section (f).

The matter of reporting on transfers may be included under Section (f) as a first paragraph. It seems that by doing this and retaining the original Section (f) as the second paragraph, the requirement for reporting transfers of equipment may be more effective.

f) 1. Any operator who sells, otherwise disposes of, or transfers any item of the class listed in Schedule A, in accordance with exception to the restriction contained in Section (e) (2), permitting transfer to an operation with serial number under Orders P-56, P-58 or P-73, shall immediately report such transaction to the Mining Division of the War Production Board, Washington, D. C., Reference: L-208, giving the following information:

[fol. 2320] (1) Name of company and mine from which transferred.

(2) Identity of items transferred.

(3) Name of party acquiring equipment and serial number of operation for which equipment is acquired.

2. Same as original Section (f).

In Section (i), "Violations", it seems that the last sentence should be revised in a manner that would be applicable to the type of operation involved. The following is suggested:

In addition, any such person may be prohibited from continuing operations or obtaining any further deliveries of material, supplies or equipment under priority control for conduct of his operation and may be deprived of further priority assistance.

The attached Schedule A should be appended as a part of this order.

Edward H. Rott.

Attachment-1
EHR:M

[fol. 2321] PLAINTIFF'S EXHIBIT 47

April 17, 1943.

Revised 5/6/43

Memorandum

To: Mr. A. S. Knoizen, Director, Mining Equipment Division, Administrator, Order L-208

From: Mr. Edward H. Rott, Deputy Administrator, Limitation Order L-208

Subject: Proposed Plan for Amending Limitation Order (Revised April 17, 1943)

In the following paragraphs, suggested changes in the provisions of Limitation Order L-208 are presented. It is felt that these changes will make the order more practical from the standpoint of application and administration. These changes will liberalize the order to some extent, but we do not believe the operations permissible under the proposed provisions will effect our war effort.

To make the order practical from the standpoint of application, a "nonessential mine" should be redefined.

(a) Definitions.

(1) "Non-essential Mine" means any mining enterprise from which the principal product is gold, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for that operation, which has been issued under Order P-56.

(2) "Principal Product" for the purpose of this Order, if the gold value exceeds 50% of the total dollar value of the recovered products of the mining enterprise, it will be considered the principal product.

To take care of misunderstandings and a loop hole in the Order which might permit considerable expansion of a given operation, the term "associate" has been introduced which should be defined as follows:

(3) "Associate", means any co-owner, partner, contractor, lessee actively engaged in the operation.

Section (b) (4) should be amended to liberalize the order to cover types of grants on which, with practically no ex-

ception, it has been the policy of this office to recommend [fol. 2322] and for the Appeals Board to grant, permission to continue operation. Justification for the continuance of such operations is that they provide employment for elderly-feeble, physically handicapped, less skilled men, and that they can continue without consuming any appreciable quantities of critical materials, new or salvaged. The proposed change is also desirable to make the order practical from the standpoint of the operator. One hundred tons of ore per month is hardly a practical operation for two men. Also, an increase in this tonnage to two hundred, might be of some benefit in increasing the supply of silicious flux to smelters. In the case of placer mines, the values are generally so low that a one hundred yard per month operation is out of the question. It is more reasonable to limit such operations on a manpower basis. The omission of the amount of production in 1941 for both lode and placer mines, permits the larger operator to take advantage of this production for clean-up and selective mining by maintenance crew. To avoid objection on the part of the War Manpower Commission, we have included in the proposed amendment, a provision similar to that contained in the grants made to permit continuance of such operations. The changes recommended are as follows:

b) 4. The provision of this order shall not restrict the operation of any lode mine which was in production in 1941, provided the rate of production after the effective date, shall not exceed 200 tons per month, employing not more than three men, including owner and associates, nor to any hydraulic placer mine, or any other type of placer mine which was in operation in 1941, provided the number of employees working on such operation, after the effective date, does not exceed five, including owner and associates. It is further provided that no employee under the age of fifty-five shall be employed unless such employment has been approved by the local office of the War Manpower Commission.

To section (d), a paragraph might be added to clarify the situation as to priority assistance.

Any mill engaged in milling ores for the holder of a serial number under Order P-56, may be classed as a pro-

ducer, as defined in that order, eligible to the same consideration with respect to issuance of a serial number and priority assistance. This provision may have some value in stimulating the conversion of idle mills to handling custom ore.

The restrictions on disposition of machinery and equipment can be administered more easily, and I believe will be received better by the industry, if conformed more closely to the provision of Order P-56, relative to transfer of equipment.

[fol. 2323] e) 1. On or before January 18, 1943, or within 60 days after the effective date, whichever is later, each operator of a nonessential mine shall file with the Mining Division, War Production Board, Washington, D. C., Reference L-208, an itemized list of machinery and equipment of the types listed in Schedule A, signed by such operator or an authorized official, giving complete specifications and condition for each item and indicate those items available for sale or transfer.

2. No person shall sell, otherwise dispose of or transfer any such machinery or equipment which has been used in a nonessential mine, and no person shall accept delivery thereof except with specific permission of the Administrator of the Order, unless the operation for which the machinery or equipment is to be used is covered by a serial number under Orders P-56, P-58 or P-73. Any transfer to an operation covered by a serial number shall be reported, in accordance with instructions contained in Section (f).

The matter of reporting on transfers may be included under Section (f) as a first paragraph. It seems that by doing this and retaining the original Section (f) as the second paragraph, the requirement for reporting transfers of equipment may be more effective.

(f) 1. Any operator who sells, otherwise disposes of, or transfers any item of the class listed in Schedule A, in accordance with exception to the restriction contained in Section (e)(2), permitting transfer to an operation with serial number under Orders P-56, P-58 or P-73, shall immediately report such transaction to the Mining Division of the War Production Board, Washington, D. C., Reference L-208, giving the following information:

(1) Name of company and mine from which transferred.
(2) Identity of items transferred.
(3) Name of party acquiring equipment and serial number of operation for which equipment is acquired.

2. Same as original Section (f).

[fol. 2324] In Section (i), Violations, it seems that the last sentence should be revised in a manner that it would be applicable to the type of operation involved. The following is suggested:

"In addition, any such person may be prohibited from continuing operations or obtaining any further deliveries of material, supplies or equipment under priority control for conduct of his operation and may be deprived of further priority assistance."

Edward T. Rott.

EHR:M

[fol. 2325] PLAINTIFF'S EXHIBIT 48

CC—Lewis Clark, W. E. Uren, F. M. Chace, W. J. Zepp, G. L. Jennison.

War Production Board

Ottawa Branch, Canadian Division

7 September, 1943.

Memorandum

To: Hugh C. Porter, Acting Director, Canadian Division, WPB.
From: Gilbert J. Brown, Chief, Ottawa Branch.
Subject: Final Report on Gold Mining in Canada.

Received Sep. 9, 1943, Canadian Division.

The use of U.S. materials in Canadian gold mining operation continues to this date to be a problem. In making this statement as a matter of summary of the present situation I am not giving consideration to (a) the approximately 20 thousand experienced and skilled Canadian miners who are still engaged in gold mining or (b) the materials of Canadian origin which are being used to support such

operations and which has two reflections in the U.S. even though indirect: the first being that it is probable that such use of Canadian materials is reflected in their deficit requirements from the U.S. and second, the trend is to develop Canadian production of mining machinery at the expense of American manufacturers who are prevented from manufacturing machinery under M and L orders.

Under the present priority arrangements including operation of PB-1005, PB-1007 and PB-1010 we are carrying out the policy of refusing any priority assistance to Canadian applicants for materials to be used in gold mining operations as per your memorandum to me dated 30 June. We feel, however, that this is futile as a means to compensate for what is obviously a failure on the part of the Canadian Government to take appropriate action themselves.

Briefly, it appears that there is no policy in the Canadian Government with respect to gold mines for the obvious reason that the problem is so fraught with political implications that they are simply handling the problem by ignoring it.

It is my personal feeling and, in fact, the conviction of many Canadians as evidenced by the attached editorial from the Ottawa Evening Citizen that this state of affairs is neither in keeping with the spirit of the Hyde Park Agreement nor a fair treatment of a problem which directly relates to U.S. interests.

[fol. 2326] It is therefore my recommendation that (1) the Canadian Division take the initiative in consideration of the whole problem with the Mining Division and other interested parties in the W.P.B. (2) unless better reasons are developed than are now apparent for continuing to ignore the problem as far as the W.P.B. is concerned that final representations be made to Canada either through the Canadian Division or perhaps more appropriately through the State Department, (3) that the substance of such representation be that Canada should formally and effectively give evidence of good faith in this matter by carrying into effect comparable provisions to the restraint placed upon the gold mining industry in the U. S. forthwith and at once.

GJB/CW.

Ottawa Evening Citizen—August —, 1943

"Piker" Recruiting

An advertisement to persuade Canadian girls to enlist is headed, "I had better quit being a piker." A girl is shown in civilian clothes, while others are marching past smartly in the uniform of the R.C.A.F.

This coercive method of recruiting is considered necessary, of course, only because of Canada's lack of an effective policy of compulsory military service. Even without the national selective draft as it should be applied to women as well as men, it should surely be unnecessary to shame girls into joining up.

A year ago, many Canadian girls were rejected or put off when they tried to enlist. They have since taken employment in essential occupations, or decided to carry on in the work which they were willing to leave a year ago.

It could, of course, be due to ignorance; but it is public knowledge that there are thousands of fit men employed in the gold-mining industry. In the United States, gold-mining has been officially declared to be non-essential. In Canada, however, where the gold-mine workers could be more usefully employed in productive industries, the authorities are doing nothing to apply national selective service.

This country is threatened with a coal shortage next winter. Gold-mining is different from coal mining, but gold-mine workers should be just as adaptable for coal-mining as structural steel workers have been for shipbuilding or as office workers for aircraft manufacturing.

There is great need for skilled mechanics in workshops where marine engines are manufactured. It would be possible to set up a complete shipyard, including marine engine builders, from among the Canadian workers whose productive capacity is at present being wasted in gold-mining. Before girls are described as "pikers" when they hesitate to enlist in the armed forces, some of the responsible authorities would do well to take a closer look at themselves.

[fol. 2327] PLAINTIFF'S EXHIBIT 49

United States Senate

Committee on Appropriations

Carter Glass, Va., Chairman; Kenneth McKellar, Tenn.; Carl Hayden, Ariz.; Elmer Thomas, Okla.; Millard E. Tydings, Md.; Richard B. Russell, Ga.; Pat McCarran, Nev.; John H. Overton, La.; John H. Bankhead, Ala.; Joseph C. O'Mahoney, Wyo.; Harry S. Truman, Mo.; Theodore Francis Green, R. I.; Francis Maloney, Conn.; Dennis Chavez, N. Mex.; James M. Mead, N. Y.; Wall Doxey, Miss.; Burnet R. Maybank, S. C.; Gerald P. Nye, N. Dak.; Styles Bridges, N. H.; Henry Cabot Lodge, Jr., Mass.; Rufus C. Holman, Oreg.; Wallace H. White, Jr., Maine; Chan Gurney, S. Dak.; C. Wayland Brooks, Ill.; Everard H. Smith, Clerk; John W. R. Smith, Asst. Clerk.

September 29, 1942.

Mr. Donald Nelson, Chairman
War Production Board
Room 5055, Social Security Building
Washington, D. C.

MY DEAR MR. CHAIRMAN:

On page 12 attached of the Washington Post of this morning there appears an article entitled "Order to Shut Gold Mines may be Issued."

The article recites that an order which would halt the greater part of the Nation's gold production was submitted to you about a week ago; hence, I address you with the hope that such an order may not be made.

I have heretofore presented this subject more at length, and I respectfully refer to my letters of August 26th and 27th, copies of which are enclosed herewith.

I respectfully urge that an order closing the gold mines of America will not at the present time augment labor in the mines of copper, lead and zinc, or in the mines of the strategic or war essential metals.

The alluring wage paid to the workers in shipyards and other war-construction industries would first attract labor thrown out of employment in gold mining communities, that

is, so much of such labor as would be able or willing to migrate from homes and families established in the communities where gold mining industry has prevailed for a half century or more. The greater percentage of men who might be put out of employment by shutting down the gold mines would go to places paying these attractive wages. The percentage of those qualified for mining, who would go to mines of non-precious metals, would be negligible. The amount of hardship and heartache, and the destruction of communities and economic set-ups, and the discouragement growing out of these things that would follow from the closing of the gold mines in America would far outweigh any gain that would be made by such a conclusion.

Aside from what I have emphasized in the letters heretofore sent to you, copies of which are attached, let me draw your attention to the outstanding fact that Great Britain, even today in the darkest hour of her war period, is encouraging the production of gold in her South African mines. Mines of the Rand-British Processing properties have reached an all-time high in the production of gold during this current year.

[fol. 2328] I would draw your attention to an editorial appearing in the South African Mining and Engineering Journal, under date of July 25, 1942, in which that recognized publication says, "The most important contribution that the Witwaterrand gold mining industry can make to the National war effort is the maintenance of its production—so declared Mr. W. H. A. Lawrence at the meeting of the Chamber of Mines a few months ago, and the same point has been emphasized by responsible Government officials, from the Prime Minister down."

On page 529 of the same publication of the same date, under the heading "Rand Gold Industry Output Well Maintained", we find a very comprehensive statement as to the production of gold in South Africa, the language being, "All things considered, the results of operations by the gold mining industry of the Witwatersrand for the first six months of the present year must be regarded as satisfactory."

We cannot believe that your Board would seriously consider the bringing about of irreparable loss by the closing down of the gold mines of America with the comparatively

small number of employees engaged when, as a matter of fact, the United States has been—and is now—transporting to South Africa mine machinery and equipment to maintain the production of gold in the mines of that territory, while here at home we have curtailed priorities for mine essentials in the gold producing industry.

Great Britain recognizes that gold is a backing to her credit, as a sustenance, and support to her monetary system. If we are to continue to ship metal-made equipment to keep the gold mining industries of South Africa going, it is inconceivable that we would close down the same industry here at home when that industry is maintaining communities, paying taxes to the Treasury of the United States, and insuring a sound money for the government of the country when this war is over.

I hope—and those in the Senate who are interested in the mining of metals which we deem essential to national welfare, both now and hereafter—join me in expressing the hope that you will not give sanction to an order that will be productive of so much havoc and conducive to so little improvement.

Sincerely, Pat McCarran.

enes.

[fol. 2329] The Washington Post, Tuesday, September 29, 1942

Order to Shut Gold Mines May Be Issued

The question of whether the Nation's principal gold mines are to be shut down for the duration and between 15,000 and 20,000 miners released to relieve critical manpower, shortages in copper, zinc and lead mines and other industries is expected to be answered in a few days by War Producton Board Chairman Donald M. Nelson.

An order which would halt the greater part of the Nation's gold production was submitted to Nelson about a week ago.

As presently drafted, the order, subject of controversy in WPB for three or four months, would shut down about 75 per cent of the country's 150 larger lode gold mines and all of the principal placer mines, including many in Alaska.

The lode mines, including the famed Homestead Mine in South Dakota, now employ between 4000 and 5000 miners whose training would fit them for work in copper and other nonferrous metal mines in the West. A manpower crisis in them several weeks ago caused the War Manpower Commission to issue a "stay-put" order intended to keep miners from migrating to shipbuilding and aircraft industries.

The placer mines last year employed 15,500 men, many of them experienced in handling heavy equipment and believed qualified for assignment to construction projects, such as highways and airfields in Alaska where workers are needed.

[fol. 2330] PLAINTIFF'S EXHIBIT 51

War Production Board
Washington, D. C.

October 30th, 1943

Memorandum

To: Mr. Hiland G. Batcheller, Operations Vice Chairman.
Mr. John J. Hall.
Mr. Howard I. Young.

From: A. S. Knoizen, Director, Mining Division.
Subject: L-208 Gold Mine Closing Order.

Confirming our telephone conversation, I have felt for some time that the Gold Mine closing order should be considerably relaxed, and I would like to submit the following suggestions for your consideration:

1. I believe that the time has come when we should relax the Gold Order as much as possible, especially insofar as old employees are concerned, who are still living at mining camps or around gold mines. I do not believe that we should continue to deprive them of employment as I am quite sure that they will not move to other localities to work in other mines or other industries.

2. That the operators of these properties have the right to expect to have their property in operating condition when the War is over.

3. That it will take from six months to a year to rehabilitate most gold mines to get them back in condition to operate.

4. That all mines be left under the No. 4 War Manpower Classification and that recruitment of labor be permitted at will by the USES.

5. With regard to the tremendous pressure that is now coming from the field on the Gold Order, the relaxation of the order should have a real political advantage and would take the Senatorial and Congressional pressure off of the War Production Board.

[fol. 2331] 6. I do not believe that further economic hardships should be imposed upon the mine operator, labor, state or community which depend upon these operations.

7. I feel that material should only be allocated to these operators to permit them to get their property back in operating condition, and that they be permitted to operate on a minimum tonnage in order to have the property prepared for operation when complete relaxation takes place.

I am passing the above on as suggestions and the details and administration can be worked out if the War Production Board feels that we are in a position to give it further consideration.

[fol. 2332] PLAINTIFF'S EXHIBIT 52

Room 1003, Temporary R

April 30, 1943

Memorandum

To: Mr. Howard I. Young.

From: Wilbur A. Nelson.

Subject: Analysis of Memorandum on Effectiveness of Gold Mining Curtailment Order L-208 Prepared by Edward T. Dickinson, Jr., Executive Director, Planning Committee, for William L. Batt, Vice Chairman, War Production Board.

I am giving the result of my investigation of each one of the statements made in the summary of the findings.

Paragraph A-1. It is stated that the gold mining limita-

tion order was responsible for the transfer of approximately 2000 gold miners to war industries and at least 1200 of these went to copper and other essential non-ferrous metal mines. In no place do any statistics refer to gold miners, but only to workers in gold mines. Those familiar with mine employment know that only about 60% of the total workers at a mine are underground miners and muckers. It is my understanding that the figures on employment which are used in Mr. Dickinson's memorandum were obtained from the office of Mr. Louis Levine, Chief of the Labor Market Division, Bureau of Program Planning and Review, War Manpower Commission. The Raw Materials Section of the Labor Production Division of WPB, using information furnished them by War Manpower Commission, shows that 454 gold mine workers were referred to copper mines, but nowhere do they show how many of these workers were actually employed by the copper mines.

A check of the two companies to which over 100 men were referred shows that Anaconda had 238 men referred to them, but on November 13, 1842, only had 119 workers from the gold mines on their payroll. The Gray Eagle Copper Mine had 102 men referred to them, but, according to Mr. Fred Searls, Jr., only have 28 workers from the gold mines on their payroll who were released from the gold mines after the closing order was issued in October. The War Manpower Commission states that 91 men were placed, which it can be seen is incorrect.

In addition to the copper mines to which over 100 men were referred, the Consolidated Coppermines Corporation at Kimberly, Nevada, was contacted, as it was stated that 44 workers from the gold mines were referred to this mine. Mr. Cass Cook, the General Manager, stated over the telephone that they only received 15 workers from the gold mines during the period from October through February, and that several of them have since then been inducted into the Army. The War Manpower Commission states that 36 men were placed, which it can be seen is incorrect.

[fol. 2333] The Climax Molybdenum Company had 125 workers from the gold mines, referred to them, and at present, according to Mr. Coulter of that company, have only 10 of these workers on their payroll. They had 60 workers from the gold mines come to their mine. Six of them failed

to pas- the physical examination, and 44 of them have since then quit working for this company.

On the basis of my checks with the officials of these companies, made this week, it can readily be seen that instead of 1200 workers from gold mines going to copper and other essential nonferrous metal mines, that only between a third and a half of this number are actually working in such mines today; and that of the 1200 referred to these mines, many of them never accepted employment. It should be made clear that these figures refer to workers from gold mines and not just to miners and muckers. No figures were kept of miners and muckers referred to such mines, but such figures would be less than the figures given.

Mr. Louis Levine, Chief of the Labor Market Divison, Bureau of Program Planning and Review, War Manpower Commission, states in a letter of March 22 to Mr. Allen Buchanan that 1577 workers in gold mines were referred to metal mines and that a placement of 1156 in metal mines has been verified. The previous paragraph shows factually that the verification of War Manpower Commission is excessive as well as inaccurate. I have no details of how the 1156 were verified. The only breakdown available, which is in a report prepared by the Raw Materials Section of the Labor Production Division of WPB, on detailed information furnished them by Mr. Levine, can only account for 994 referrals made to specific nonferous mines. No detailed information can be obtained as to where the other 583 workers in gold mines were referred, as Mr. Levine's office states such statistics were not kept by the field offices. On the check basis mentioned previously, we can only assume that between 25% and 50% of the 994 workers in gold mines actually started work at the mines they were referred to. By taking 50%, this would mean that 497 workers in gold mines probably were actually placed in metal mines due to the gold mine closing order, and only a percentage of these workers were miners or muckers. This is the mos optimistic view that can be taken, and it is probable that fewer than this were actually placed by War Manpower Commission in nonferrous metal mines.

Paragraph A-1-b. Figures are given showing how many tons of copper, zinc, lead, and tungsten and pounds of molybdenum have been added to the annual production of these

metals due to the closing of the gold mines. All of these figures must be greatly discounted, as they are based on estimated increases in monthly production due to the 1200 men which it is stated erroneously were transferred to copper and other nonferrous metal mines. It would take some time to make a complete check of each one of the copper mines to which workers from the gold mines were transferred, but on the basis of Anaconda, Gray Eagle, and Consolidated Coppermines, which are credited with 384 men out of 454 men referred to the copper mines, only 42% were employed. It can be seen that only a fourth to a half of the production of 11,000 tons of copper, which it is [fol. 2334] stated has been added to the annual production, might be credited to the work of gold miners, and only at present to the first four months of 1943; but this is not the entire picture, for the mechanics of figuring the tons of copper produced by each of these men per month is open to criticism. Figures prepared by Mr. J. J. Beeson of OPA on tons of copper per month per employee for the leading copper mines show a considerably less tonnage than the estimated increases given by the Labor Production Division. Also, we do not know how many of these men worked in the mines, or whether they were employed in the mill or smelter. Following these lines of reasoning, I doubt if more than two or three thousand to copper could be credited to such workers from the gold mines for the year 1943.

The same reduction should be made in the 4000 tons of zinc and the 2400 tons of lead. The statement that 13,000 tons of tungsten was added to the annual production is recognized as a clerical error, as they mean 13,000 units of tungsten (a unit equals 20 pounds of WO_3; but again, the analysis made of copper would require that this figure be materially reduced. The 6,000,000 pounds of additional molybdenum to be produced by workers from the gold mines was based on the figure of 125 workers from the gold mines working at Climax, whereas only ten such men are working at this mine at the present time. This would reduce this estimate from 6,000,000 pounds to a few thousand pounds of additional molybdenum. The 6,000,000 pounds of additional molybdenum which it is stated will be produced by the workers from the gold mines in 1943 is an absurd figure, as it represents 15% of the annual production of Climax,

and such variation would be impossible. Actually the mine production at Climax for the first three months of 1943 is *10%* below the last quarter of 1942.

I do not know how many more workers from the gold mines that have been transferred to metal mines may leave these jobs before the end of the year, so I cannot credit additional annual production of metals due to the transfer of workers from the gold mines except for the months of 1943 which have already passed. This would mean that only minor amounts of copper, lead, zinc, molybdenum, and tungsten have been produced due to the closing of the gold mines and the transfer of a few hundred gold miners to the nonferrous metal mines. I believe that only between 3000 and 4000 tons of all nonferrous metals can be logically assumed as possible additional production for the year 1943 due to the closing of the gold mines.

Paragraph A-2-a. Of the $1,500,000 in equipment that has been transferred by the Mining Equipment Division from gold mines to other mines, $713,500 went to essential nonferrous mines and the remainder to other operations. About 33⅓% of this equipment came from gold dredging operations, which were limited by the War Production Board before the gold mine closing order was issued; and about 5% came from gold mines which were shut down before the gold mine closing order was issued. Records are available to show that a number of gold mines were planning to shut down in early 1943, even if no closing order was issued.

[fol. 2335] *Paragraph A-2-b.* Mr. Dickinson's memorandum states: "Approximately $15,000,000 worth of strategic material has been released from gold mines that were closed." This is not a correct statement. This figure was taken from a memorandum furnished him by the Mining Equipment Division, and should read as follows: The potential demand of gold mines operating in 1941 in the United States and Alaska for materials for repair, maintenance, and operating supplies, amounting to $15,000,000, was eliminated by the cessation of gold mining. But a considerable percentage of this was eliminated before the closing order was issued, as at that time practically all the large gold mines in the United States except Homestake were operating at about one-third capacity.

The figure of $15,000,000 given by the Mining Equipment

Division is higher than the estimates made by the Homestake Mining Company and other mining engineers in the West who estimate about $11,000,000. However, to keep the larger gold mines on a break-even basis, it is estimated that only a few million dollars worth of operating materials and supplies would be needed, of which explosives would be an important item.

Paragraph *B-1.* The statement in Mr. Dickinson's report in regard to damages incurred is in part correct, but as Order P-56 was administered from the standpoint of keeping the essential mines in operation, it is hard to conceive how any losses could be sustained by a mine operating under this order.

Paragraph B-2. Mr. Dickinson does not consider that Order P-56 was an adequate instrument to curtail gold mining operations, but under this Order before L-208 was issued, gold mines producing no minerals needed in the war effort or which were not producing fluxing ores or diluents needed in smelter operations were required to get all of their supplies by the use of PD-1A forms which had been used for a number of months and had resulted in a definite curtailment of gold mine operations.

The figures given by Mr. Dickinson as to the number of men employed in gold mines in September, 1942, as 12,286 men, does not check with figures I have obtained from state sources. These figures are broken down by states in a letter written by Mr. McNutt on March 25. They credit 3,871 men to gold mining in California, while our figures show 3,496. They credit 2,459 to South Dakota, while our figures show 1,901. These are the two states employing most of the gold miners. Checks have not been made of the other states, but as these figures are in error, it is logical to assume that the others are likewise.

Mr. Dickinson makes this statement: "The inescapable fact is that at the time the gold order was instituted the labor shortage in copper mines made immediate action imperative." This is an incorrect statement, as is shown by his attached chart. The gold mine closing order was issued [fol. 2336] on October 8, 1942, but the mines were given sixty days before they would have to close their operations. The great increase in labor in the Western copper mines, amounting to around 400 miners, was due to the release of

this number of men from the armed services for work in the copper and other nonferrous mines of the Western states in September, October, and November.

Paragraph B-3. Mr. Dickinson states that 3217 laborers were displaced from the gold mines and that they were only from lode mines; while Mr. Paul McNutt in a letter of April 24 states these miners were from both placer and lode mines. This coincides with the statement made by Mr. Wilbur A. Nelson to Mr. W. L. Batt on October 3rd, in which it was estimated that there would be 3,270 men available for release from the lode mines and dredges in the Western states and that of this total number 896 would be experienced miners and muckers.

Paragraph C. Exception must be taken to Mr. Dickinson's conclusions that "there can be no doubt that the contributions made by the gold order are significant. It substantially accomplished the purposes for which it was passed." The actual figures on men who went to work in the nonferrous mines does not permit of this conclusion. Although the amount of manpower released due to the Order coincides with the estimates made prior to its issuance, towit, between 3000 and 4000 men, the number of men that went into nonferrous mining is estimated at less than 500 men, and these men have not been responsible for any important increase in the production of critical nonferrous metals.

Furthermore, attention should be called to the fact that the gold mine closing order, according to Mr. Dickinson's statement at the bottom of page 3, only affected about 6500 workers in gold mines. My analysis indicates a slightly smaller figure.

Wilbur A. Nelson.

[fol. 2337] PLAINTIFF'S EXHIBIT 53

March 30th, 1943.

Memorandum

To: Mr. William L. Batt, Vice Chairman, War Production Board., Mr. Howard I. Young, Director, Mineral Resources Coordinating Division.

From: Mr. A. S. Knoizen, Director, Mining Equipment Division.

Subject: South African Gold Mines.

Confirming telephone conversation with reference to our thoughts on the South African Gold Mines, after concurrence with my Deputy Administrator of L-208, Mr. Edward H. Rott, we submit the following:

From our contacts with the South African gold mining industry and the information supplied to us by representatives of that industry, there has been no sincere effort on the part of that industry, and apparently none on the part of the Government, to curtail gold mining operations.

The following are some pertinent facts relative to the gold mining industry in South Africa:

During the middle part of 1942, the industry is reported to have reached an all time high in gold production. The records for the full year indicate that there was a 2% decrease in 1942 gold production below that of 1941. However, the average tonnage of ore milled per month during 1942 was slightly more than the average tonnage milled in 1941. That certainly is not curtailed production. The development work for the quarter ending September, 1942, was one foot for every 44.5 tons milled, or a total of 384,190 feet for the three months period. This is less than the same quarter in the previous year, when 665,000 feet of development work was done. However, the variation is believed to be largely due to the fact that during 1941 new mines were being opened up and excessive development work was required. Considering the type of this deposit, it is our opinion that the present rate of development work should be adequate to maintain a sufficient tonnage of ore blocked out in advance of mining operations.

[fol. 2338] We strongly believe that if the war lasts beyond 1943 the continuance of shipments of critical materials, supplies and equipment to Africa for gold mining may be too costly in manpower and ships and will, no doubt, be a handicap to our war effort.

It is strongly recommended that the War Production Board limit the amount of materials to be supplied to South Africa for gold mining to a percentage of their anual 1943 requirements comparable to that allowed in the cases of Nicaragua and Colombia. The magnitude of this industry in South Africa may justify leniency up to allowing 50% of their 1943 requirements to be selected by a vertical cut of those requirements from the United States as set forth in Exhibit A, attached. This procedure will take care of the deficiency resulting from failure to furnish the industry's future requirements for the last half of 1942. With these additional supplies, the industry may adjust its operations to gracefully bring about curtailment, which it is hoped will stimulate a realization that more can be contributed to the war effort than the production of gold in South Africa.

The Civilian economy in this country, mines and otherwise, is being too greatly restricted due to shortages of materials, to permit us to make any sincere recommendation other than the above. With due consideration to the trend of the war and the effect of the proposed curtailment on South African economy, we can give attention to revision of this policy starting in the Third Quarter of this year.

A. S. Knoizen.

Attachment-1.

[fol. 2339] EXHIBIT "A"

Transvaal Chamber of Mines—Mine Stores Department

Summary of Materials Which Are Required by the South African Gold Mining Industry in Whole or in Part from the U. S. A. (See Note Below)

	Estimated requirements July-December 1942—Tons				Estimated requirements January-December 1943—Tons			
	U. S. A.	Local	Other	Total	U. S. A.	Local	Other	Total
Chemicals	74	.....	5	79	5,532	.....	3,573	9,105
Oils and greases	2,886	36	.....	8,922	14,630	45	.....	14,675
Timber	2,074	23,752	1,008	35,087	16,803	37,995	1,838	56,636
Sundry	274	2	1,675	1,953	1,040	29	6,138	7,206
Steel & steel goods other than tools	444	2,455	3,754	6,653	2,065	9,263	8,592	19,921
Tools	59	.....	47	106	190	.....	165	355
Totals	11,811	35,218	6,489	53,520	40,260	27,332	20,306	107,898
Machinery and spares required from the U. S. A.	546	(We recommend reduced to 508 minimum)	.....		1,017			
Total requirements from the U. S. A.	12,357	(We recommend reduced to 20,630 minimum)	...		41,277			

Note: The requirements shown above are those accompanying a report from the Gold Producers Committee of the Transvaal Chamber of Mines, prepared in cooperation with the United States Economic Mission to South Africa. In the above requirements, no provisions are made for explosives, hospital requisites and raw materials for rubber goods.

[fol. 2340] PLAINTIFF'S EXHIBIT 54

X-4639. WPB-1989

Title 32—National Defense

Chapter IX—War Production Board

Subchapter B—Director General for Operations

Part 3093—Gold Mining

Limitation Order L-208

The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary

and appropriate in the public interest and to promote the national defense.

Section 3093.1—Limitation Order L-208

(2) *Definitions.* For the purposes of this order, "nonessential mine" means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P-56.

(b) *Restrictions upon production.*

(1) On and after the issuance date of this order, each operator of a nonessential mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.

(2) In no event on or after 7 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any development work or any new operations in or about such mine.

(3) In no event on or after 60 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below ground, or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair, and its access and development workings safe and accessible.

(4) The provisions of this order shall not apply to any lode mine which produced 1200 tons or less of commercial ore in the year 1941, provided the rate of production of such mine, after the issuance date of this order, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1000 cubic yards of material in the year 1941, provided that the rate of treatment of such placer mine, after the issuance date of this order, shall not exceed 100 cubic yards per month.

(5) Nothing contained in this order shall limit or prohibit the use or operation of the mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a [fol. 2341] preference rating of A-1-k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P-56.

(c) *Restrictions on application of preference ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the Director General for Operations issued after application made to the Mining Branch, War Production Board.

(d) *Assignment of preference ratings.* The Director General for Operations, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in subparagraph (b)(3) above.

(e) *Records.* All persons affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore.

(f) *Reports.* All persons affected by this order shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

(g) *Audit and inspection.* All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(h) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to: War Production Board, Mining Branch, Washington, D. C. Ref: L-208.

(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false

information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(j) *Appeal.* Any person affected by this order who considers that compliance therewith would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting forth the pertinent facts and the reason he considers he is entitled to relief. The Director General for Operations may thereupon take such action as he deems appropriate.

[fol. 2342] (k) *Applicability of Priorities Regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the Priorities Regulations of the War Production Board, as amended from time to time.

Issued this 8th day of October, 1942.

Ernest Kanzler, Director General for Operations.

[fol. 2343] PLAINTIFF'S EXHIBIT 58

Title 32—National Defense

Chapter IX—Office of Production Management

Subchapter B—Priorities Division

Part 958—Repairs

Preference Rating Order No. P-22

958.1 Preference Rating Order. For the purpose of facilitating the acquisition of Material for the Repair of the property or equipment of certain industries and services hereinafter specified, a preference rating is hereby assigned to deliveries of Material for such purpose upon the following terms:

(a) *Definitions.*

(1) "Producer" means any individual, partnership, association, corporation, governmental unit, or other organization engaged in one or more of the following industries and services, and such other industries and services as may be added from time to time by supplement to this Order:

(i) The following Federal, State, County, and municipal services: Fire and police services; Highway maintenance.

(ii) Carriers:

(a) Urban, suburban, interurban, and intercity common, contract, and private carriers of passengers or freight by electric railway, electric coach, motor truck, or bus, including terminals.

(b) Railroads, including terminals.

(c) Shipping—Commercial carriers of freight and passengers by ocean, lake, river, or canal, including terminals.

(iii) Chemicals—Plants engaged in producing chemicals by chemical processing of raw materials.

(iv) Coke converting.

(v) Educational institutions (including vocational training).

(vi) Explosives—plants engaged in manufacturing explosives.

(vii) Farm machinery and equipment—plants engaged in manufacturing farm machinery and equipment.

(viii) Food preserving or storing—plants engaged in any of the following: milling, refining, preserving, refrigerating, wholesaling or storing of food for human consumption or livestock feed.

[fol. 2344] (ix) Highway maintenance and equipment—plants engaged in the production of equipment used in highway maintenance.

(x) Hospitals, clinics and sanatoriums.

(xi) Lumber—plants engaged in the production of lumber (including planing, drying, storing, and treating of lumber), cooperage, plywood, and millwork.

(xii) Metallurgy—plants engaged in the production of metals and alloys.

(xiii) Mines and quarries (including ore dressing or processing plants and smelting facilities).

(xiv) Newspapers—plants engaged in the publication of newspapers.

(xv) Petroleum production, refining and transportation —plants and equipment used in petroleum production, refining and transportation.

(xvi) Radio—Commercial broadcasting and communication (not including home receiving sets).

(xvii) Research laboratories—industrial and academic.

(xviii) Rubber and rubber products—plants engaged in the production of rubber and rubber products including reclaimed and synthetic rubber.

(xix) Shipyards and Ship Repair Yards engaged in building and repairing ships (excluding yards devoted principally to pleasure craft).

(xx) Telephone and telegraph communications.

(2) "Material" means any commodity, equipment, accessories, parts, assemblies, or products of any kind.

(3) "Repairs" means only repairs needed because of an actual or imminent breakdown, from whatever cause, of a Producer's property or equipment.

(4) "Emergency Inventory" means minimum inventory of Material required to provide for Repairs to meet an actual or imminent breakdown, from whatever cause, of a Producer's property or equipment.

(5) "Supplier" means any person with whom a purchase order or contract has been placed by a Producer or any Supplier for

(i) Material to be used for Repairs;

(ii) Material required for a Producer's Emergency Inventory;

(iii) Material to be physically incorporated in other Material which is to be used for Repairs or which is required for a Producer's Emergency Inventory.

[fol. 2345] (b) *Assignment of Preference Rating.* Subject to the terms of this Order, Preference Rating A-10 is hereby assigned

(1) to deliveries to a Producer of Material required by him for Repairs or for his Emergency Inventory;

(2) to deliveries to a Supplier of Material which is, in turn, to be delivered to a Producer for Repairs or for his

Emergency Inventory or to be physically incorporated in Material to be so delivered.

(c) *Persons Entitled to Apply Preference Rating.* The preference rating hereby assigned may be applied by

(1) a Producer;

(2) a Supplier, provided that he requires the Material so purchased in order to make deliveries duly rated pursuant to paragraph (b).

(d) *Application of Preference Rating.*

(1) A Producer in order to apply the preference rating to a delivery of material to him must endorse the following statement on the original and all copies of the purchase order or contract for such Material signed by a responsible official duly designated for such purpose by such Producer.

> "Purchase Order for Repair or Emergency Inventory —Preference Rating A-10 under Preference Rating Order P-22."

Such endorsement shall constitute a certification to the Office of Production Management that such Material is required for the purposes stated therein. Any such purchase order or contract shall be restricted to material the delivery of which is rated in accordance herewith.

(2) A Supplier in order to apply the preference rating to a delivery of Material to him must endorse the following statement on the original and all copies of the purchase order or contract for such Material signed by a responsible official duly designated for such purpose by such Supplier:

> "Purchase Order for Material required to fill a duly rated order for Repair or Emergency Inventory. This purchase order bears Preference Rating A-10 under Preference Rating Order P-22."

Such endorsement shall constitute a certification to the Office of Production Management that such Material is required to fill an order placed by a Producer or Supplier duly rated in accordance herewith. Any such Supplier's purchase order or contract shall be restricted to Material the delivery of which is rated in accordance herewith.

[fol. 2346] (3) A Producer or Supplier placing any such rated purchase orders or contracts and the Supplier selling the Material covered thereby, must each retain endorsed copies of such purchase orders or contracts segregated from all other purchase orders, or contracts for a period of two years from the date thereof for inspection by authorized representatives of the Office of Production Management.

(e) *Restrictions on Application of Rating.* The Preference Rating hereby assigned shall not be applied

(1) by a Producer to obtain Material in excess of his requirements for Repairs or for his Emergency Inventory;

(2) unless the Material to be delivered cannot be obtained when required without such rating;

(3) by a Supplier to obtain Material in excess of the amount necessary to make rated deliveries.

(f) *False Statements and Penalties.* Any person who applies the preference rating hereby assigned in wilful violation of the terms and provisions of this Order, or wilfully falsifies records required to be kept or information to be furnished pursuant to this Order, or who obtains a delivery of Material by means of a material and wilful misstatement, will be prohibited from further applying said rating. Such person may also be prohibited from obtaining further deliveries of Material under allocation and be deprived of any other priorities assistance. The Director of Priorities may also take any other action deemed appropriate, including the making of a recommendation for prosecution under Section 35A of the Criminal Cole (18 U.S.C. 80).

(g) *Revocation or Modification.* This order may be revoked or amended by the Director of Priorities at any time in whole or in part or in its application to any Producer or any Supplier. In the event of revocation, or upon expiration of this Order, deliveries already rated pursuant to this Order shall be completed in accordance with said rating, unless the rating has been specifically revoked. No additional applications of this rating to any other deliveries shall thereafter be made by any Producer or Supplier affected by said revocation or expiration.

(h) *Effective Date.* This Order shall take effect on the

9th day of September, 1941, and unless sooner revoked shall expire on the 28th day of February, 1942.

(P.D. Reg. 1, Aug. 27, 1941, 6 F.R. 4489; O. P. M. Reg. 3, March 8, 1941, 6 F. R. 1996; E. O. 8629, Jan. 7, 1941, 6 F. R. 191; E. O. 8875, Aug. 28, 1941, 6 F. R. 4483; sec. 2(a), Public No. 671, 76th Congress, Third Session, as amended by Public No. 89, 77th Congress, First Session; Sec. 9, Public No. 783, 76th Congress, Third Session.)

Donald M. Nelson, Director of Priorities.

Certified to be a true copy of Original.

John D. ———, Assistant to the Deputy Director of Priorities, Division of Priorities, Office of Production Management.

[fol. 2347] PLAINTIFF'S EXHIBIT 59

Title 32—National Defense

Chapter IX—Office of Production Management

Subchapter B—Priorities Division

Part 958—Repairs, Maintenance, and Operating Supplies

Preference Rating Orders No. P-100

Section 958.2 Preference Rating Order. For the purpose of facilitating the acquisition of Material for (1) the maintenance and repair of the property and equipment of producers as hereinafter defined, and (2) the continued operation of the property and equipment of such producers, a preference rating is hereby assigned to deliveries of such Material upon the terms hereinafter set forth. Such terms shall control until such time as the Office of Production Management certifies specific quantities of such Material to which the preference rating herein assigned may be applied, or until the Office of Production Management may specifically limit production by any type of producer or withdraw any type of Material from use by such pro-

ducer, or until the Office of Production Management may issue an order specifically relating to the maintenance, repair and operation of the property and equipment of any type of producer.

(a) *Statement of Policy.* It is the purpose of this Order to effectuate the policy of the Supply Priorities and Allocations Board in maintaining governmental, charitable, and industrial property located in the United States, its territories and possessions, including the Philippine Islands, upon an adequate operating basis, without expansion or improvement of facilities except where duly authorized or approved. The terms and conditions of this Order are to be interpreted in conformity with this expressed policy.

(b) *Definitions.*

(1) "Producer" means:

(i) any governmental unit;

(ii) any individual, partnership, association, corporation, or other form of enterprise engaged in one or more of the following capacities to the extent that it is so engaged or so acts;

(a) manufacturing, processing, or fabricating;

(b) warehousing—maintaining warehouses for storage or distribution of any Material;

(c) wholesaling—acting as a distributor of products sold to manufacturers, wholesalers, retailers, or other persons not consumers;

(d) charitable institutions—any charitable or eleemosynary institution which is recognized as such for purposes of the Internal Revenue Laws of the United States;

(e) carriers—urban, suburban, and interurban common or contract carriers of passengers or freight by electric railway, electric coach, motor truck, or bus, including terminals of any of the foregoing; railroads, including terminals; shipping—commercial carriers of freight and passengers by ocean, lake, river, or canal, including terminals; [fol. 2348] (f) educational institutions (including vocational training),

(g) printers and publishers.

(h) radio—commercial broadcasting and communication,

(i) telephone and telegraph communication, including wire services,

(j) hospitals, clinics, and sanatoriums,

(k) irrigation systems, whether publicly or privately owned; toll bridges and toll canals.

(iii) any person located in the United States, its territories and possessions, using tools or equipment to repair or maintain agricultural machinery or the property of any Producer as defined in (b)(1)(i) and (ii).

(iv) any person located in the Dominion of Canada, to whom and in whose name a copy of this Order is specifically issued.

(2) "Material" means any commodity, equipment, accessories, parts, assemblies, or products of any kind.

(3) Subject to subparagraph (p), "Maintenance" means the upkeep of a Producer's property and equipment in sound working condition.

(4) Subject to subparagraph (6), "Repair" means the restoration of a Producer's property and equipment to a sound working condition when such property or equipment as been rendered unsafe or unfit for service by wear and tear, damage, destruction of parts, or similar causes.

(5) Subject to subparagraph (6), "Operating Supplies" means any Material which is essential to the operation of the Producer's business and which is consumed in the course of such business including, but not limited to, lubricants, catalysts, small perishable tools, and ferrous material necessary for the fabrication of containers; *Provided*, it shall not include

(i) any Material which is physically incorporated, in whole or in part, into any material which the producer manufactures, distributes, sells, stores, or transports, excepting Material used by a Producer to repair or maintain agricultural Machinery or the property of another Producer; or

(ii) any Material that is to be used as fuel, or

(iii) any non-ferrous Material to be used as packaging supplies.

[fol. 2349] (6) The terms "Maintenance," "Repairs," and "Operating Supplies" *do not* include the following:

(i) The replacement of an item carried on the Producer's books as a fixed asset,

(ii) Material which would not be carried on the Producer's books as Maintenance, Repairs, Operating Supplies, or the equivalent, in the Producer's established method of bookkeeping,

(iii) Material for the improvement of a Producer's property or equipment through the replacement of Material in the existing installation unless such equipment is beyond economic repair.

(iv) Material for additions to, or expansions of, such property or equipment.

(7) "Supplier" means any person with whom a purchase order or contract has been placed for delivery of Material to a Producer or another Supplier.

(c) *Assignment of Preference Rating.* Subject to the terms of this Order, Preference Rating A-10 is hereby assigned:

(1) to deliveries, to a producer, of Material required by him as Operating Supplies or for the maintenance or repair of his property or equipment;

(2) to deliveries to any Supplier, who has received purchase orders rated under this Order from a Producer or from another Supplier, of Material which will be delivered by him or by another Supplier to the Producer to fill such rated orders, or which will be physically incorporated into Material which will be so delivered; or which will be used within the limitations of paragraph (f)(2) hereof, to replace in such Supplier's inventory Material delivered to fill orders rated pursuant to this Order or pursuant to Preference Rating Order No. P-22, as heretofore amended.

Provided, That when any General Preference ("E" or "M") Order assigns a specific preference rating to deliveries of any particular Material to be used by a particular industry or for a specific purpose, such preference rating shall control and the A-10 rating hereby assigned may not be applied; and *provided further,* that the preference rating hereby assigned may not be applied to deliveries of any Material to be used for purposes prohibited by any Order or Regulation issued by the Director.

[fol. 2350] (d) *Persons Entitled to Apply Preference Rating.* The Preference Rating hereby assigned may be applied by:

(1) a Producer;

(2) any Supplier provided deliveries to a Producer or another Supplier are to be made by him, which are of the kind specified in paragraph (c) and have been rated pursuant to his Order.

(e) *Application of Preference Rating.*

(1) A Producer or Supplier, in order to apply the preference rating to deliveries of Material to him, must endorse the following statement on the original and all copies of the purchase order or contract for such Material manually signed by a responsible official duly designated for such purpose by such Producer or Supplier:

> "Material for Maintenance, Repair, or Operating Supplies—Rating A-10 under Preference Rating Order P-100 with the terms of which I am familiar."
>
> "—— ——" (Name of Producer or Supplier and Serial No. of Producer if located in Canada.)
> "—— ——" (Signature of Designated Official)

Such endorsement shall constitute a representation to the Director that such Material is required for the purpose stated and that the application of the rating is authorized by this Order. Any such purchase order or contract for such Material shall be restricted to Material the delivery of which is rated in accordance herewith.

(2) The Producers and each Supplier placing or receiving any purchase order or contract rated hereunder shall each retain, for a period of two years, for inspection by representatives of the Director, endorsed copies of all purchase orders or contracts, whether accepted or rejected, segregated from all other purchase orders or contracts or filed in such manner that they can be readily segregated for such inspection.

(f) *Restrictions on Use of Rating.*

(1) *Restrictions on Producer and Supplier.* No Producer or Supplier may apply the rating hereby assigned to obtain scarce Material, the use of which could be eliminated without

serious loss of efficiency by substitution of less scarce Material or by change of design.

[fol. 2351] (2) *Restrictions on Supplier:*

(i) No Supplier may deliver Material pursuant to a rating applied to him by a Producer located in the Dominion of Canada, unless the endorsement on the purchase order placed with such Supplier includes a Serial number.

(ii) No Supplier may apply the rating to obtain Material in greater quantities or on earlier dates than required to enable him to make on schedule a delivery rated hereunder or, within the limitations of (iii) and (iv) below, to replace in his inventory Material so delivered. He shall not be deemed to require such Material if he can make his rated delivery and still retain a practicable working minimum inventory thereof; and if, in making such delivery, he reduces his inventory below such minimum, he may apply the rating only to the extent necessary to restore his inventory to such minimum.

(iii) A Supplier who supplies Material which he has in whole or in part manufactured, processed, assembled, or otherwise physically changed may not apply the rating to restore his inventory to a practicable working minimum unless he applies the rating before completing the rated delivery which reduces his inventory below such minimum.

(iv) A Supplier who supplies Material which he has not in whole or in part manufacured, processed, assembled, or otherwise physically changed may defer application of the rating hereunder to purchase orders or contracts for such Material to be placed by him until he can place a purchase order or contract for the minimum quantity procurable on his customary terms; *Provided*, that he shall not defer the application of any rating for more than three months after he becomes entitled to apply it.

(g) *Restrictions on Withdrawls and Inventory.*

(1) Except as provided in paragraphs (g)(3) and (4), no Producer who has applied the ratings assigned hereby shall, at any time, accept deliveries (whether or not rated pursuant to this Order) of any Material to be used as Operating Supplies or for Maintenance or Repair until the

Producer's inventory and stores of Material to be used for these purposes have been reduced to a practicable working minimum. Such practicable minimum shall in no event exceed one hundred ten percent (110%) of the maximum dollar volume of Material to be used as Operating Supplies [fol. 2352] and for Repairs and Maintenance in inventory and stores during the corresponding calendar quarter of 1940.

(2) Except as provided in paragraphs (g) (3) and (4), no Producer who has applied the ratings assigned hereby shall, during any Calendar Quarterly Period, make withdrawals from stores or inventory of any Material to be used as Operating Supplies or for Maintenance or Repair the Aggregate dollar volume of which shall exceed one hundred ten percent (110%) of the aggregate dollar volume of the withdrawals of such Material during the corresponding quarter of 1940, or, at the Producer's option, twenty-seven and one-half percent (27½%) of the aggregate dollar volume of the withdrawals of such Material during the calendar year 1940.

(3) From time to time, the Director may determine that certain Producers or classes of Producers are exempt, in whole or in part, from the restrictions contained in paragraphs (g) (1) and (2).

(4) Restrictions contained in paragraphs (g) (1) and (2) shall not apply to any Producer during any Calendar Quarterly Period in which

(i) the total volume of his purchases of Material for Maintenance, Repairs, and Operating Supplies does not exceed five thousand dollars ($5,000); and

(ii) the total volume of his withdrawals of Material for such purposes does not exceed five thousand dollars ($5,000).

(h) *Audits and Reports.*

(1) Each Producer or Supplier who applies the preference rating hereby assigned, and each person who accepts a purchase order or contract for Material to which the preference rating is applied, shall submit from time to time to an audit and inspection by duly authorized representatives of the Director.

(2) Each such Producer or Supplier shall execute and file with the Director such reports and questionnaires as said Office shall from time to time request. No such reports shall be filed until such time as the proper forms are prescribed by the Director.

[fol. 2353] PLAINTIFF'S EXHIBIT 60

Title 32—National Defense

Chapter IX—Office of Production Management

Subchapter B—Priorities Division

Part 958—Repairs, Maintenance and Supplies

Revocation of Preference Rating Order No. P-22 Amended

Part 958.1 (Preference Rating Order No. P-22 Amended) is hereby revoked.

(P.D. Reg. 1, Aug. 27, 1941, 6 F.R. 4489; O.P.M. Reg. 3, Amended, Sept. 2, 1941, 6 F.R. 4865; E.O. 8629, Jan. 7, 1941, 6 F.R. 191; E.O. 8875, Aug. 28, 1941, 6 F.R. 4483; sec. 2(a), Public No. 671, 76th Congress, Third Session, as amended by Public No. 89, 77th Congress, First Session; sec. 9, Public No. 783, 76th Congress, Third Session).

Issued this 18th day of December, 1941.

Donald M. Nelson, Director of Priorities.

[fol. 2354] PLAINTIFF'S EXHIBIT 61

Title 32—National Defense

Chapter IX—War Production Board

Subchapter B—Division of Industry Operations

Part 958—Repairs, Maintenance, and Operating Supplies Preference Rating Order No. P-100 as Amended February 10, 1942

Section 958.2 (Preference Rating Order No. P-100) is hereby amended so as to read as follows:

(a) For the purpose of facilitating the acquisition of Material for (1) the maintenance and repair of the property and equipment of producers as hereinafter defined, and (2) the continued operation of the property and equipment of such producers, a preference rating is hereby assigned to deliveries of such Material upon the terms hereinafter set forth. Such terms shall control until such time as the Director of Industry Operations (hereinafter referred to as the "Director") certifies specific quantities of such Material to which the preference rating herein assigned may be applied, or until he may specifically limit production by any type of producer or withdraw any type of Material from use by such producer, or until he may issue an order specifically relating to the maintenance, repair, and operation of the property and equipment of any type of producer.

(b) *Definitions.*

(1) "Producer" means:

(i) any governmental unit of the United States of America,

(ii) any individual, partnership, association, corporation, or other form of enterprise located in the United States, its territories and possessions, engaged in one or more of the following capacities to the extent that it is so engaged or so acts:

(*a*) manufacturing, processing, or fabricating,

(*b*) warehousing—maintaining warehouses for storage or distribution of any Material,

(*c*) wholesaling—acting as a distributor of products sold to manufacturers, wholesalers, retailers, or other persons not consumers,

(*d*) charitable institutions—any charitable or eleemosynary institution which is recognized as such for purposes of the Internal Revenue Laws of the United States,

(*e*) carriers—urban, suburban, and interurban common or contract carriers of passengers or freight by electric railway, electric coach, motortruck, or bus, including terminals of any of the foregoing; railroads, including terminals; shipping—commercial carriers of freight and passengers by ocean, lake, river, or canal, including terminals, [fol. 2355] (f) educational institutions (including vocational training);

(g) printers and publishers;

(h) radio—commercial broadcasting and communication;

(i) telephone and telegraph communications, including wire services;

(j) hospitals, clinics, and sanatoriums;

(k) Petroleum and Natural Gas—discovery, development and depletion of pools of petroleum and associated hydrocarbons, and derivatives thereof, and transportation of petroleum, associated hydrocarbons and derivatives thereof;

(l) irrigation systems, whether publicly or privately owned; toll bridges and toll canals.

(iii) Any person using tools or equipment to repair or maintain the property of any Producer as defined in (b)(1)(i) and (ii)

(2) "Material" means any commodity, equipment, accessories, parts, assemblies, or products of any kind.

(3) Subject to subparagraph (6), "Maintenance" means the upkeep of a Producer's property and equipment in sound working condition.

(4) Subject to subparagraph (6), "Repair" means the restoration of a Producer's property and equipment to a sound working condition when such property or equipment has been rendered unsafe or unfit for service by wear and tear, damage, destruction of parts, or similar causes.

(5) Subject to subparagraph (6), "Operating Supplies" means any Material which is essential to the operation of

the Producer's business and which is consumed in the course of such business including, but not limited to, lubricants, catalysts, small perishable tools, and ferrous material necessary for the fabrication of containers: *Provided*, it shall not include

(i) any Material which is physically incorporated, in whole or in part, into any material which the producer manufactures, distributes, sells, stores or transports; or

(ii) any material that is to be used as fuel; or

(iii) any non-ferrous material to be used as packaging supplies.

(6) The terms "Maintenance", "Repairs", and "Operating Supplies" *do not* include the following:

(i) The replacement of an item carried on the Producer's books as a fixed asset;

[fol. 2356] (ii) material which would not be carried on the Producer's books as Maintenance, Repairs, Operating Supplies, or the equivalent, in the Producer's established method of bookkeeping;

(iii) material for the improvement of a Producer's property or equipment through the replacement of Material in the existing installation, unless such equipment is beyond economic repair;

(iv) material for additions to, or expansions of, such property or equipment.

(7) "Supplier" means any person with whom a purchase order or contract has been placed for delivery of material to a Producer or another Supplier.

(c) *Assignment of Preference Rating.* Subject to the terms of this Order, Preference Rating A-10 is hereby assigned:

(1) to deliveries, to a producer, of Material required by him as Operating Supplies or for the Maintenance or Repair of his property or equipment;

(2) to deliveries to any Supplier, who has received purchase orders rated under this Order from a Producer or from another Supplier, of Material which will be delivered by him or by another Supplier to the Producer to fill such rated orders, or which will be physically incorporated into Material which will be so delivered; or which will be used

within the limitations of paragraph (f)(2) hereof, to replace in such Supplier's inventory Material delivered to fill orders rated pursuant to this Order or pursuant to Preference Rating Order No. P-22, as heretofore amended.

Provided, that when any General Preference ("E" or "M") Order assigns a specific preference rating to deliveries of any particular Material to be used by a particular industry or for a specific purpose, such preference rating shall control and the A-10 rating hereby assigned may not be applied; and *provided further*, that the preference rating hereby assigned may not be applied to deliveries of any Material to be used for purposes prohibited by any Order or Regulation issued by the Director of Priorities.

(d) *Persons Entitled to Apply Preference Rating.* The Preference Rating hereby assigned may be applied by:

(1) a Producer;

(2) any Supplier provided deliveries to a Producer or another Supplier are to be made by him, which are of the kind specified in paragraph (c) and have been rated pursuant to this Order.

(e) *Application of Preference Rating.*

(1) A Producer or Supplier, in order to apply the preference rating to deliveries of Material to him, must endorse the following statement on the original and all copies of the purchase order or contract for such Material manually signed by a responsible official duly designated for such purpose by such Producer or Supplier:

> [fol. 2357] "Material for Maintenance, Repair, or Operating Supplies—Rating A-10 under Preference Rating Order P-100 with the terms of which I am familiar."
>
> —— ——, Name of Producer or Supplier, —— ——, Signature of Designated Official.

Such endorsement shall constitute a certification to the Office of Production Management that such Material is required for the purpose stated and that the application of the rating is authorized by this Order. Any such purchase order or contract for such Material shall be restricted to

Material the delivery of which is rated in accordance herewith.

(2) The Producers and each Supplier placing or receiving any purchase order or contract rated hereunder, shall each retain, for a period of two years, for inspection by representatives of the Office of Production Management, endorsed copies of all purchase orders or contracts, whether accepted or rejected, segregated from all other purchase orders or contracts or filed in such manner that they can be readily segregated for such inspection.

(f) *Restrictions on Use of Rating.*

(1) *Restrictions on Producer and Supplier*—No Producer or Supplier may apply the rating hereby assigned to obtain scarce Material, the use of which could be eliminated without serious loss of efficiency by substitution of less scarce Material or by change of design.

(2) *Restrictions on Supplier.*

(i) No Supplier may apply the rating to obtain Material in greater quantities or on earlier dates than required to enable him to make on schedule a delivery rated hereunder or, within the limitations of (ii) and (iii) below, to replace in his inventory Material so delivered. He shall not be deemed to require such Material if he can make his rated delivery and still retain a practicable working minimum inventory thereof; and if, in making such delivery, he reduces his inventory below such minimum, he may apply the rating only to the extent necessary to restore his inventory to such minimum.

(ii) A Supplier who supplies Material which he has in whole or in part manufactured, processed, assembled or otherwise physically changed may not apply the rating to restore his inventory to a practicable working minimum unless he applies the rating before completing the rated delivery which reduces his inventory below such minimum.

(iii) A Supplier who supplies Material which he has not in whole or in part manufactured, processed, assembled or otherwise physically changed may defer application of [fol. 2358] the rating hereunder to purchase orders or contracts for such Material to be placed by him until he can place a purchase order or contract for the minimum quantity procurable on his customary terms; *provided*, that he

shall not defer the application of any rating for more than three months after he becomes entitled to apply it.

(g) *Restrictions on Withdrawals and Inventory.*

(1) Except as provided in paragraph (g)(3) and (4), no Producer who has applied the ratings assigned hereby shall, at any time, accept deliveries (whether or not rated pursuant to this Order) of any Material to be used as Operating Supplies or for Maintenance or Repair until the Producer's inventory and stores of Material to be used for these purposes have been reduced to a practicable working minimum. Such practicable minimum shall in no event exceed one hundred ten percent (110%) of the maximum dollar volume of Material to be used as Operating Supplies and for Repairs and Maintenance in inventory and stores during the corresponding calendar quarter of 1940.

(2) Except as provided in pargaraph (g)(3) and (4), no producer who has applied the ratings assigned hereby shall, during any Calendar Quarterly Period, make withdrawals from stores or inventory of any Material to be used as Operating Supplies or for Maintenance or Repair the aggregate dollar volume of which shall exceed one hundred ten percent (110%) of the aggregate dollar volume of the withdrawals of such Material during the corresponding quarter of 1940, or, at the Producer's option, twenty-seven and one-half percent (27½%) of the aggregate dollar volume of the withdrawals of such Material during the calendar year 1940.

(3) From time to time the Director of Priorities may determine that certain Producers or classes of Producers are exempt, in whole or in part, from the restrictions contained in paragraph (g)(1), and (2).

(4) Restrictions contained in paragraph (g)(1) and (2) shall not apply to any Producer during any Calendar Quarterly Period in which

(i) the total volume of his purchases of Material for Maintenance, Repairs and Operating Supplies does not exceed five thousand dollars ($5,000); and

(ii) the total volume of his withdrawals of Material for such purposes does not exceed five thousand dollars ($5,000).

(h) *Audits and Reports.*

(1) Each Producer or Supplier who applies the preference rating hereby assigned, and each person who accepts a purchase order or contract for Material to which the preference rating is applied, shall submit from time to time to an audit and inspection by duly authorized representatives of the Office of Production Management.

[fol. 2359] (2) Each such Producer or Supplier shall execute and file with the Office of Production Management such reports and questionnaires as said Office shall from time to time request. No such reports shall be filed until such time as the proper forms are prescribed by the Office of Production Management.

(i) *Utilities and Mines Excepted.* This Order is not applicable to any Utility defined as a Producer in Preference Rating Order No. P-46 (section 978.1 as amended from time to time, nor to any Operator as defined in Preference Rating Order No. P-56 (section 982.1). The Director of Priorities may from time to time specifically except further classes of Producers from this Order by specific direction.

(j) *False Statements and Penalties.* Any person who applies the preference rating hereby assigned in wilful violation of the terms and provisions of this Order, or wilfully falsifies any records which he is required to keep by this Order, or who obtains a delivery of Material by means of a material and wilful misstatement will be forbidden to further apply said rating. Such person may also be prohibited from obtaining further deliveries of Material under allocation and be deprived of any other priorities assistance. The Director of Priorities may also take any other action deemed appropriate, including the making of a recommendation for prosecution under section 35 A of the Criminal Code (18 U.S.C. 80).

(k) *Revocation or Modification.* This Order may be revoked or amended by the Director of Priorities at any time as to any Producer as Supplier. In the event of revocation, or upon expiration of this Order, deliveries already rated pursuant to this Order shall be completed in accordance with said rating, but no applications of this rating to any other deliveries shall thereafter be made by the Producer or Supplier affected by said revocation or expiration.

(l) *Effective Date.* This Order shall take effect immediately. (P.D. Reg. 1, Aug. 27, 1941, 6 F.R. 4489; OPM Reg. 3 Amended, Sept. 2, 1941, 6 F. R. 4865; E. O. 8629, Jan. 7, 1941, 6 F. R. 191; E. O. 8875, Aug. 28, 1941, 6 F. R. 4483; sec. 2(a), Public No. 671, 76th Congress, Third Session, as amended by Public No. 89, 77th Congress, First Session; sec. 9, Public No. 783, 76th Congress, Third Session.)

Issued this 18th day of December, 1941.

Certified to be a true copy of Original.

——. ——, Assistant Deputy Director of Priorities.
Donald M. Nelson, Director of Priorities.

[fol. 2360] (i) *Order Not Applicable.* This Order is not applicable to persons whose maintenance, repair, and operating supply requirements are specifically provided for by any other Order.

(j) *False Statements and Penalties.* Any person who applies the preference rating hereby assigned in willful violation of the terms and provisions of this Order, or willfully falsifies any records which he is required to keep by this Order, or who obtains a delivery of Material by means of a material and willful misstatement will be forbidden to further apply said rating. Such person may also be prohibited from obtaining further deliveries of Material under allocation and be deprived of any other priorities assistance. The Director may also take any other action deemed appropriate, including the making of a recommendation for prosecution under section 35 (A) of the Criminal Code (18 U.S.C. 80).

(k) *Revocation or Modification.* This Order may be revoked or amended by the Director at any time as to any Producer or Supplier. In the event of revocation, or upon expiration of this Order, deliveries already rated pursuant to this Order shall be completed in accordance with said rating, but no applications of this rating to any other deliveries shall thereafter be made by the Producer or Supplier affected by said revocation or expiration.

(l) *Effective Date.* This Amendment shall take effect immediately.

(P.D. Reg. 1, amended December 23, 1941, 6 F. R. 6680; W.P.B. Reg. 1, Jan. 26, 1942, 7 F.R. 561, E. O. 9024, Jan. 16, 1942, 7 F.R. 329; E.O. 9040, Jan. 24, 1942, 7 F.R. 527; sec. 2(a), Public No. 671, 76th Congress, Third Session, as amended by Public No. 89, 77th Congress, First Session.)

Issued this 10th day of February 1942.

J. S. Knowlson, Director of Industry Operations.

Certified to be a true copy of the original.

John P. Gregg, Deputy Chief, Bureau of Priorities, War Production Board.

[fol. 2361] PLAINTIFF'S EXHIBITS 62

P-100 Revocation

April 2, 1943.

War Production Board

Part 958—Repairs, Maintenance and Operating Supplies

[Revocation of Preference Rating Order P-100]

Section 958.2 *Preference rating order P-100* is hereby revoked as of April 2, 1943, except that any serial numbered copy of said order issued to a producer located in the Dominion of Canada shall remain in effect until either (1) the same is specifically revoked, or (2) such producer becomes eligible to apply the ratings assigned by CMP Regulation No. 5.

Issued this 2d day of April 1943.

War Production Board, by J. Joseph Whelan, Recording Secretary.

Certified to be a true copy of the Original.

J. Joseph Whelan, Recording Secretary.

[fol. 2362] PLAINTIFF'S EXHIBIT 63

Controlled Materials Plan (CMP)—Regulation No. 5

See the Cumulative Index (last pages of this division) for new matters

Maintenance, Repair and Operating Supplies

[¶ 33,228]

CMP Regulation No. 5: Maintenance, repair and operating supplies under the Controlled Materials Plan. C. F. R., Title 32, Ch. 9, Part 3175, Section 3175.5. Issued February 9, 1943. Amendment No. 1 issued April 6, 1943, WPB-3080. Revised regulation issued May 14, 1943, WPB-3542. Amendment No. 1 issued June 18, 1943; No. 2 issued July 10, 1943; No. 3 issued August 23, 1943, WPB-4106. Revised schedules issued September 13, 1943. Amendment No. 1 issued October 30, 1943, WPB-4538; No. 2 issued November 19, 1943, WPB-4598; No. 3 issued January 8, 1944, WPB-4805. Revised regulation issued February 26, 1944, WPB-5064. Schedules as amended May 18, 1944, WPB-5721. Amendment No. 1 issued July 12, 1944, WPB-6144. Order as amended September 28, 1944. Amendment No. 1 issued October 18, 1944. Amendment No. 2 issued March 1, 1945. Amendment No. 3 issued March 12, 1945. Amendment No. 4 issued May 16, 1945. Amendment No. 5 issued July 5, 1945.

3175.5 *CMP Regulation 5*—(a) *Purpose and scope.* (1) The purpose of this regulation is to provide a uniform procedure for obtaining maintenance, repair and operating supplies, both in the case of controlled materials obtained by use of allotment symbols under the Controlled Materials Plan and in the case of materials or products obtained by preference ratings. Persons requiring maintenance, repair and operating supplies, in any form, in such quantities as are available from warehouses or distributors under CMP Regulation No. 4, or at retail without preference ratings or allotments, may obtain the same without using the procedure provided in this regulation, but subject to all applicable limitations in War Production Board regulations and orders.

(2) The provisions of this regulation shall not apply to any governmental agency (other than Claimant Agencies) or to any institution, as the same are defined in paragraphs (b) (1) and (b) (2) of CMP Regulation No. 5A, regardless of whether it is engaged in the production of any product or in any activity or service listed in any schedule attached to this regulation or not. Procedures for the obtaining of maintenance, repair and operating supplies by such governmental agencies and by such persons and institutions are provided under CMP Regulation No. 5A. This regulation is also inapplicable to certain purchases by Claimant Agencies or for export as more fully provided in paragraph (g).

NOTE: Canadians will obtain MRO in the United States under Canadian Order PO 5 B.

(b) *Definitions.* Maintenance, repair and operating supplies and minor capital additions (which are sometimes collectively referred to as "MRO") have the following meanings in this regulation and in other War Production Board regulations and orders unless otherwise indicated:

(1) "Maintenance" means the minimum upkeep necessary to continue a facility in sound working condition, and "repair" means the restoration of a facility to sound working condition when the same has been rendered unsafe or unfit for service by wear and tear, damage, failure of parts or the like: *Provided,* That neither maintenance nor repair shall include the improvement of any plant, facility or equipment, by replacing material which is still usable, with material of a better kind, quality or design, except as provided in paragraph (b) (3) of this regulation.[1]

(2) "Operating supplies" means any materials or products which are normally carried by a person as operating supplies according to established accounting practice and are not included in his finished product, except that materials included in such product which are normally chargeable to operating expense may be treated as operating supplies.

The term shall also include such items as hand tools pur-

[1] See also Interpretation No. 8; Repairs which are capitalized must be treated as capital additions.

chased by their employer for sale to his employees for use only in his business, in those cases where they would constitute operating supplies under established accounting practice if issued to employees without charge.[2] [(2) *as amended July* 10, 1943.]

(3) Minor capital additions may be obtained under the procedures provided for in this regulation for obtaining maintenance, repair and operating supplies where the cost of the minor capital addition does not exceed $500 (excluding the purchaser's cost of labor[3] for any one complete capital addition. The term "one complete capital addition" includes a group of items customarily purchased together and all items which would normally be purchased as part of a single project or plan. No capital addition shall be subdivided for the purpose of coming within this paragraph, and where the capital addition involves construction, authorization to construct must be obtained to the extent required by Conservation Order L-41 or by any other appli- [fol. 2363] cable order or regulation of the War Production Board.[4]

(4) Production materials required by a manufacturer for physical incorporation in his products, which products he sells for use as maintenance, repair or operating sup-

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[2] See also Direction No. 2: Steel shoe wire is to be treated as an operating supply; Direction No. 4: Stitching wire is to be treated as an operating supply; Direction No. 7: Welding rod is not an operating supply when used in manufacturing; Direction 16: Broom wire is to be treated as an operating supply; Direction No. 19: Blueprint materials are to be treated as operating supplies; Direction No. 22: Stevedores may get certain items as operating supplies; Direction No. 4 to Priorities Regulation No. 3: Employees may use their employer's rating to buy hand tools and safety equipment.

[3] See Interpretation 11 explaining what cost of labor can be excluded from the cost of a minor capital addition.

[4] See also Interpretation No. 9: Relationship of L-41 and CMP Regulation No. 5. Direction No. 15: MRO Symbol and Rating may be used to buy installation materials where authorization to construct is not required under L-41.

plies, may be obtained as provided in CMP Regulation No. 1 and in CMP Regulation No. 3, and such production materials shall not be deemed maintenance, repair or operating supplies as to such manufacturer.

(c) *Controlled materials.* (1) Subject to the quantity restrictions contained in paragraph (f) of this regulation, any person engaged in the business of producing any product or conducting any business listed in Schedule A, requiring delivery of any controlled material, for maintenance, repair or operating supplies in the conduct of such business,[5] may obtain the same by placing on his delivery order substantially the following certification, (or the alternative form of certification provided in CMP Regulation No. 7); signed manually or as provided in Priorities Regulation No. 7 [*above paragraph as amended September* 28, 1944.]

CMP allotment symbol MRO—The undersigned certifies, subject to the criminal penalties for misrepresentation contained in section 35(A) of the United States Criminal Code, that the controlled materials covered by this order are required for essential maintenance, repair or operating supplies, to be used for a purpose listed in Schedule I or Schedule II of CMP Regulation No. 5 and that delivery thereof will not result in a violation of the quantity restrictions contained in paragraph (f) of said regulation.

An order bearing such certification shall constitute an authorized controlled material order.

(d) *Preference ratings for maintenance, repair and operating supplies.* (1) Subject to the quantity restrictions contained in paragraph (f) of this regulation, orders calling for delivery of maintenance, repair or operating supplies other than controlled materials (regardless of whether such supplies be Class A products, Class B products, or other products or materials) are hereby assigned preference ratings as indicated in Schedule A for maintenance or repair of facilities required for producing any product or conducting any business listed in that schedule or for necessary operating supplies for such production or business.

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[5] See also Interpretation No. 5; Conduct of business includes general offices, branch offices, salesrooms, et cetera.

(i) [Deleted September 28, 1944.]

(ii) [Deleted September 28, 1944.]

(iii) [Deleted September 28, 1944.]

(2) A preference rating of AA-5 is hereby assigned for necessary maintenance or repair of facilities required for producing any product or conducting any business not listed in Schedule A, or for necessary operating supplies for any such purpose.

(3) A preference rating assigned under this paragraph (d) shall be applied only by use of the following certification (or the alternative form of certification provided in CMP Regulation No. 7), signed manually or as provided in Priorities Regulation No. 7:

Preference rating . . . (specify rating)—MRO. The undersigned certifies, subject to the criminal penalties for misrepresentation contained in section 35 (A) of the United States Criminal Code, that the items covered by this order are required for essential maintenance, repair or operating supplies; that this order is rated and placed in compliance with CMP Regulation No. 5; and that the delivery requested will not result in a violation of the quantity restrictions contained in paragraph (f) of said regulation.

[(d) *as amended September 28, 1944.*]

(e) *Plants engaged in several activities.* If a single plant or operating unit is engaged in several activities which are not all listed on the same schedule (or if some are so listed and others are unlisted), and it is impracticable to apportion requirements for maintenance, repair and operating supplies between such activities, the principal activity alone shall be considered for purposes of determining whether controlled materials may be obtained under paragraph (c) of this regulation and also for determining which preference ratings may be applied under paragraph (d).

(f) *Quantity restrictions.* A person who uses the MRO rating or symbol assigned by this regulation must not buy any more material and products than is permitted under this paragraph.

(1) *General quota.* A person must not order for de-

livery[6] in any calendar quarter MRO (maintenance, repair and operating supplies) costing more than one-fourth of what he spent for MRO in 1942 (or his fiscal year ending nearest to December 31, 1942).

(2) *Seasonal quota.* A person engaged in a seasonal business must not order MRO for delivery[6] in any calendar quarter in an amount more than the amount he spent for MRO in the corresponding quarter of 1942. A person may choose either the seasonal quota explained in this paragraph or the general quota explained in sub-paragraph (1) above, but he may not afterwards change to the other quota without special authorization by the War Production Board.

[fol. 2364] (3) *Quota for new business.* In the case of a plant or other operating unit which was not in operation during the base periods mentioned in subparagraphs (1) or (2) above, the person operating the plant may take as a quota the amount he spent for MRO during the first quarter of 1943 (or during the part of the quarter the plant was in operation) reasonably adjusted for seasonal or other variable factors. However, he must first notify the War Production Board, in writing, of the base which he is taking, why he is selecting that base, and what adjustments he has made. In the case of a plant starting operations after February 28, 1943, MRO may be bought under this regulation in the minimum amounts necessary for operation up to $5,000 per quarter. If more than this amount is needed, application may be made to the War Production Board as provided in paragraph (f)(8).

(4) *When increased quotas can be used as a base.* If a person's quota has been increased by specific authorization of the War Production Board pursuant to application, he may continue to operate on the basis of the increased quota. However, if a substantial part of the increase was to take care of an abnormal situation, as for example, where he required a large amount of special tools and equipment in order to produce a new product, he may not use that increased quota as a base.[7]

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[6] See also Direction No. 8: Quota may be determined on a receipt basis.

[7] See also Interpretation No. 12: An increased quota for a seasonal business may be used only in the same quarter.

(5) *How to figure the quota.* In figuring his quota, a person must include every expenditure during the base period which he charged to a maintenance, repair or operating supplies account. He must not include any expenditure which was charged to a capital account. In each quarter he must charge against his quota (i) everything he buys for MRO, whether he uses the MRO rating and symbol, or another rating or symbol, or no rating; and (ii) material and products he buys for minor capital additions for which he uses the MRO rating or symbol. (note, that in deciding whether a single capital addition falls within the cost limits of paragraph (b) (3), the cost of all material and products must be included whether a preference rating or symbol is used or not). In figuring his quota, a person may at his option exclude the cost of his own labor, or the cost of any item on List A or B of Priorities Regulation No. 3 as long as he excludes cost of such items both from the computation of the quota and from charges against the quota.

(6) *Records.* Each person who is subject to this paragraph (f) must figure his quota and must keep his computation and supporting work sheets in his files for two years after his last purchase under the regulation. He must indicate on his computation any election which he makes under this paragraph (f), and in the case of paragraph (f) (3) "Quota for new businesses" or (f) (4) "When increased quotas can be used as a base", he must indicate the base which he selects. He must also maintain a record of his expenditure for a period of not less than two years.

(7) *Treatment of separate plants.* A person who has several plants or other operating units which maintain separate records of maintenance, repair and operating supplies shall treat each of them separately for purposes of complying with the provisions of this paragraph (f).

(8) *Applications for increased quota.* In any case where the quota provided in this paragraph (f) is not enough for necessary operations, a person may apply for a larger quota by letter in triplicate sent to the War Production Board, Washington 25, D. C., Reference: CMP Regulation 5, stating the relevant facts. Direction No. 18 explains what facts should be set forth in the letter of application.

*[(8) *as amended September 28, 1944.*]

(9) *Persons who use less than $5,000 a year worth of MRO not limited.* The quantity restrictions in this paragraph (f) shall not apply to persons whose aggregate requirements of maintenance, repair and operating supplies do not exceed $5,000 per year.

(10) *Further reports and limitations in special cases.* The War Production Board may, by further regulations or orders, require specified persons or classes of persons to file applications or reports regarding their requirements of maintenance, repair and operating supplies and may prescribe specific quantitative limits for the same, either larger or smaller than the limits provided above in this paragraph (f).

(g) *Special provisions for Claimant Agencies, exports and ship repairs.* Maintenance, repair, and operating supplies required for export (except to the extent authorized under Direction 20), or by Claimant Agencies, as regular procurement items covered by specific programs (except for the purposes mentioned in Schedule A), or material required for ship repairs programmed by the Maritime Commission, shall not be obtained under this regulation, but, if they are controlled materials or Class A products, shall be obtained only by the use of allotments in the same manner as production materials under CMP Regulation No. 1, and, if they are other materials or products, shall be obtained [fol. 2365] only by such preference ratings as may be specifically assigned for the purpose. *[(g) *as amended September 28, 1944.*]

(g-1) *Use of customer's or tenant's MRO symbol and rating.* (1) Any person (such as a service repair shop) engaged in the business of doing maintenance or repair work, or the installing of minor capital additions, for others may use the same allotment symbol and preference rating (including any allotment symbol or preference rating assigned for MRO by CMP Regulation 5A or any P or U order) to obtain materials needed in the performance of the work which his customer would be entitled to use if the customer did the work himself. The cost of materials used in the performance of maintenance or repair work, or the installing of minor capital additions, shall be treated as expenditures of the customer for the purpose of computing his

quantity restrictions under pargaraph (f). A person engaged in such business may, instead, request an allotment of controlled materials and a preference rating by applying to the War Production Board on Form CMP-4B, but, if he does so, he must use that method exclusively and may not use a customer's rating or symbol. * [(1) *as amended September* 28, 1944.]

(2) A landlord may use his tenant's allotment symbol and rating to obtain maintenance, repair and operating supplies (including controlled materials) for the leased property if the tenant is engaged in the production of a product or in a business listed in Schedule I or II or if the tenant is assigned a rating or symbol for MRO CMP Regulation 5A or by any P or U order; but if the same property is occupied by several tenants and the supplies are not for the exclusive benefit of a single tenant the landlord may only use a tenant's rating if 75 per cent or more of the leased property is leased to tenants on Schedule I or II and, in such case, if any are on Schedule II, he can only use the AA-2 rating.

(3) A person who leases equipment to others which he agrees to keep in good order may use either his own or his customer's rating and symbol (regardless of whether the rating is assigned by this regulation or CMP Regulation 5A or any order in the P or U series) to get materials needed to repair and maintain the equipment.

(h) *Restrictions on use of MRO symbol, rating, and materials*—(1) *Use of symbol and rating.* No person shall use the MRO symbol or the preference rating assigned to him by this regulation to get anything except materials which he needs for essential maintenance, repair or operating supplies, or minor capital additions as permitted by paragraph (b) (3). If he is assigned different ratings by this regulation for different businesses and it is practicable to segregate his purchases, he must not use a higher rating to get material for a purpose for which he is assigned a lower rating. If it is not practicable for him to segregate his purchases, paragraph (e) explains what rating he may use.

(2) *Use of material.* If a person has bought material under this regulation for MRO and then finds that he has

another use for it, he may use the material for the other purpose if a preference rating or allotment symbol is assigned to him by any certificate or order for that purpose. However, if he uses the material for another use he may not replace it in inventory by use of the rating or symbol assigned by this regulation. If he replaces it, he must use the rating or symbol assigned for the purpose for which the materials were used. Also, if he uses material bought under this regulation for another use, his records must be adequate to show that his purchases of material are substantially proportionate to his authorized uses. For example, a manufacturer has a rating of AA-2 under this regulation for MRO and also has a rating of AA-3 for a construction project. He may take lumber from his MRO inventory which he bought on the AA-2 rating and use it on the construction job, but if he replaces it in his inventory he must use the AA-3 rating for this purpose, so that he will not, in effect, have filled both his MRO and his construction requirements at the AA-2 rating. Exchanges of this kind may be made only where the material is acquired in good faith for use as MRO. The manufacturer may not use the AA-2 ratings to get lumber if he is getting it specifically for use in the construction project.

(i) *Inventory restrictions.* Nothing in this regulation shall be deemed to authorize any person to receive any delivery of maintenance, repair or operating supplies if acceptance thereof would increase his inventory above a practicable working minimum as provided in Section 944.14 of Priorities Regulation No. 1 or would exceed the inventory limitations prescribed for such person by CMP Regulation No. 2, or by any other applicable regulation or order of the War Production Board.

(j) *Additional assistance in individual cases.* Any person requiring maintenance, repair or operating supplies who is unable to obtain them with the rating assigned to him by this regulation, and any person requiring any controlled material for maintenance, repair or operating supplies who is not listed in Schedule A and who is unable to obtain it from a warehouse or distributor under CMP Regulation No. 4 may apply to the nearest local office of War [fol. 2366] Production Board on Form WPB-541 (formerly PD-1A) for a higher rating, or the right to use the MRO

symbol to obtain controlled materials. Application for an increase in the quantity of expenditures for maintenance, repair and operating supplies permitted by paragraph (f) of this regulation shall, however, be filed in the manner specified in subparagraph (8) of paragraph (f).

(k) *Effect on other orders and procedures.* (1) The preference ratings and allotment symbols assigned by this regulation may be used by any person, unless he is engaged in an activity or business which is covered by an order in the P or U series which specifically provide that the ratings assigned by CMP Regulation No. 5 may not be used.

(2) [Deleted February 26, 1944.]

(3) [Deleted February 26, 1944.]

(4) When an order in the "E," "L" or "M" series assigns a specific preference rating to deliveries of any particular material to be used by a particular industry or for a specific purpose, such preference rating shall control and the preference ratings hereby assigned may not be applied.

(5) Nothing in this regulation shall be construed to relieve any person from complying with any applicable priorities regulation or order of the War Production Board (including orders in the "E", "L" and "M" series) or with any order of any other competent authority.

(l) *Industry reclassification.* Any person who is of the opinion that the business activity in which he is engaged should be assigned a higher preference rating for its MRO than it is assigned by this regulation may apply to have such higher rating assigned by filing a letter, in triplicate, with the appropriate Industry Division setting forth the relevant facts and the reasons why he considers such requests should be granted.

The War Production Board may assign the higher rating to such activity by appropriate amendment to Schedule A or, in special cases, may permit the applicant to operate under this regulation to the same extent as though his business activity were so listed in Schedule A. ☆[(l) *as amended September* 28, 1944.]

(m) *Records.* Each person acquiring maintenance, repair or operating supplies pursuant to this regulation shall keep and preserve, for a period of not less than two years, accurate and complete records of all such supplies so ac-

quired, and used, which shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(n) *Communications.* All communications concerning this regulation should be addressed to: War Production Board, Washington 25, D. C., Ref: CMP Regulation No. 5.

(o) *Restriction on use of ratings.* The preference rating assigned by this regulation cannot be used to get any of the items shown on List A or B of Priorities Regulation No. 3.

(p) *Penalties for misrepresentation.* The placing of any order bearing a certification or symbol as provided by this regulation shall constitute a representation, subject to the criminal penalties of section 35 (A) of the United States Criminal Code (18 U. S. C. 80), that the person placing the order is entitled, under the terms of this regulation to use of the symbol or preference rating indicated thereon.

[*Revised order issued February* 26, 1944.]

Issued this 9th day of Februay, 1943.

List A

Excluded Items

[*Revoked August* 23, 1943. *See List A or B of Priorities Regulation* No. 3.]

Schedule A

Preference rating AA-1 may be used for MRO by those businesses listed with "AA-1" preceding them, AA-2 by those with "AA-2", AA-3, by those with "AA-3"; others who are not listed may use AA-5.

Manufacture of the following products:

Unfabricated and semi-fabricated metal products

Rating

AA-1 Ferro-alloys (except producers to whom serial numbers have been issued under Order P-68).

AA-1 Iron products including pig iron, pipe, wire, wrought iron and foundry products (except producers to whom serial numbers have been issued under Order P-68).

Unfabricated and semi-fabricated metal products—Continued.

Rating

AA-1 Non-ferrous metal and non-ferrous metal alloy unfabricated and semi-fabricated products, including castings, ingots, shot, bar, forgings, sheet strip tubing, extrusions and wire and wire products.

AA-1 Steel rolling mill and foundry products, including semi-finished steel, bars, pipe, plates, sheets, strip, castings, forgings, structural shapes, piling; tin plate, terne plate, black plate, tubing, rails, track accessories, wheels, tires, axles, wire and wire products (except producers to whom serial numbers have been issued under Order P-68).

Intermediate metal products

AA-1 Bearings, ball and roller.
AA-1 Bolts, nuts, rivets, washers, screws and pins.
AA-1 Bushings, journal bearings and sleeve bearings.

[fol. 2367]

AA-1 Crankshafts.
AA-1 Cylinders, hydraulic actuating.
AA-1 Fittings, pipe.
AA-1 Gaskets, packings and grease retainers.
AA-2 Metal stampings.
AA-1 Nails, brads, staples and tacks.
AA-1 Pipe, fabricated.
AA-1 Plate, fabricated (steel).
AA-1 Railroad frogs, switches and crossings.
AA-1 Screw machine products.
AA-1 Screw machine products.
AA-1 Springs.
AA-2 Strapping, metal, round and flat (including seals).
AA-1 Structural steel (fabricated).
AA-1 Tanks, metal storage.
AA-1 Tubing and hose, flexible (metallic).
AA-1 Valves.

Chemical products

AA-1 Chemicals and allied products for industrial and military use (excluding automobile body polish and top dressing; candles; cleaning and polishing preparations for

Chemical products—Continued

Rating

metal, leather, floors and furniture; household dyes; ink and ink eradicators; incense; toiletries and cosmetics, perfumes, powders and creams, manicure preparations, hair dressings, dyes, shampoos and tonics; dentrifices and depilatories).

AA-1 Colors and pigments.

AA-1 Drugs, medicinals, pharmaceuticals and biologicals.

AA-2 Dry cleaning preparations.

AA-1 Paints, varnishes and lacquers.

AA-2 Printing ink.

AA-2 Soap, soap chips, flakes and powders.

General industrial equipment

AA-1 Air conditioning and refrigeration equipment; industrial and commercial.

AA-1 Boilers, 100 lbs. pressure and over.

AA-2 Boilers, below 100 lbs pressure.

AA-2 Bottling machines.

AA-1 Compressors and dry vacuum pumps.

AA-1 Condensers; steam, surface, jet and barometric.

AA-1 Control valves and regulators, industrial type.

AA-1 Conveyors and conveyor systems.

AA-1 Cranes, hoists, winches and derricks.

AA-2 Dust collecting equipment, industrial.

AA-1 Fans, blowers and exhausters, excluding propeller type and commercial ventilating fans.

AA-1 Furnaces and ovens, industrial.

AA-1 Heat exchanges, as defined in official CMP B Product List.

AA-1 Instruments, industrial types.

AA-1 Lubricating equipment, industrial.

AA-1 Metal working machinery, equipment, attachments and accessories; including machine tools, bending, die casting, die molding, extruding and forging machines; foundry machinery, equipment and supplies; heat treating equipment; hydraulic and mechanical presses; rolling mills and allied equipment; shears, punches and nibblers; welding equipment and apparatus; wire drawing and wire-working machinery; diamond dies; metal cutting tools; and welding rods and electrodes.

General industrial equipment—Continued

Rating

AA-1 Meters, gas and water.

AA-2 Packaging machinery; including packaging machines, bag filling and closing machines, case packers and case sealing machines, wrapping machines.

AA-1 Power transmission equipment, mechanical and hydraulic.

AA-1 Pulverizers, coal.

AA-1 Pumps.

AA-2 Presses, baling.

AA-1 Pressure vessels, as defined in official CMP B Product List.

AA-1 Safety equipment, industrial.

AA-2 Sewing machines, industrial.

AA-1 Speed changers.

AA-2 Spraying equipment, industrial.

AA-1 Stokers.

AA-1 Trucks and tractors, industrial; hand and power operated.

AA-1 Tube cleaners and expanders.

AA-1 Turbo-blowers and turbo-exhausters.

AA-2 Vacuum cleaners, industrial.

Special industry machinery

AA-2 Automotive maintenance equipment.

AA-2 Broom, brush and mop making machinery.

AA-1 Ceramics manufacturing machinery.

AA-1 Chemicals producing machinery.

AA-2 Cooperage machinery.

AA-2 Cotton ginning, compressing and delinting machinery.

AA-2 Distillery machinery (except beverage).

AA-1 Drilling equipment, oil field, including rigs and accessories.

AA-1 Drilling machinery, water well.

AA-1 Drug and pharmaceutical machinery.

AA-1 Dry-kilns and redriers for wood treatment.

AA-1 Fertilizer machinery and equipment.

AA-2 Food and food processing machinery and equipment, except food dehydration machinery.

Special industry machinery—Continued

Rating

AA-1 Food dehydration machinery.

AA-1 Gas generating, conditioning and gas producing equipment and apparatus.

AA-1 Glass container making machinery.

AA-1 Glass making machinery.

AA-2 Hemp, flax and similar fibre decorticating machinery.

AA-2 Leather working machinery.

AA-1 Logging and sawmill machinery and equipment.

AA-2 Metal container and closure making machinery.

[fol. 2368] AA-1 Mining machinery and equipment.

AA-1 Oil machinery and equipment: animal, fish, vegetable.

AA-1 Ore milling machinery and equipment.

AA-2 Optical and opthalmic goods making machinery.

AA-1 Paint and varnish making machinery.

AA-2 Paper and fiber container making machinery.

AA-2 Papermill, pulp mill and paper products machinery.

AA-1 Petroleum refinery machinery and equipment.

AA-1 Plastics molding machinery.

AA-2 Printing trades machinery and equipment.

AA-1 Rubber working and tire making, retreading, recapping and repairing machinery.

AA-2 Sewer cleaning machinery and equipment.

AA-1 Smelting and refining equipment.

AA-1 Stone products manufacturing machinery.

AA-1 Textile machinery.

AA-1 Water conditioning equipment.

AA-2 Wood boxmaking machinery.

AA-1 Woodworking machinery.

AA-2 Special industry machinery not elsewhere listed, excluding tobacco manufacturing machinery and equipment and cosmetics machinery.

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* Added March 12, 1945.

Construction machinery and equipment

Rating

AA-1 Drilling and boring machinery, earth and rock.

AA-1 Power cranes and shovels, draglines, buckets, stiff-leg derricks, and dredges.

AA-1 Scrapers, maintainers and graders.

AA-1 Tractors, track-laying and wheel types.

AA-1 Tractor mounted construction equipment, including angle-dozers, bull-dozers, and power control units.

AA-1 Winches and hoists, contractors elevating.

AA-2 Other construction machinery and equipment, not elsewhere listed.

Military type products

AA-1 Aircraft, including airframes, engines, propellors, instruments, components, maintenance and concurrent spares, and air borne equipment.

AA-1 Airplane landing mats.

AA-1 Ammunition.

AA-1 Ammunition boxes and chests.

AA-1 Ammunition and explosive loading machinery and equipment.

AA-1 Artillery, including railway and seacoast.

AA-1 Barrage balloon equipment.

AA-1 Bombs depth charges, mines and torpedoes.

AA-1 Combat tanks and parts, including engines.

AA-1 Communication equipment, military.

AA-1 Explosives.

AA-1 Fire control and other combat instruments.

AA-2 Insignia, military.

AA-1 Machine guns, ground and hand arm.

AA-1 Motor cycles, side cars and parts including power cycles.

AA-1 Motor vehicles, military, including armored cars, scout cars, half-tracks and other military motor vehicles, including bodies, engines, parts and accessories.

AA-1 Naval armament and weapons.

AA-1 Navigation instruments.

AA-1 Pyrotechnics, including flares and signals.

AA-1 Radio and radar equipment and components.

AA-1 Safety equipment, military, including masks, inhalators, rescue breathing apparatus, goggles, helmets, pro-

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**As amended July 5, 1945.

Military type products—Continued

Rating	
	tective clothing and footwear, and decontamination apparatus.
AA-1	Searchlights, anti-aircraft.
AA-1	Ships, vessels, and other watercraft, including elevators, turbines, engines, equipment and parts.
AA-1	Tanks and anti-tank armament and weapons.
AA-1	Weapons, anti-aircraft.
AA-1	Weapons, not elsewhere listed.
AA-2	Products for military use not elsewhere listed.

Electrical products

AA-1	Anodizing equipment.
AA-1	Batteries, dry cell.
AA-1	Batteries, storage.
AA-2	Bells, buzzers, chimes, gongs, horns and other sound signalling devices (electric).
AA-1	Capacitors.
AA-1	Carbon brushes.
AA-1	Cut-outs and fuse links, electric (heavy duty).
AA-2	Electric appliances, commercial and domestic, all types.
AA-1	Electrical apparatus for internal combustion engines.
AA-1	Electrical connectors.
AA-1	Electroplating equipment.
AA-2	Flashlight cases.
AA-1	Fuses.
AA-1	Infra-red heating and drying equipment.
AA-1	Instruments, electrical measuring.
AA-2	Lamp bulbs and tubes, except aircraft.
AA-2	Lamps and lanterns.
AA-1	Lighting equipment and accessories, aircraft, airport and marine.
AA-2	Lighting equipment and accessories other than aircraft, airport and marine.
AA-2	Lighting fixtures.
AA-1	Magnets, electrical lifting.
AA-1	Motor controls and control equipment.
AA-1	Motors, generators and motor generator sets.
AA-1	Physio-therapy apparatus.

Electrical products—Continued

Rating

AA-1 Pole-line hardware and insulators.
AA-1 Rectifiers, mercury arc.
AA-1 Regulators.
AA-1 Searchlights and floodlights.
AA-1 Sparkplugs.
AA-2 Street and highway traffic control signals and controllers.
AA-1 Switchgear, panel and distribution boards.
AA-1 Synchronous condensers and frequency changers.
[fol. 2369] AA-1 Transformers.
AA-1 Tubes, electronic and rectifier.
AA-1 Wire and cable, insulated.
AA-1 Wiring devices and conduits (electric).
AA-1 X-ray apparatus and tubes.

Engines, turbines and generator sets

AA-1 Engines, internal combustion, and accessories.
AA-1 Engines, steam.
AA-1 Generator sets.
AA-1 Turbines.

Communication equipment

AA-1 Alarm and signal systems, protective.
AA-1 Radio equipment and components.
AA-1 Wire communication equipment.
AA-1 Other communication equipment.

Transportation equipment

AA-1 Bicycles.
AA-1 Brakes, air and airbrake actuating mechanism.
**AA-2 Civilian type aircraft.
AA-1 Hardware, transportation equipment.
AA-1 Locomotives, railroad; parts and accessories.
***AA-1 Motor vehicles, bodies, engines, parts and accessories, non-military; including buses, motorized fire apparatus and automobile trailers for attachment to pas-

** Added May 16, 1945.
*** As amended May 16, 1945.

Transportation equipment—Continued

Rating

senger cars and passenger car repair and replacement parts excluding passenger cars and parts.

AA-2 Motor vehicles, bodies, engines, parts and accessories, non-military; passenger cars only.

AA-1 Railroad cars, parts and accessories.

AA-1 Railroad and transit maintenance-of-way equipment.

AA-1 Railroad and transit signal equipment.

AA-1 Railroad and transit track equipment.

AA-1 Street and rapid transit cars; parts and accessories.

AA-2 Wagons, carts, sleds, sleighs and other non-motorized vehicles.

Building materials

AA-1 Asbestos building materials.

AA-2 Asphaltic building products.

AA-2 Building mesh.

AA-2 Cement, Portland.

AA-2 Concrete building products.

AA-2 Doors and windows.

AA-2 Gypsum building products.

AA-1 Hard board.

AA-2 Hardware, builders.

AA-2 Metal moulding and trim.

AA-2 Mineral wool, industrial.

AA-2 Plumbing fixtures, fittings and trim, and sanitary ware.

AA-2 Radiators, convectors and blast heating coils.

AA-2 Screen cloth.

AA-2 Sheet metal building products.

AA-2 Structural insulation and fibre board.

AA-2 Weatherstripping.

AA-2 Wire fence, posts and gates.

AA-2 Products for structural use not elsewhere listed.[8]

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[8] See also Interpretation 10: Other products includes light weight aggregates, ready mixed concrete and ready mixed bituminous cement; and Direction 14: Manufacturers of roll roofing, shingles and corkboard may use MRO symbol to buy steel nails.

Miscellaneous products

Rating

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AA-1 Abrasive products.

AA-1 Agricultural machinery, implements and equipment, excluding farm and garden hand tools.

AA-1 Asbestos textiles.

AA-2 Baby carriages and similar equipment.

AA-2 Bag and bale ties.

AA-2 Beds, bedsprings and mattresses.

AA-2 Bells, gongs and other non-electric signalling devices.

AA-3 Beverages of all types.

AA-1 Blast detonating equipment, industrial.

AA-1 Blue printing developing and drying machines.

AA-2 Brooms, brushes, mops.

AA-1 Buoys.

AA-2 Burners, gas, oil and combination.

AA-1 Carbon products, industrial.

AA-2 Caskets, coffins, burial cases and vaults.

AA-2 Ceramic and clay products.

AA-1 Chains.

AA-3 Chewing gum.

AA-2 Church goods.

AA-2 Clocks and watches, including chronometers, except aircraft.

AA-2 Closures, all types.

AA-1 Coke and coke oven by-products (except producers to whom a serial number has been issued under Order P-68).

AA-2 Containers: all types except fiber drums, gas cylinders and ton containers, and nailed wooden boxes and crates.

AA-1 Containers; fiber drums, gas cylinders and ton containers, and nailed wooden boxes and crates only.

AA-1 Cooking stoves and ranges, domestic, including laundry stoves, hot plates, and portable ovens.

AA-1 Cooking equipment, commercial.

*AA-1 Cordage: Manila, sisal, henequen, jute, and istle; twine, and jute rope yarns.

**** The item "AA-3 Manufacturer of any product under the terms of Priorities Regulation 25." deleted May 16, 1945.

Miscellaneous products—Continued

Rating

AA-2 Cork products.
AA-2 Cutlery.
AA-2 Dishwashing machinery, commercial.
AA-2 Elevators and escalators.
AA-2 Fans, ventilating (commercial).
AA-2 Findings, apparel and shoe.
AA-1 Fire extinguishers, carbon dioxide.
AA-2 Fire protection equipment, including portable and fixed fire extinguishers and systems other than carbon dioxide types; stirrup pumps; automatic sprinkler systems; fire hose, hose dryers, racks, reels and related products; and fire hydrant indicator posts and stand pipe equipment.
AA-1 Fishing equipment, commercial.
AA-2 Floor coverings, linoleum and felt base.
[fol. 2370] AA-2 Floor finishing and floor maintenance machines, as defined by WPB Order L-222.
AA-2 Food preparation and serving fixtures, equipment and appliances, commercial.
AA-2 Furniture.
AA-1 Glass products: fibrous glass products for military, industrial and structural use, and technical glass for military and industrial use.
AA-2 Glass products: not elsewhere listed, excluding ornamental and novelty glass.
Note: Mirrors are included in the above item by the amendment of September 28, 1944.
AA-2 Hairpins, bob pins and hair curlers.
AA-2 Hardware, not elsewhere listed.
AA-1 Heating equipment (except electric) including heating system controls and hot water equipment.
AA-2 Hooks and eyes, slide and snap fasteners, buckles, buttons and miscellaneous apparel findings.
AA-2 Houses, mobile and prefabricated.
AA-1 Ice.
AA-2 Identification badges, emblems, pin tickets, plates, tags not military.
AA-1 Instruments, apparatus, equipment, supplies and appliances; dental.
AA-1 Instruments and apparatus; laboratory.

Miscellaneous products—Continued

Rating

AA-1 Instruments and equipment; engineering (including surveyors' drawing and mathematical).

AA-1 Instruments and apparatus; analytical and industrial testing.

AA-1 Instruments, equipment, supplies; surgical and medical, including orthopedic appliances.

AA-1 Instruments and lenses; optical.

AA-2 Instruments; musical.

AA-1 Jewel bearings.

AA-2 Kitchen, household and other miscellaneous articles, as defined in WPB Order L-30.

AA-2 Lamps and lanterns, non-electric.

AA-2 Laundry, dry cleaning and pressing machinery, commercial.

AA-2 Laundry machinery, domestic.

AA-2 Lawn mowers, hand and power.

AA-2 Leather and leather products.

AA-1 Lenses and instruments; optical.

AA-2 Loose leaf binders.

AA-2 Morticians' goods.

AA-2 Needles.

AA-2 Office machinery.

AA-2 Office supplies, including marking devices.

AA-2 Ophthalmic goods.

AA-2 Pens and pencils.

AA-1 Photographic equipment, apparatus and materials, excluding projection apparatus.

AA-2 Phonographs, parts, records and needles.

AA-2 Pins, common and safety.

AA-1 Plastic products: moulding and laminating.

AA-2 Projection apparatus.

AA-2 Pulp and paper and paper products.

AA-2 Razors and blades.

AA-1 Refractories.

***AA-2 Refrigerators and parts (domestic).

****AA-1 Refrigerators: repair parts only.

AA-2 Rope.

*** As amended May 16, 1945.

**** Added May 16, 1945.

Miscellaneous products—Continued

Rating

AA-1 Rubber and rubber products.
AA-2 Scales and balances, industrial and commercial.
**AA-1 Screen cloth, metal insect.
AA-1 Sensitized film and paper.
AA-2 Sewing machines.
*AA-1 Textiles: Cotton, rayon and nylon yarns and fabrics for tire cords, duck and duck substitutes; merino yarns and fabrics, combed cotton yarns and fabrics and wool tops.
AA-2 Textiles and clothing.
AA-2 Time stamps and recording devices.
AA-3 Tobacco products.
AA-2 Tools, farm and garden, edge and hand.
AA-1 Tools; including edge tools, hand tools, mechanics hand service tools, gauges and machinists precision measuring tools, files and rasps; excluding farm and garden edge and hand tools.
AA-2 Traps and cages, animal.
AA-2 Unit heaters and unit ventilators.
AA-2 Vitreous enameled products.
AA-2 Wood products.
AA-2 Products for military, industrial and structural use not elsewhere listed.

Conduct of the following businesses or activities

AA-1 Air services operating exclusively for crop dusting, seeding and spraying.
AA-2 Civil Air Patrol "A" category: Operation of airplanes exclusively for tow target and tracting units and bomber-search activities.[9]
AA-2 Cotton ginning and compressing.

** Added March 12, 1945.
* As amended October 18, 1944, and March 1, 1945.
[9] Airline operators and certain foreign aircraft operators may obtain priorities assistance under Order P-47. Government agencies operating aircraft will obtain preference rating assistance under CMP Regulation No. 5A. Other businesses operating aircraft obtain preference rating assistance under this regulation.

Conduct of the following businesses or activities—Continued

Rating

AA-2 Commercial sound recording.

AA-2 Construction.

AA-1 Detinning.

AA-2 Drainage and irrigation.

AA-1 Electrical and mechanical repair shops for industrial, commercial and agricultural equipment; and public, industrial and commercial transportation equipment.[10]

AA-1 Electro-plating, galvanizing and other metal treating and finishing.

AA-2 Engraving on metal.

AA-1 Fabricating and rifting mica.

AA-1 Feed and grain (stock and poultry) processing and storage.

AA-1 Fishing, commercial.

AA-2 Hemp, flax, and similar fiber decortication.

[fol. 2371] AA-1 Industrial food manufacturing, processing, packaging, preservation and storage, (except soft drink and alcoholic beverages, and chewing gum). Restaurants, hotels, retail stores, and farms are not included in this category.[11]

AA-1 Logging operations, sawmills, veneer mills, plywood mills, planing mills, shingle mills, and dry kilns operated in connection with sawmills.[12]

AA-1 Military and Naval establishments: camps, posts, bases, stations, air fields and depots.

AA-2 Motion picture production.[13]

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[10] See also Interpretation No. 6: Public transportation means common carriers; Direction No. 10: Welding rods for service repair shops.

[11] See also Interpretation No. 7 relating to distribution of food products.

[12] See also Interpretation No. 13: Manufacturers of staves, heading and hoops are classified as "saw mills and planing mills."

[13] See also Direction No. 17: Motion picture theatres may use AA-2 rating and MRO symbol for electronic equipment repair.

Conduct of the following businesses or activities—
Continued

Rating

AA-1 Operation of ships, vessels and other craft, except pleasure vessels.[14]

AA-2 Printing and publishing, including blue-printing and allied reproduction.

AA-1 Public utilities: gas, light, power, water and central heating and sanitation (except producers as defined in Utilities Order U-1).

AA-1 Public transportation, terminal and dock facilities including stevedoring.[15]

AA-1 Petroleum and natural gas production, transportation, refining and marketing (except to the extent covered by P-98 (b)).

AA-1 Radio communication or broadcasting.

AA-2 Refrigeration (commercial) other than food.

AA-2 Scrap salvage, sorting and processing.

AA-1 Seed processing, packaging, preservation and storage.

AA-1 Ship repair and maintenance.

AA-1 Slag recovery and disposal.

AA-1 Smelting and refining (except producers to whom a serial number has been issued under P-73).

AA-2 Solid fuel distribution and marketing including only those dealers with equipped yards (a dealer with an equipped yard is one who regularly maintains storage and sorting facilities as a part of his own operations, and loading, carrying and other machinery for handling and weighing).

AA-2 Tire and tube recapping, retreading and vulcanizing.

AA-1 Vegetable oil extraction.

AA-2 Warehousing, metal.

AA-2 Warehouses: public: dry and open storage.

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[14] See also Direction No. 6: ships of friendly foreign nations.

[15] See also Interpretation No. 6: Public transportation means common carriers.

Conduct of the following businesses or activities—Continued

Rating

AA-1 Warehouses, refrigerated: perishable food products.

AA-1 Wire communications industries (except operators as defined in Utilities Order U-3 and U-4).

[Schedule A *formerly Schedules I and II redesignated and amended September* 28, 1944.]

DIRECTION 1 UNDER CMP REGULATION NO. 5

[¶33,229]

Direction 1 Under CMP Regulation No. 5: Concerning the procedure for obtaining aluminum pattern equipment under CMP. C. F. R., Title 32, Ch. 9, Part 3175. Issued May 13, 1943, WPB-3549. Direction as amended November 19, 1943, WPB-4631, and April 26, 1944, WPB-5622.

[Text of Direction]

The following direction is hereby issued pursuant to section 3175.5, CMP Regulation No. 5:

(a) The word "patterns" as used in the following instructions means only match plates, patterns, core boxes, core driers, flasks and bottom boards made of aluminum. It does not include such items as jigs, dies, molds, fixtures, or other tooling of a type which has only one special use since these are provided for in Direction 35 to CMP Regulation No. 1. [(a) *as amended November* 19, 1943, *and April* 26, 1944.]

(b) Patterns (including finished aluminum patterns) are castings under CMP and hence controlled materials.

(c) When the purchaser of a pattern furnishes the pattern foundry with all the required weight of aluminum in the form of obsolete or defective patterns:

(1) No preference rating or CMP allotment symbol, number or certification is required on the order to the foundry or to the pattern maker;

(2) Any foundry may remelt aluminum scrap in the form of obsolete or defective patterns furnished by the prospective purchaser of the new pattern (and only such type of aluminum scrap) without prior authorization; and

be referred to the CMP Division, War Production Board, Washington, D. C.

[fol. 2372] (3) Wherever possible, old patterns should be used to make new patterns.

(d) When the purchaser of a pattern does not furnish all the aluminum, he may place an authorized controlled material order for aluminum patterns by affixing the symbol MRO on his order and the certification set forth in CMP Regulation No. 7 executed as provided in that regulation. [(d) *as amended April* 26, 1944.]

(e) [Deleted April 26, 1944.]

(f) Pattern manufacturers are hereby authorized to use the MRO symbol endorsed on their customers' orders to obtain aluminum pattern castings. Pattern manufacturers are not required to apply for an allotment of aluminum notwithstanding anything to the contrary in any CMP regulation.

(g) Foundries fill only authorized controlled material orders for aluminum patterns (except as provided in paragraph (c) above), which they may recognize by the symbol MRO and the certification described in CMP Regulation No. 7. [(g) *as amended April* 26, 1944.]

(h) The foregoing direction also applies to a company which makes its own aluminum patterns. Except as provided in paragraph (c) above, every such company places authorized controlled material orders on its own pattern foundry so that the foundry may make delivery of the patterns.

(i) Nothing in this direction shall be construed to relieve any person from complying with the provisions of Supplementary Order M-1-i which requires that only low-grade aluminum ingot (as defined in the order) be used for aluminum pattern equipment, and prohibits contamination of aluminum. Pattern foundries, and not the purchaser or user of patterns, must file Forms WPB-2530 (formerly CMP-19) and WPB-2685 (formerly CMP-24) monthly. Foundries regularly producing aluminum castings have been assigned an AM license number which must be shown on all orders for ingot. Foundries which do not have an AM license may secure ingot for patterns only by indicating on their order "MRO patterns".

This direction supersedes all previous instructions relat-

ing to the acquisition of aluminum for the manufacture of patterns.

[(i) *as amended April* 26, 1944.]

Issued this 13th day of May 1943.

Direction 2 for Steel Shoe Wire

[¶ 33,229.10]

CMP Regulation No. 5 Direction 2: Concerning the treatment of steel wire for footwear as an operating supply. Issued May 24, 1943, WPB-3650. Direction as amended June 26, 1943, and April 22, 1944, WPB-5527. Superseded by Direction 24.

Direction 3 Concerning Rerating of Orders

[¶ 33,229.11]

CMP Regulation No. 5, Direction 3: Down-rating of orders for maintenance, repair, and operating supplies not required where orders were placed prior to May 16, 1943. Issued June 2, 1943, WPB-3825. Obsolete.

Direction 4 Concerning Stitching Wire

[¶ 33,229.12]

CMP Regulation No. 5, Direction 4: Stitching wire for the printing and publishing industry is an operating supply under CMP Regulation No. 5. Issued June 5, 1943, WPB-3796. Superseded by Direction 24.

[fol. 2373] Direction 5 Concerning Use of Ratings by Farmers

[¶ 33,229.13]

CMP Regulation No. 5, Direction 5: Farmers may not use AA-5 rating assigned to unclassified activities by CMP Regulation No. 5. Issued June 11, 1943.

[Text of Direction]

The following direction is hereby issued pursuant to CMP Regulation No. 5 (Section 3175.5):

Farmers may not use the AA-5 rating assigned to unclassified activities by paragraph (d) (1) (iii) of CMP Regulation No. 5. They may obtain their maintenance, repair and operating supplies under Priorities Regulation No. 19.

Direction 6 for Ships of Friendly Foreign Nations

[¶ 32,229.14]

CMP Regulation No. 5, Direction 6: Maintenance, repair and operating supplies for ships of friendly nations. Issued June 21, 1943. Direction as amended October 21, 1943, WPB-4464.

[Text of Direction]

The following direction is issued pursuant to CMP Regulation No. 5 (Section 3175.5):

(a) Persons operating ships (except pleasure vessels) of foreign nations flying flags of the United Nations may obtain maintenance, repair and operating supplies essential for the operation of such ships under CMP Regulation No. 5 as though such activity were listed in Schedule I of the regulation. [(a) *as amended October* 21, 1943.]

(b) Persons operating ships (except pleasure vessels) under the flags of neutral nations, not United Nations, may obtain maintenance, repair and operating supplies essential for the operation of such ships under CMP Regulation No. 5 as though such activity were listed in Schedule I of the regulation, if, but only if, the purchase order to which a [fol. 2374] preference rating or MRO symbol is applied under this paragraph is countersigned by a representative of the War Shipping Administration. [(b) *as amended October* 21, 1943.]

(c) The quantity limitations of paragraph (f) of CMP Regulaiton No. 5 shall not apply to purchases made under this direction.

(d) Material for repair of ships in ship repair yards may not be obtained under this direction. Such repair is under the direction of the Coordinator of Ship Repair and Conversion.

(e) This direction does not apply to purchases of food and fuel, or to any item set forth in Lists A, B, or C at-

tached to Priorities Regulation No. 3 as amended from time to time.

Issued this 21st day of June 1943.

Direction 7 for Welding Rod

[¶ 33,229.15]

CMP Regulation No. 5, Direction 7: Concerning the treatment of welding rod as operating supplies. Issued June 26, 1943.

[Text of Direction]

The following direction is issued pursuant to CMP Regulation No. 5 (Section 3175.5):

Welding rod (arc welding electrodes and gas welding rod) used for manufacturing purposes may not be treated as an operating supply under CMP Regulation No. 5 even though it is carried as an operating supply under established accounting practice.

A manufacturer may use the rating assigned to him by CMP Regulation No. 5 to get his requirements of welding rod for repairing his own equipment. He may not use the rating to get his requirements of welding rod for welding operations in the course of producing his product.

Issued this 26th day of June 1943.

Direction 8 Concerning Quantity Restrictions Under CMP Regulation No. 5

[¶ 33,229.16]

CMP Regulation No. 5, Direction 8: Concerning the determination of quantity restrictions on a receipt basis. Issued June 29, 1943.

[Text of Direction]

The following direction is issued pursuant to CMP Regulation No. 5 (Section 3175.5):

(a) The quantity restrictions provided in paragraph (f) of CMP Regulation No. 5 are on an "order" rather than a "receipt" basis—that is, expenditures for maintenance, repair and operating supplies are computed on the basis

of orders for supplies calling for delivery during a quarter rather than on the value of supplies received during the quarter.

(b) If a person prefers to keep his records on maintenance, repair and operating supplies on a "receipt" rather than an "order" basis, he may do so. However, he cannot use one method for a part of the supplies and another method for the remainder.

Issued this 29th day of June 1943.

Direction 9 for Hand Tools

[¶ 33,229.17]

CMP Regulation No. 5, Direction 9: Concerning the purchase of hand tools by employees on their employer's ratings. Issued July 9, 1943. Direction revoked December 20, 1943, WPB-4700. Employees may obtain hand tools under Direction 4 to Priorities Regulation No. 3.

Direction 10 Concerning Welding Rod for Repair Shops

[¶ 33,229.18]

CMP Regulation No. 5, Direction 10: Concerning the rating assigned to welding rod for repair shops. Issued July 28, 1943. Direction revoked January 28, 1944. Repair shops may obtain welding rod by the use of the rating assigned by CMP Regulation No. 9A.

[fol. 2375] Direction 11 for Safety Equipment

[¶ 33,229.19]

CMP Regulation No. 5, Direction 11: Concerning safety equipment purchased by employees. Issued August 13, 1943, WPB-4045. Direction as amended September 18, 1943, WPB-4272. Direction revoked December 20, 1943. Employees may obtain safety equipment under Direction 4 to Priorities Regulation No. 3.

Direction 12 for Rerating of Orders

[¶ 33,229.20]

CMP Regulation No. 5, Direction 12: Concerning the rerating of orders for maintenance, repair and operating supplies, for delivery in the third and fourth quarter of 1943. Issued September 13, 1943. Obsolete.

Direction 13 for Quota and Expenditure Records

[¶ 33,229.21]

CMP Regulation No. 5, Direction 13: Concerning quota computation and expenditure records for maintenance, repair and operating supplies. Issued September 21, 1943. Direction 13 revoked, February 26, 1944. The provisions of the direction are included in paragraph (f) of CMP Regulation No. 5 as amended, February 26, 1944.

Direction 14 for Roll Roofing, Shingles and Cork Board

[¶ 33,229.22]

CMP Regulation No. 5, Direction 14: Concerning the use of MRO symbol by manufacturers of roll roofing, shingles, cork board and metal weather stripping. Issued December 2, 1943, WPB-4638. Direction as amended August 28, 1944, WPB-6368.

[Text of Direction]

(a) A manufacturer of asphalt shingles, asphalt roll roofing, asphalt siding, asbestos shingles, asbestos siding, cork board or metal weather stripping may use the MRO symbol to buy steel nails which he will deliver along with such products for use in applying them. He may not use the MRO symbol to buy more steel nails than needed to apply the asphalt shingles, asphalt roll roofing, asphalt siding, asbestos shingles, asbestos siding, cork board or metal weather stripping with which he delivers them, and he must not increase the quantity of steel nails delivered with any unit of such product over the quantity he delivered with such unit during the year 1943. [(a) *as amended August* 28, 1944.]

(b) A manufacturer buying steel nails under this direction does not have to charge them against his MRO quota.

(c) A manufacturer who can purchase his steel nail requirements under this direction must not get them under Order M-21-b-2 relating to steel warehouses and dealers, or under any other regulation or order. The provisions of Order M-21-b2 or of CMP Regulation No. 4 shall not apply to such a manufacturer so far as the purchase and sale of steel nails bought under this direction are concerned. [(c) *added August* 28, 1944.]

(e) After December 31, 1943, a manufacturer who can purcha e his steel nail requirements under this direction must not get them under Order M-21-b-2 relating to steel warehouses and dealers, or under any other regulation or order. The provisions of Order M-21-b-2 or of CMP Regulation No. 4 shall not apply to such a manufacturer after December 31, 1943, so far as the purchase and sale of steel nails bought under this direction are concerned.

Issued this 2d day of December 1943.

[fol. 2376] Direction 15 for Installation Materials

[¶33,229.23]

CMP Regulation No. 5, Direction 15: Concerning the use of MRO symbol and rating to buy installation materials where authorization to construct is not required under L-41. Issued December 9, 1943, WPB-4656. Direction amended August 19, 1944, September 23, 1944, November 4, 1944, and May 24, 1945.

[Text of Direction]

(a) (1) Any person who has obtained machinery or equipment which he is permitted to install or relocate under Direction 2 to L-41 and who needs priorities assistance to get building materials to install or relocate the machinery or to make building alterations required in connection with the installation or relocation may use the MRO symbol and rating assigned to the business or the manufacture of the product for which he will use the machinery or equipment. This includes the MRO symbol and rating assigned by CMP Regulation 5, 5A, or a "P" or "U" order.

(2) Any person who has obtained machinery or equipment for use in a business which is not listed on Schedule A of CMP Regulation 5 or Schedules I and II of CMP Regulation 5A may use the MRO symbol and a preference rating of AA-3, to get up to $500 worth of building materials (including controlled materials) needed to install or relocate any piece of machinery or equipment which Direction 2 to L-41 permits him to install or relocate without getting an authorization under that order and to make a building alteration allowed in connection with the installation or relocation.

(3) If construction as defined in L-41 is not involved in an installation, for example in installing an engine in a boat, a person may use the priorities assistance assigned to the business or product for which he will use the machinery or equipment by CMP Regulation 5, 5A, or any "P" or "U" order to get $500 worth of materials required for such an installation of any piece of machinery or equipment.

★ [(a) *as amended September* 23, 1944, *November* 4, 1944, *and May* 24, 1945.]

(b) [Deleted August 19, 1944.]

(c) *MRO quota need not be charged:* A person buying installation materials under this direction need not charge the amount he spends for them against his MRO quota under paragraph (f) of the regulation.

(d) *Relation to minor capital addition provision of CMP No. 5.* The purchase of installation materials under this direction is not affected by the restrictions on purchases of minor capital additions under paragraph (b) (3) of CMP Regulation No. 5. This direction applies only in cases where machinery or equipment which is installed or relocated is acquired without using the MRO rating for a minor capital addition under paragraph (b) (3) of the regulation. Under this direction, it does not matter whether the machinery or equipment costs more than $500. However, if machinery or equipment is acquired with the MRO rating under paragraph (b) (3) of the regulation, installation materials are considered part of the same capital addition, in which case the total must not exceed $500 and the cost of the installation materials as well as cost of the machinery or equipment must be charged to the MRO quota.

(c) *Applications.* Where permission to install or relocate machinery is required by Order L-41, application for such permission should be made on the appropriate form indicated on Schedule C of Order L-41. Also, such form should be used in applying for priorities assistance to buy installation materials where they cannot be bought under this direction, even if permission to install or relocate is not required by Order L-41.

Issued this 9th day of December 1943.

Direction 16 for Broom Wire

[¶33,229.24]

CMP Regulation No. 5, Direction 16: Concerning steel wire used in making brooms. Issued February 15, 1944, WPB-4997. Superseded by Direction 24.

[fol. 2377] Direction 17 for Motion Picture Theatres

[¶33,229.25]

CMP Regulation No. 5, Direction 17: Concerning the use of ratings by motion picture theatres. Issued February 19, 1944, WPB-5015.

[Text of Direction]

Motion picture theatres may use the preference rating AA-2 and the allotment symbol MRO for the minimum necessary maintenance and repair of electronic equipment already installed in the theatre. The AA-2 rating may not be used for repair of projection equipment (except soundheads) or other theatre equipment or to obtain minor capital additions.

Issued this 19th day of February 1944.

Direction 18 for Quota Increase

[¶33,229.26]

CMP Regulation No. 5, Direction 18: Concerning applications for an increase of quota. Issued March 17, 1944. WPB-5237.

[Text of Direction]

(a) A person applying for an increase in his quota under paragraph (f) (8) of CMP Regulation No. 5 should show in his letter of application the following information:

(1) Name of product(s) manufactured or description of services rendered;

(2) Show what quarterly quota you were authorized under paragraph (f) in 1943. (If operating on a seasonal basis, show for each quarter of 1943). If you received a special authorization for any quarter, show that for each such quarter in addition to the "base" quota;

(3) Statement of total dollar value of deliveries of your product in 1942, and first and subsequent quarters of 1943, by quarters. Show deliveries for each quarter by principal Claimant Agencies;

(4) Statement of total amount of MRO requested to be authorized per quarter. This should include the base quota already permitted by paragraph (f) (1), (2), or (3) plus the increase requested;

(5) Statement of total amount expended during 1943 for minor capital additions under paragraph (b) (3) of the regulation;

(6) Statement of deliveries of your product scheduled for quarters for which MRO increase is requested.

(7) Any additional information which may be pertinent to proper evaluation of the application.

(b) If any of these questions do not apply to your operations, substitute equivalent information describing the circumstances.

(c) The application should be filed with the War Production Board, Washington 25, D. C., Reference: CMP Regulation No. 5.

Issued this 17th day of March 1944.

Direction 19 for Blue Print Materials

[¶ 33,229.27]

CMP Regulation No. 5, Direction 19: Concerning ratings for blue print materials. Issued May 11, 1944, WPB-5661. Superseded by Direction 24.

[fol. 2378] Direction 20 for MRO for Persons Abroad

[¶33,229.28]

CMP Regulation No. 5, Direction 20: Concerning MRO for persons abroad producing for the United States Government. Issued July 1, 1944.

[Text of Direction]

A person producing material in foreign areas on contract with or for sale to the United States Government may get maintenance, repair and operating supplies under CMP Regulation 5, but only upon specific authorization and within a quota issued by the War Production Board upon the recommendation of the Foreign Economic Administration. An application for issuance of an authorization and quota should be made by letter in triplicate, addressed to the War Production Board but filed with the Foreign Economic Administration, Requirements and Supply Branch, Washington, D. C., which will forward the application to the War Production Board with appropriate recommendations for action. This direction does not apply, however, to an operator in the petroleum industry or to any person for whom Order P-56 ("Mines and Smelters") prescribes the procedure for obtaining maintenance, repair and operating supplies.

Issued this 1st day of July 1944.

Direction 21 for Tobacco, Chewing Gum and Beverage Industries

[¶33,229.29]

CMP Regulation No. 5, Direction 21: Concerning MRO for tobacco, chewing gum, and beverage industries. Issued July 26, 1944, WPB-6172. Revoked September 28, 1944. Items formerly appearing in this direction are included in CMP Regulation 5 as amended September 28, 1944.

Direction 22 for Stevedores

[¶33,229.30]

CMP Regulation No. 5, Direction 22: Concerning the use of the MRO symbol for stevedores and stevedoring com-

panies. Issued July 26, 1944, WPB-LD-777. Superseded by Direction 24.

Direction 23 for Radio Communication Carriers

[¶33,229.31]

CMP Regulation No. 5, Direction 23: Concerning special MRO rule for international, point-to-point radio communication carriers. Issued September 26, 1944.

[Text of Direction]

(a) Any person engaged in international point-to-point radio communication as a commercial operation may use the preference rating AA-1 and the CMP allotment symbol MRO to rearrange, modify or expand existing facilities and equipment (but not buildings) either to maintain his regularly established services, or to provide whatever new or modified services may be necessary to render services by or for the account of the United States Army, the United States Navy, any agency of the United States Government, or any agency of any foreign government.

(b) The cost of materials for any one project undertaken under this direction must not exceed $2,500.00. In such cases the restrictions and limitations of CMP Regulation 5 (including the prohibition of paragraph (g) against getting maintenance, repair and operating supplies for export) and the rules of Conservation Order L-41 shall not apply; and an authorization to begin construction shall not be necessary.

Issued this 26th day of September 1944.

[fol. 2379] Direction 24 for Purchase of Certain Materials

[¶33,292.32]

CMP Regulation No. 5, Direction 24: Concerning the purchase of certain materials as MRO irrespective of accounting practices. Issued October 16, 1944. Direction as amended November 18, 1944, April 3, 1945, and May 11, 1945.

[Text of Direction]

(a) Persons who manufacture products, or who engage in activities listed below may buy the materials indicated

for use in such activities or in manufacture of such products by use of their MRO rating and symbol irrespective of whether such material is charged to operating expense under a particular manufacturer's accounting practice.

Product or activity	Material that may be purchased under this direction
Footwear	Steel toe lasting wire, steel staple wire, steel grip tacker wire, steel slugging wire, steel taper nail wire, steel wire used for similar purposes and all types of steel staples.
Products of printing and publishing business.	Steel stitching wire.
Brooms	Steel wire.
Commercial blueprint and allied reproductions including white prints, and all intermediate processes and photo - copy reproductions (Photostat, Rectigraph, etc.) but not photograph prints for amateurs or commercial photographs, or mass produced photographic copies for business or professional use.	All materials.
Stevedores and Stevedoring companies.	Steel wire rope, steel rods, steel nails, steel angles, other steel in controlled material form and steel metal strapping needed for lashing cargoes only.
Paperboard products	Steel stitching wire.
All persons conducting businesses listed in Schedule A.	Aluminum foil (plain, printed, embossed, laminated or otherwise processed) for their own use for wrapping purposes.

(b) Such purchases need not be charged to the purchaser's MRO quota under CMP Regulation No. 5, or other WPB order assigning blanket MRO ratings (as defined in Priorities Regulation No. 3).

(c) This direction supersedes Directions 2, 4, 16, 19 and 22 to CMP Regulation 5.

Note that processed foil (printed, laminated, embossed, etc.) is a Class B product and manufacturers of it must obtain their requirements of plain foil (controlled material) by filing Form CMP-4B with the War Production Board. They may not use their customers, or their own, MRO symbol to get plain foil. However, some processed foil sold for wrapping Army or Navy products will be treated as a Class A product, and the Army or Navy allots aluminum identified by the appropriate symbol.

[Direction as amended April 3, 1945, and May 11, 1945.]

Issued this 16th day of October 1944.

Direction 25 for Purchase of Controlled Materials

[¶33,229.33]

CMP Regulation No. 5, Direction 25: Concerning the purchase of controlled materials required for jigs, dies, special tooling, and fixtures to be used for a product not now being produced. Issued November 4, 1944. Revised direction issued May 24, 1945.

[Text of Direction]

(a) *What this direction does.* This direction permits the use of MRO ratings assigned by CMP Regulation 5 to get maintenance, repair and operating supplies and jigs, dies and fixtures for reconversion where a person proposes to start manufacturing a product he is not now making.

(b) *Use of ratings and MRO symbol for maintenance, repair and operating surplus.* Any person who is planning to make any product may use the preference rating and MRO allotment symbol (if any) assigned to the manufacturer of that product under CMP Regulation 5 to get maintenance, repair and operating supplies and minor capital additions which he requires before actually beginning production of such product.

(c) *Jigs, dies, fixtures, special tooling and minor hand tools.* Any person who needs jigs, dies, fixtures, special tooling or minor hand tools for the manufacture of a product which he is not presently manufacturing may get them as follows:

[fol. 2380] (1) He may use the preference ratings assigned by CMP Regulation 5 to the product for which he is going to use the items to get the complete jigs, dies, fixtures, minor hand tools and special tooling.

(2) If he wants to make the items himself, or furnish material to another person to make special tooling for him (under Direction 35 to CMP Regulation 1) he may use the MRO allotment symbol to get the controlled materials (whether or not the product is listed on Schedule A of CMP Regulation 5) and may get the other materials by use of the preference rating assigned by CMP Regulation 5 to the production of the product for which he will use the jigs, dies, fixtures, special tooling, or minor hand tools.

(d) *MRO quotas.* Any purchases made under the provisions of this direction must be charged against the MRO quota provided in CMP Regulation 5. Persons who are setting up completely new businesses or plants after February 28, 1943, and who were not in business in 1942, are automatically entitled to a quota of $5,000 per quarter, under the provisions of paragraph (f) (3) of CMP Regulation 5. Thus special quota does not apply when an established plant starts producing a new product since the quota restrictions (unlike the preference ratings assigned) are on a plant basis, and not a product basis. If an MRO quota is inadequate, an application for an increased quota may be made under paragraph (f) (8) of CMP Regulation 5.

★ [*Revised direction issued May* 24, 1945.]

Issued this 4th day of November 1944.

[fol. 2381] Direction 26 for Steel

[¶ 33,229.34]

CMP Regulation No. 5, Direction 26: Concerning temporary limitation on the purchase of steel for MRO during the second quarter of 1945. Issued March 28, 1945.

[Text of Direction]

(a) No person shall use the MRO symbol to place authorized control material orders for steel in any controlled material form for delivery in the second calendar quarter of 1945 in excess of 80% (by weight or dollar value, whichever he prefers) of the steel he purchased for MRO during the second calendar quarter of 1944. Any person who has already placed authorized controlled material orders by use of the MRO symbol for delivery in the second quarter of 1945 in excess of 80%, must cancel or reduce the authorized controlled material orders by the amount of the excess.

(b) This direction is required because of a severe shortage in steel anticipated during the second calendar quarter. In the absence of circumstances which cannot now be foreseen, this limitation will apply only in the second quarter and will not be extended beyond. The War Production Board urges all persons to defer all MRO that is possible in order to conserve steel, and in doing necessary MRO to use steel out of existing inventories to the greatest extent possible.

(c) Any person who has to do essential MRO during the second quarter, which cannot be feasibly postponed, and who is prevented from doing so by this direction, may apply to his local Field Office of the War Production Board for permission to buy additional quantities of steel. The application may be made by letter, Ref: Direction 26 to CMP Regulation 5, and should state (1) the amount of steel he is permitted to buy, the amount and type of steel he requires, in addition (2) the reasons why the maintenance, repair or operation must be continued, cannot be deferred, and cannot be supplied out of inventory, and (3) why other maintenance, repair or operation cannot be deferred to provide the needed steel.

(d) Any person whose quota has been increased since the second quarter of 1944 by an application under paragraph (f) of CMP Regulation 5 may adjust the amount of steel that he can buy as follows: He may increase his percentage of steel over the amount purchased in the second quarter of 1944 by the proportion that his present quota bears to the quota that he had in the second quarter of 1944. For example: a manufacturer had a quota of $100,-

000 in the second quarter of 1944 and purchased 10 tons of steel for essential MRO. He has since received an increase in quota applicable to the second quarter of 1945 which raises his quota to $130,000 (or 30% increase). In determining how much steel he can buy, he can increase his base period consumption of steel by the same percentage, i.e., his base period consumption of steel will be 10 tons plus 30% of 10 tons or 13 tons. Thus he will be permitted to order for the second quarter of 1945, 80% of 13 tons or 10.4 tons of steel.

(e) This direction does not apply to any person who will order for delivery less than 10 tons of carbon and 2 tons of alloy steel during the second quarter of 1945.

Issued this 28th day of March 1945.

Direction 27 for Aluminum Foil

Revoked May 11, 1945.

[¶ 33,229.35]

CMP Regulation No. 5, Direction 27: Concerning aluminum foil for wrapping. Issued April 3, 1945. Direction 27 to CMP Regulation 5 revoked May 11, 1945. This revocation does not affect any liability incurred under the direction.

[Text of Direction]

(a) No person may use his MRO symbol to get aluminum foil in controlled material form for wrapping any product except cheese (Liederkranz, Camembert, Erie, Bleu, and Roquefort only), yeast and suppositories. Any order for aluminum foil already placed for wrapping any other product must be cancelled.

(b) Note that processed foil (printed, laminated, embossed, etc.), is a Class B product and manufacturers of it must obtain their requirements of plain foil (controlled material) by filing Form CMP-4B with the War Production Board. They may not use their customers' or their own, MRO symbol to get plain foil. However, some processed foil sold for wrapping Army or Navy products will be treated as a Class A product, and the Army or Navy allots aluminum identified by the appropriate symbol.

(c) This direction does not forbid the use of the MRO rating (as distinguished from the MRO symbol used on an authorized controlled material order) to get processed foil.

Issued this 3d day of April 1945.

[fol. 2382] PLAINTIFF'S EXHIBIT 64

Title 32—National Defense

Chapter IX—Office of Production Management

Subchapter B—Priorities Division

Part 982—Mines

Maintenance, Repair, and Supplies

Amendment to Preference Rating Order No. P-56

(a) Section 982.1 (Preference Rating Order No. P-56) is hereby amended as follows:

(1) Paragraph (a)(2) is amended to read as follows:

"(a)(2) "Mine" means any plant actually engaged in the extraction by surface, open-pit or underground methods, or in the beneficiation, con ntration or preparation for shipment of the products of mining activity. It does not include that form of mining known as "gold placer mining."

(2) Paragraph (b) is amended to read as follows:

"(b) Certification of Mines.

(1) Domestic Mines. The agency designated by the Governor or other chief executive officer of each state, territory or possession of the United States shall furnish in duplicate to the Office of Production Management a certificate setting forth the names of the persons operating Mines within such state, territory or possession. The Office of Production Management will thereupon issue a Mine Serial Number, through such state agency, to each such person who may be approved by the Director of Priorities.

Any person aggrieved by failure or refusal of a state agency to certify him as a Mine Operator may apply in writing to the Director of Priorities for issuance of a Mine Serial Number. The Director of Priorities may thereupon take such action as he deems appropriate.

(2) Foreign Mines. The Director of Priorities may, in his discretion, issue a Mine Serial Number to a person operating a Mine outside the limits of the United States, its territories and possessions."

(3) Paragraph (e) is amended to read as follows:

"(e) Assignment of Preference Ratings. Subject to the terms of this Order, the following preference ratings are hereby assigned, but nothing herein contained shall prevent the use of any other or higher rating to which any person may be entitled by reason of any other Preference Rating Certificate or Order.

[fol. 2383] (1) A-1-a to deliveries to a Mine Operator of material essential for emergency repair of a Mine, as approved by the Office of Production Management pursuant to paragraph (e)(1).

(2) A-8 to deliveries to a Mine Operator of material required for emergency inventory or for operating supplies or for maintenance of a Mine.

(3) A-8 to deliveries to a Supplier.

(a) of material required by a Mine Operator for maintenance, emergency repair, emergency inventory or operating supplies of a Mine, and

(b) of material to be physically incorporated in other material so required by a Mine Operator."

(4) Paragraph (e)(2) is amended to read as follows:

"(e)(2) A Mine Operator or a Supplier, in order to apply the A-8 preference rating assigned by paragraph (e)(2) and (3), must endorse the following statement on the original and all copies of each purchase order or contract for material, the delivery of which is entitled to such preference rating:

"Purchase order for Materials for a Mine rated pursuant to Preference Rating Order P-56, Mine Serial No. . . . Rating A-8. This application of the rating is made pur-

suant to the terms and conditions of that Order, with which the undersigned is familiar.

—— ——, (Name of Mine Operator or Supplier),
By: —— ——, (Authorized Signature)"

Such purchase order or contract so endorsed shall be delivered to the seller of such material. Such endorsement shall constitute a certification to the Office of Production Management that the Mine Operator or Supplier is entitled to apply such rating to such delivery pursuant to this Order. Such purchase order or contract must be in writing and shall not include any material the delivery of which is not rated pursuant to this Order."

(5) Paragraph (n) is amended to read as follows:

"(n) Amendment of Prior Order. The provisions of Preference Rating Order P-22 shall not apply to deliveries to which a preference rating is assigned by this Order."

(b) This amendment shall take effect immediately. [fol. 2384] (P.D. Reg. 1, Aug. 27, 1941, 6 F.R. 4489; OPN Reg. 3, March 8, 1941, 6 F.R. 1596; E.O. 8629, Jan. 7, 1941, 6 F.R. 191; E.O. 8875, Aug. 28, 1941, 6 F.R. 4483; sec. 2(a), Public No. 671, 76th Congress, Third Session, as amended by Public No. 89, 77th Congress, First Session; sec. 9, Public No. 783, 76th Congress, Third Session.)

Issued this 22 day of September, 1941.

Donald M. Nelson, Director of Priorities.

Certified to be a true copy of original.

—— ——, Assistant Deputy Director.

[fol. 2385] PLAINTIFF'S EXHIBIT 67

Address before Training Group of the Priorities Field Service

By

Wilbur A. Nelson, PH.D., Administrator of Mine Priorities, Mining Division

Subject

THE MINING ORDER

November 10, 1941.

[fol. 2386] There has been considerable confusion in regard to the application of P-22 to mines. The order P-22 was amended several weeks ago and the amendment incorrectly stated that all mines were excepted from the order P-22. What should have been said was that they were excepted until they received a P-56 order. The P-22 order was amended and it now makes clear that mines, including placer mines, may utilize P-22 until they receive a serial number under order P-56. This procedure gives them an A-10 rating.

In addition, we tell a placer mine operator that if he is in dire need of any particular item he may send to our office a filled-in PD-1 form which we will expedite as promptly as possible, provided he is not asking for an unreasonable quantity of material. In other words, we wish to keep the mines going on a restricted basis and not to dislocate any more labor than it is necessary.

Placer mines are divided roughly into three types: 1. the regular placer who washes the gravel out of a streambed; 2. the hydraulic type of placer where they wash it out of the side of the mountain or hill under a heavy force of water through a nozzel and 3. the type where they impound water by building a dam across the stream of water, or float it around, or dredge the gravel and treat it, on this dredge itself, to recover the gold. Many of the people operating the latter two types of placers insist that they are not the type of placer mines we referred to in our restriction in order P-56. They are incorrect. We refer to all three types.

PLAINTIFF'S EXHIBIT 74

(P. 1438 A)

SEC-4
Rev. 1/30/42

WAR PRODUCTION BOARD
Division of Industry Operations

RECOMMENDATION FOR ACTION BY DIVISION OF INDUSTRY OPERATIONS
(Applicable to General or Special Order, or other Authorization but excluding Allocations made pursuant to an Order and Individual Preference Rating Certificate)

(If additional space is required, use reverse side)

A. Identification of New or Previous Related Order P-56
(Order Number)

B. Reasons for proposed Action (in sufficient detail to make understandable):

The definition of "Mining enterprise" formerly excluded any mine 50 percent or more of the production of which was in gold or silver. It has been urged that this language has had a bad psychological effect in the mining states. Elimination of the language will have no practical effect as no person can use the ratings assigned unless a serial number is assigned by the Director of Industry Operations, and gold and silver mines which produce no substantial quantities of critical materials have not been and will not be issued serial numbers.

FILED
MAR 10 1943

C. Action Recommended:

Issuance of attached amendment.

1/13 Nelson

The type of operator with which we have had the most trouble is the one who operates the dredge and who insists that he does not come under the provisions of P-56. But he *does* come under those provisions.

United States Senators from several western states and the Governor of one state have come to Washington to try to have the order changed. As far as I know there is no desire on the part of the Office of Production Management to change the order. We feel that we can take care of their needs where it is necessary through order P-22, or through a PD-1 in special cases. So much for the exceptions to the definition of the word "mine."

The broad term "mine" and the type of operations included under this term are as follows: Outside of the regular underground mines there are the open-pit operations. These operations are divided into two types:

[fol. 2387] PLAINTIFF'S EXHIBIT 71

War Production Board

February 18, 1942.

Office Memorandum

To: Mr. C. H. Matthiessen, Jr.

From: John P. Gregg.

Subject: P-56 and P-56-a.

These two orders are revisions of the existing "P" orders covering requirements for mining operations and manufacturers of mining machinery. The orders were discussed at length with Dr. Wilbur Nelson. The following objections were made to the orders as drafted:

1. The A-1-b for deliveries of essential machinery and equipment to mines and to the producers of mining machinery was objected to. This proposed rating will be applied upon specific request by the applicant for deliveries which he is unable to obtain under the blanket A-3, and will be subject to check by the administrator of mining orders, and by Review and Approval with concurrence or consulta-

tion with the ANMB. The ANMB representatives on the Committee refused to concur. The recommendations of the whole Committee were, first, that the order be drafted to provide that instead of A-1-b on such requirements, a rating should be permitted in such cases above A-3 but in no case higher than A-1-b, and second, that reconsideration be given to Schedule "A" with a view to drastic reduction in the number and type of machinery equipment and tools to which the higher rating should be applicable.

2. The provision with respect to prohibiting ratings for the purpose of reducing costs should include A-3 ratings as well as A-1-b ratings.

3. P-56 remains an open-end order as far as the A-8 ratings are concerned (not the quota form) and as far as the A-3 ratings are concerned, does not require the applicant to submit Form 25-a, but under paragraph (a)(3) merely requires the operator to communicate with the War Production Board describing machinery and equipment needed and the reasons why such machinery and equipment is necessary for the proper operation of the mining enterprise. A requirement for a report of this character should be covered in a form if it is found impossible to handle it through Form 25-a. The Committee pointed out that when this order was last considered and pursuant to directions from Mr. Knowlson, P-56 was to be placed under 25-a in so far as the comparatively small number of mining enterprises producing by far the major production of mines in the United States were concerned, and that this revised order does not accomplish this purpose.

[fol. 2388] 4. The Committee is of the view that the restrictions with respect to materials to be used in the mining of gold and silver are not sufficiently restrictive and that a limitation order should be drafted forthwith to stop production of gold and silver in the United States, appropriate consideration being given to the continuance of such production in Canada, Mexico, South Africa, and other areas now permitted to obtain materials and equipment from this country under Lend-Lease or direct purchase.

Mr. Gaddess of Civilian Supply was unwilling to pass upon the order, his division not having been consulted with respect thereto. The Labor Division indicated they had no desire to be consulted in this matter. The Production Division was not consulted, but certain producers of mining ma-

chinery such as Allis Chalmers are very large producers of turbines and other critical equipment needed by Navy, shipbuilding and essential power requirements. The Committee therefore felt that that Division should be consulted.

John P. Gregg.

[fol. 2389] PLAINTIFF'S EXHIBIT 72

War Production Board

Washington, D. C.

Mining Branch

March 16, 1942.

Memorandum

To: Mr. A. I. Anderson, Deputy Director, Materials Division.

From: Mr. Wilbur A. Nelson, Administrator of Mining Branch.

Subject: Meeting, Reno, Nevada, March 12, 1942. Meeting, Denver, Colorado, March 14, 1942.

The Reno, Nevada, meeting on March 12 was made a part of Secretary Ickes' meeting on his development program. It followed their presentation of their program. Discussion of Order P-56 started at 3:30 p. m. with five governors in attendance—Governor Carville of Nevada presiding, Governor Osborn of Arizona, Governor Carr of Colorado, Governor Maw of Utah, and Governor Clark of Idaho, with Mr. John M. Kelly, the State Geologist of New Mexico representing the Governor of New Mexico, and some mine operators from California stating that they represented the Governor of California.

Each Governor made about a thiry-minute general talk on the importance of his state. I spoke for about the same length of time on Order P-56, reviewing the history of mining priorities since the establishment of the Mining Branch on September 22, 1941. I explained in detail the Order as amended March second and made the statement that any mines producing amounts of copper, lead, or zinc needed in

our War Effort, irrespective of the amounts of gold or silver they might produce, would have their cases reconsidered and that priorities would be restored to them which would permit them to work on the same basis as mines not producing any gold or silver.

I also stated that where a siliceous ore was essential as a flux in a smelter operation and where it was proven that this smelter could not continue to produce the same amount of copper and lead without the siliceous ore, that such a mine, irrespective of the gold or silver it produced would continue to receive priorities under P-56 after each case had been reviewed on its merits. I also stated that mines not in the categories above mentioned which produced nothing but gold or silver would have to work under lower [fol. 2390] priorities such as were given in Order P-100, plus the use of PD-1A forms where any special items were needed on higher ratings. Where PD-1A forms were used I stated that if the items needed were not needed in our most important War Efforts that they would be given sympathetic consideration.

I also called attention to the fact that public utilities, newspapers, manufacturers, and railroads operated under an A-10 rating. The meeting adjourned for dinner and reconvened at eight o'clock p. m. and finally adjourned between 10:30 and 11:00 p. m.

Governor Maw of Utah stated that he had listened to my presentation and that as far as Utah was concerned they had nothing to worry about and were satisfied that the mines of Utah could continue to operate in a satisfactory manner.

Governor Clark of Idaho made similar statements.

Governor Osborn of Arizona felt the Order should be amended, but later on after the meeting was over, stated to me that he was certain they could get along all right.

Governor Carville of Nevada was emphatic in his statement that the Order should definitely be amended, as it would work a hardship on the mines in Nevada.

Governor Carr of Colorado was also emphatic in his statement that the Order would ruin the mining industry of the West, as at present drawn. Senator McCarran and Senator Bunker of Nevada, particularly the former, brought in the silver question and considered that this was a cir-

cuitous attack on the silver mines of the West, to help Secretary Morgenthau on his new silver policy.

Newspaper publicity in the Reno papers on the account of the meeting all played up the statements of the people opposing the Order, and barely mentioned the statements made by Governor Maw and Governor Clark. The editorial comments in the same papers, however, were of a satisfactory nature, stating that there seemed to be no doubt but that the matter could be handled without any trouble for the mines of the West.

The Denver meeting on March 14 was held in the House of Representatives at the State Capitol, Governor Carr presiding. Governor Carville of Nevada and Senator Pat McCarran were present. The other Governors who were present at the Reno meeting, who felt that the amended Order as interpreted by me would not hurt their mining industry, did not attend the Denver meeting. Governor Carr had representatives from the mining interests in the other three states speak to show how the mining industries of those [fol. 2391] states would be hurt.

The Denver meeting was more or less a repetition of the Reno meeting with the exception that Governor Carr had a program arranged and the entire meeting was taken up with prepared speeches by men who were informed they would be on the Program in advance.

Senator McCarran did not talk about Order P-56, but made a speech on the silver question.

The Denver meeting started at ten o'clock, adjourned for luncheon, and I attended the meeting until 3:30 in the afternoon, at which time I left for the train. The meeting lasted about ten minutes after I left, at which time it adjourned without taking any formal action. It is my understanding that the Colorado mining people, due to the influence of the Colorado Mining Association, have stated that probably they are going to send a delegation to Washington to request that this Order be amended.

The publicity in the Denver papers was all in accordance with Governor Carr's wishes, while the publicity in the Utah papers was all favorable to our interpretation of how Order P-56 would be operated.

Wilbur A. Nelson.

(Here follows 1 Photolithograph, side folio 2392)

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D. Review Committee Signature or Name of Person Cleared With	Date	Memo Attached
1. Army and Navy Munitions Board		☐
2. Division of Labor		☐
3. Division of Civilian Supply		☐
4. Division of Statistics		☐
5. Bureau of Industrial Conservation		☐
6. Division of Materials		☐
7. Division of Production		☐
8. Other (Specify)		☐

E. Drafting Committee (Implementation of Action) Signature	Date	Memo Attached
1. William D. Nelson Branch Chief	4/9/42	☐
2. Alexander Falconer Priorities Specialist		☐
3. Record in Federal Register [X] No. [ ] [illegible] Legal Expert	4/9/42	☐
4. M.F. Asst. Gen. Counsel (Div. Ind. Oper.)		☐
5. Division of Statistics (Prior. Section)		☐
6. Office of Procedural Consultant		☐
7. [illegible] & Approval Branch		☐
8. Chief or Deputy Chief of Bureau of Statistics		☐

Original - For Official Files

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GENERAL SERVICES ADMINISTRATION
NATIONAL ARCHIVES AND RECORDS SERVICE
Washington 25, D. C.

Three Centimeters

RG 179: Records of the War Production Board: Policy Documentation File.

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July 3, 1942.

Memorandum

Received, July 3, 1942. A. I. Henderson.

To: Mr. A. I. Henderson.

From: H. O. King.

Subject: Materials Division Circular #122; Loss of Production Due to Loss of Man Power.

1. The Tacoma Plant of the American Smelting and Refining Company report they will lose production of 2,000 tons of copper per month due to the loss of men. Approximately 200 have left already. There are two reasons for leaving,—one is higher wages in ship building and other defense plants on the Pacific Coast, and, secondly, wage disputes between the company and the union, which we believe have been referred to the War Labor Board.

2. The Butte operations of the Anaconda Copper Mining Company; this company is having difficulty maintaining a full working force and have transferred men from their zinc operations to their copper operations in order to maintain production. During the summer there is a great falling off,—many of the miners go into camps in the mountains for a month or two.

3. At the Kennecott Copper operations in Utah, namely, their mine at Bingham and the smelter at Garfield, difficulties are arising as far as maintaining a full working force is concerned. The same condition exists at the Morinci, Bisbee and Douglas operations of the Phelps-Dodge Company.

All of the copper producers anticipate increased difficulty in the future. We have heard reports of labor scouts working all through the West, employed by the airplane and ship building plants of the West, working through the mountain states offering higher wages and inducing men to leave the mines and go to the West Coast. This is a very serious situation and the indications are that it will be much more serious in the months to come. Anything that

can be done to keep the men where they are, and in fact bring other men into these mining camps, will help production.

H. O. King.

[fol. 2394] PLAINTIFF'S EXHIBIT 76

(Submitted by Services of Supply, War Department)

July 8, 1942.

Committee Program for Increasing Production in the Copper Mining Industry *

The growing productive capacity of the country's factories and the tremendous demands for ammunition have already exceeded the capacity to produce war-essential copper. There are now in operation copper smelters and refineries, brass foundries, rolling mills, and fabicating plants whose capacity to process copper and copper base alloys exceeds the capacity of the nation's copper mines plus the capacity of foreign mines available to us.

Planned increases in small arms ammunition plants have been held in abeyance because it seems improbable on the basis of present copper output that enough of this material to keep present facilities in operation can be made available. It is estimated that if small arms ammunition were produced next December at the optimum rate of the supply program these items *alone* would consume more copper than the country is expected to produce.

Since February of this year, the amount of copper allocated to mills to fill the orders of the Army and Navy has steadily fallen below the amount required for these orders; increasing from a net shortage of 9,000 tons in March to a net shortage of 23,000 tons in June.

The success of our armament program, consequently, is basically dependent on our ability to increase the produc-

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* Although the efforts of this Committee will be directed toward increasing the production of all types of critical non ferrous metals, special emphasis is placed herein on the copper mining industry, since the greatest stringency exists in the output of this metal.

tion of basic raw materials such as copper and other non-ferrous metals.

The basic factors preventing or seriously hampering the desired increase in output in the copper mining industry are out-migration of the present labor force to other war industries because of more attractive wages and working conditions, excessive labor turnover within the industry, low morale of workers, the tendency of miners to work a short week, the effects of Selective Service withdrawals, and the lack of an organized program of recruitment of workers for this industry. In some important districts of Utah, Idaho, and Montana, the replacement of miners has been virtually impossible. In Arizona, Montana, and Utah, production schedules have already been retarded as a result of labor stringency.

In the 50 or so establishments for which data were received by the Bureau of Employment Security in May, total employment actually decreased about 340, although more than 4,000 workers are known to have been hired in the 60 day period preceding the dates of the reports. In this [fol. 2395] period, withdrawals amounted to 13 per cent of total employment. On an industry-wide basis, there were approximately 11 withdrawals for every 10 hires. Reports indicate that there is an urgent need now in copper mines for 1,000 more workers, while the expansion of present mining facilities now in progress will require 3,000 additional. In addition, lead and zinc mines report a current shortage of 2,000 workers.

In short, in this industry which must expand rapidly to keep pace with the mounting demands of war production, the effective labor force is actually decreasing rather than increasing.

Immediate action is necessary to avoid a manpower crisis in the copper mine.

Realizing that a serious labor situation exists in the copper and other non-ferrous mines, the following recommendations for remedial action are proposed:

A. Responsibility of the War Manpower Commission

1. Recruitment of Additional Mine Labor

The existing facilities, funds and personnel of the U. S. Employment Service in the Mining areas are inadequate

because the Service has not been utilized in the past to any large extent by the mine operators, and hence, has not been able to build up an organization capable of meeting the current emergency. It will be necessary to expand the offices and personnel of the U.S.E.S. in the mining areas to carry out the following program:

a. To institute at once a concerted recruitment drive to obtain workers from outside areas, providing the necessary clearance centers and machinery.

b. To prevent the recruitment by other war industries of workers now living in the mining areas.

c. To carry out a program for the orderly transfer of workers in gold mines and other non-essential industries to the non-ferrous mines.

d. To explore the possibility of transferring unemployed iron miners and unemployed coal miners to the copper mining regions.

e. To explore the possibility of utilizing aliens and Mexicans in agricultural regions of the West in order to release additional workers for employment in these mines.

2. Selective Service Deferments for Mining Occupations.

a. A special list of mining occupations should be prepared indicating those categories for which deferments should be recommended.

b. Many miners have left the mines to take jobs in other war industries thinking that deferment in such industries may be more certain. This misapprehension should be clarified by proper publicity to the effect that miners who change occupations are less likely to secure deferment.

[fol. 2396] B. Responsibility of the War Production Board

1. Labor-management Production Drive Committees.

a. Maximum output of copper and other non-ferrous metals can be attained only through better morale and increased efficiency of the working forces coupled with the securing of their cooperation in all phases of the program outlined herein. Workers in the mines must fully understand the strategic importance of copper and other non-ferrous metals in the war effort. They must also feel a sense of participation in speeding the war production pro-

gram. For this reason the formation of labor-management production committees in the mines should be actively pushed by the War Production Drive.

b. The Materials Division in cooperation with the Labor Production Division, should impress upon the mine operators and the labor organizations the importance of cooperating with the labor-management committee program in an effort to raise worker morale and increase production.

2. Production of gold, with the exception of required amounts of essential silicious gold ores, should be curtailed by an order of the War Production Board to free labor which is urgently needed in the non-ferrous mines which are essential to the war effort. In special cases where smelter operations may be severely handicapped by lack of sufficient fluxing ores or diluents, it may be necessary to permit limited production of silicious gold-bearing ores.

3. The Materials Division should impress upon the mine operators the necessity of cooperating with the U. S. Employment Service and the War Manpower Commission in recruiting the additional manpower required.

C. Responsibility of the War Labor Board

Important labor relations problems are closely interwoven with the problems heretofore mentioned. Serious disputes over wages, hours and working conditions are presently threatening continued production in numerous places, affecting worker morale, and hampering orderly treatment of labor supply. Approximately 30 cases involving principally wages and union security, and covering approximately 50% of the industry and including substantially all the Idaho and Utah non-ferorus mining facilities, are presently before the War Labor Board, and a large number of additional cases in other areas, having approximated the breaking point, will probably soon be certified. Over 50 collective bargaining agreements in this industry are now up for renegotiation.

The solution of the wage issue is of primary importance. Further out-migration of workers from the mines can only be handled if proper consideration and treatment is given to the wage differential problem. One thing is obvious—the wage problem must be treated on a general as distinguished from a case by case basis. This can be done in

either of two ways: (a) by the War Labor Board assuming immediate jurisdiction of the remaining cases and treating such cases on a similar basis, or (b) by calling a stabiliza- [fol. 2397] tion conference. Decision as to which method should be used must be made immediately and the procedure adopted accelerated, tied in with other aspects of the program outlined herein. Because time will inevitably lapse before a complete solution of the wage problem is effected, and because the intervening period is of the utmost importance, some arrangement should be made now to apply wage adjustments retroactively.

D. Responsibility of the War Department, the Navy, and the Army and Navy Munitions Board

1. The Public Relations Branch of the Services of Supply should continue to cooperate with the various divisions of the War Production Board in a morale building program for the mines, sponsoring where necessary Army parades and demonstration, rallies, displays and other programs to make the mines "war conscious".

2. Liaison Officers of the Civilian Personnel Division, Services of Supply, should assist in securing employer, labor and community backing on the regional level for the program set forth above, and make reports to headquarters on its progress and development.

3. The Army, Navy and Maritime Commission, in cooperation with the War Manpower Commission, should use their influence to have their contractor desist from further recruitment of workers in the non-ferrous mining areas.

4. The Services and the Army and Navy Munitions Board should transmit to the other agencies of government mentioned such information and data as are necessary to the successful attainment of the objective set forth above. In addition, the Services and the Army and Navy Munitions Board should give formal endorsement and backing to the program outlined above.

[fol. 2398] PLAINTIFF'S EXHIBIT 77

Interdepartmental Committee on Non-Ferrous Metals
Meeting August 18, 1942

H. O. King, Chairman

The following were present:

Mr. H. O. King, Chairman, War Production Board.
Mr. Allen Buchanan, War Production Board.
Lieutenant Hetzel, War Production Board.
Mr. James Newman, War Production Board.
General McSherry, War Manpower Commission.
Mr. Wm. H. McPherson, War Manpower Commission.
Mr. Frederick H. Harbison, Services of Supply, U. S. Army.
Captain Long, Service of Supply, U. S. Army.
Robert Abelow, War Labor Board.
Major Coons, Selective Service.

By invitation:

Dean Lloyd K. Garrison; Mr. Almon Roth, and Mr. A. E. Stevenson, of the War Labor Board.

Mr. King opened the meeting and reported that the available supply of copper on a basis of all-out production was far below the amount necessary to meet total requirements for military and essential civilian purposes, and that further loss of production due to a shortage of manpower would greatly aggravate this critical shortage. Mr. King also explained that a critical shortage existed in [fol. 2399] high grade zinc. Reports on the labor situation and requirements for 1942 indicated a shortage of approximately 6,000 men in copper, zinc and lead mining and milling operations. Less than 60,000 men are presently employed in these operations.

Mr. King distributed to the members of the committee a statement of the loss of production of copper in July as compared with June, which showed a reduction of about 6,000 tons. Two tables indicating present employment and additional labor requirements by properties and a summary showing this shortage by states were also submitted to the committee. A set of six tables on the employment and production effected by labor cases now before the War Labor

Board was also distributed to the committee. A general discussion followed and particular inquiries on the significance of this information were made by members of the War Labor Board Panel.

It was brought out that while the present shortage of 6,000 workers (10 percent of the present employment in mines and mills) was small in comparison with the total manpower engaged in war production, nevertheless the effects of this shortage and the resultant decline in output of base metals from mines would be magnified one hundredfold in terms of future reductions in the output of ammunition, planes, tanks and other war material.

The meeting then turned to a discussion of the particular measures that could be taken to alleviate this manpower shortage.

It was agreed that a set of four letters would be prepared, addressed to the mine workers in the non-ferrous fields, and signed by Mr. Donald M. Nelson, Paul V. McNutt, General Hershey and Wm. H. Davis. These letters would emphasize the importance of miners to the whole war program and critical effects of any loss of production in this field and they would also describe what each [fol. 2400] of the governmental agencies involved was doing to keep the men on their jobs and to provide the additional workers required. It was agreed that the War Production Board would distribute copies of these letters to all the operators and to the labor unions involved. General McSherry was to send copies of these letters to the mayors of communities in the mining areas and Selective Service would distribute the letters to the various local and state draft boards in mining regions.

Before proceeding to a consideration of actions which might be taken, Mr. King raised the question of publicity and press releases on the work of the committee. It was agreed that the discussions of the committee were to be considered as secret and confidential and no representative on the committee should make any statement to the press as to actions taken or contemplated by the committee unless it was specifically agreed, as in the case of the letters mentioned above, to give out such information.

Mr. King then introduced the question of the issuance of a gold curtailment order, and distributed to the members of the committee a statement by Dr. Wilbur Nelson of the

Mining Branch, W.P.B. on the subject. The matter was discussed at some length and it was the sense of the meeting that no time should be lost in taking effective action to curtail nonessential gold mining operations and that along with this action steps should be taken by the United States Employment Service, in cooperation with mine operators, to see that miners released from gold mining operations are made available for employment in base metal mining.

General McSherry explained the procedure for companies to follow in using the United States Employment Service to meet their labor shortages. He stated he would draft a letter outlining this procedure so that the committee [fol. 2401] could distribute it to all interested parties. It was suggested that Mr. King write all producers recommending that they use the facilities of the United States Employment Service in procuring workers to meet shortages.

Major Coons outlined the procedure for obtaining deferments and agreed to send to the committee an outline of this procedure for distribution to the companies involved.

General McSherry and Mr. Harbison outlined certain measures which are being considered by the Army, Navy and Maritime Commission to prevent the recruiting of miners for Army and Navy construction projects in the mining areas. General McSherry agreed to report to the Committee the result of conferences he expected to have looking to definite action in this regard.

Mr. Harbison reported on the activities and program of the Labor Morale Division of the War Department and submitted a photostatic copy of the material to be used by them in conjunction with the Production Drive of the War Production Board.

Dean Garrison asked if it would be proper for him to attend future meetings of the committee so as to keep informed of the various actions taken by the committee as it related to the questions before them.

Major Coons reported that Selective Service had certain data on the question of recruitments in all these mining districts and the employees who had volunteered for service and stated he would make such material available.

It was agreed to hold meetings regularly on Tuesdays, at 2:00 P. M. The next meeting will be held on Tuesday, August 25.

[fol. 2402] PLAINTIFF'S EXHIBIT 79

Meeting XXX

September 1, 1942

Present: Board Members, Alternates and Staff

Mr. Donald M. Nelson, Chairman.

Vice President Henry A. Wallace, Chairman, Board of Economic Warfare.

Mr. Robert P. Patterson, Under Secretary of War, acting for Mr. Henry L. Stimson, Secretary of War.

Rear Adm. S. M. Robinson, Chief of the Office of Procurement and Material, Navy Department, acting for Mr. Frank Knox, Secretary of the Navy.

Mr. Jesse H. Jones, Secretary of Commerce.

Lt. Gen. William S. Knudsen, Director of Production, War Department.

Mr. Isador Lubin, acting for Mr. Harry L. Hopkins, Special Assistant to the President supervising the Defense Aid Program.

Mr. Donald Wallace, acting for Mr. Leon Henderson, Administrator, Office of Price Administration. (For discussion of a portion of Item 1.)

Mr. John Lord O'Brian, General Counsel, War Production Board.

Mr. William L. Batt, Vice Chairman, War Production Board.

Mr. G. Lyle Belsley, Executive Secretary, War Production Board.

By Invitation

Mr. Ralph A. Bard, Assistant Secretary of the Navy.

Mr. Ferdinand Eberstadt, Chairman, Army and Navy Munitions Board.

Mr. Will Clayton, Special Assistant to the Secretary of Commerce.

Mr. A. I. Henderson, Deputy Director General for Indus-

try Operations, War Production Board. (For discussion of Item 1.)

Mr. Wendell Lund, Director, Labor Production Division, War Production Board. (For discussion of Item 1.)

Mr. Stacy May, Director of Statistics, War Production Board. (For discussion of a portion of Item 1 through Item 4.)

Mr. H. O. King, Chief, Copper Branch, Industry Operations, War Production Board. (For discussion of Item 1.)

Mr. Allan Buchanan, Chief, Non-Ferrous Metals Section, Industry Branch Consultant Service, War Production Board. (For discussion of Item 1.)

Mr. Samuel Lipkowitz, Labor Consultant, Non-Ferrous Metals Section, Industry Branch Consultant Service, War Production Board. (For discusion of Item 1.)

1. Labor Supply for Copper, Lead, and Zinc Industries

The Chairman stated that since the labor supply in the copper industry had reached a critical stage and already had resulted in a decline in the production of copper, he had asked the Labor Production Division and the Copper Branch to report to the Board on the manpower problem in the non-ferrous metals industries (Doc. 135).

Mr. King reported that 6,000 miners have been lost by the [fol. 2403] copper, lead, and zinc mines to other industries during the past several months and that the shortage of labor will become increasingly acute next year when new facilities will require 2,000 additional miners. Preliminary reports indicate a shortage of 2,100 workers in smelters and refineries. Mr. King pointed out that the loss of 5 or 6 thousand workers at the copper mines might so influence the subsequent fabricating processes that 100 thousand workers in war plants at the end product stage would be affected. Although monthly production of copper increased steadily from early 1941 to a peak of 95,000 tons in May and June 1942, output in July dropped 5,000 tons to 90,000. The copper outlook is even more critical than shown by the drop in production, since at many mines labor is being transferred from developmental and stripping operations, necessary to provide for future production, to current ore extraction. The position of the smelters and refineries is exemplified by a smelter at Tacoma where output of 2,000

tons of copper per month is being lost for lack of only 300 unskilled common laborers. Mr. King emphasized that production at the mines, smelters and refineries will continue to fall unless the exodus of labor is checked and the supply of workers augmented. Output of lead and zinc likewise declined in July, and the labor-production situation in these metals is similar to that in the copper industry.

Mr. Lund pointed out that there is general agreement that the higher wages paid to workers in competing occupations in other industries are the prime factor causing the out-migration of labor from the mines and mills. Average weekly earnings in April of 37.28 dollars for mine workers and 35.18 dollars for smelting and refining workers compared with an average of 53.30 dollars in shipbuilding and 45.94 dollars in aircraft, the principal competing industries. Corollary factors in the out-migration of workers have been rumors of ceilings on wages and proposals to confine workers to their present jobs, the hazards of mining, and inadequate housing and transportation facilities.

Mr. Lund pointed out that the decision of the War Labor Board, expected within a month on 30 or 40 cases involving higher wages for copper miners, will have an extremely important bearing on the out-migration problem.

Mr. King reported that following a resolution of the War Production Board (See WPB Minutes, March 3, 1942, Item 7), labor-management committees were established in the metal mining areas and the importance of having mine workers stay at their jobs was publicized. On June 13, 1942 the Chairman of the War Production Board formally launched the War Production Drive in the non-ferrous metals industries by a radio address to the miners at Butte, Montana.

As further steps in halting out-migration, the Inter-Departmental Committee on Non-Ferrous Metals was established on August 11 and various letters and literature have been prepared for distribution to mine operators and labor unions; an order has been prepared to prohibit the use of materials in non-essential gold mines, which may free about 8,000 workers; plans to prevent employment of miners on Army and Navy construction projects are being considered; and training programs are being introduced into mining properties. To increase the efficiency of present working forces, mine equipment is being accorded high priority

ratings, and labor is being trained and up-graded by improving working and living conditions, and by lowering age and other restrictions on hiring. Mr. Lund observed that in many cases labor standards have shown no change from those existing in normal times when a surplus of labor is available. He suggested that the pooled employment interviews which the War Manpower Commission is now conducting in some parts of the country should be pursued with increasing vigor.

Mr. Lubin inquired if the order to prohibit the use of materials in non-essential gold mines had actually been issued and, if not, what steps are being taken toward its issuance. Mr. King replied that a first problem is to define a non-essential gold mine since gold is frequently found in association with other metals and it is necessary to avoid denying materials to mines that produce important quantities of critical metals jointly with gold. It is hoped that an appropriate definition can be developed very shortly and an order issued promptly thereafter.

At this point, Mr. Stacy May entered the meeting.

The Chairman remarked that since other uses have been cut to a minimum, the major use of copper is in munitions, especially small arms ammunition, and any reduction in the copper supply will be reflected in a reduced output of ammunition. He expressed the belief that the War Production Board must take an active and leading role in assuring an adequate supply of copper and Mr. Lubin added the suggestion that the concern of the War Production Board in this problem is sufficiently great to establish its own employment offices, if this is necessary to obtain additional copper miners.

At this point, Mr. Donald Wallace entered the meeting.

After further discussion it was agreed that:

Inadequate production of copper, lead, and zinc will result inevitably in reduced output of munitions, including small arms ammunition needed by the fighting forces. The output of these metals is now being reduced by a shortage of manpower in mines, smelters and refineries.

The War Production Board is charged with the primary responsibility for providing the maximum possible production of critical metals, but the solution of the problem of assuring a sufficient supply of labor involves the responsibilities of other agencies of the Government as well. The

coordination of the efforts and activities of other agencies of the Government with those of the War Production Board [fol. 2404] is needed, therefore, to ensure an adequate supply of critical metals.

The War Production Board urges all agencies involved to promote and support such actions as may be necessary to provide to non-ferrous mines, smelters, and refineries a supply of labor adequate for the maximum possible output of such metals. It is especially important that the facilities of the United States Employment Service be expanded and strengthened to meet this particular need.

At this point, Messrs. A. I. Henderson, Lund, King, Buchanan, Lipkowitz, and Donald Wallace left the meeting.

2. Rationing of Fuel Oil

The Chairman reported that pursuant to the action of the War Production Board (See WPB Minutes, August 18, 1942, Item 2), he had designated the Petroleum Coordinator for War, the Administrator of the Office of Price Administration, and the Under Secretary of War as members of the Committee to consider the problem of the shortage of fuel oil in District No. I. He was submitting now the findings of this Committee to the Board so that the members might discuss the actions taken and express any agreement or disagreement with them. He stated that it was the unanimous conclusion of the Committee that the consumption of fuel oil in District No. I and, to some extent at least, in District II must be curtailed, probably by not less that 25 percent.

The Petroleum Coordinator for War had favored the issuance of a limitation order as the best method of achieving this objective, believing that the competitive relationships of fuel oil distributors should be maintained unchanged and that it should be made impossible for dealers to assume responsibility for supplying new customers. The Committee, however, reaffirmed the previously stated policy of the War Production Board that the adoption of any curtailment program should not be based on an effort to crystallize the competitive business structure (See WPB Minutes, July 14, 1942, Item 4). The Administrator of the Office of Price Administration had advocated a coupon rationing plan, and the Committee determined that such a plan should be adopted to limit consumption of fuel oil to the available supply.

Extension of the rationing area beyond District No. I was approved by the Committee in view of the inventories in District No. II which were sufficiently large to permit withdrawals for tank-car delivery to the East with greater economy of turn-around time than if an equal quantity of oil were moved there from the West or Southwest. The imposition of fuel oil rationing upon the Mid-West may come as a shock to residents of that area, but is necessitated by the extremely critical fuel oil situation. If a severe winter ensues, it may be necessary to curtail fuel oil consumption by 35 percent.

Mr. Patterson stated that while consumers have accepted the prospect for rationing fuel oil in District No. I, the need for extending rationing into District No. II should be carefullly explained to the population of that area. He expressed the belief, which was concurred in by all members of the Board, that the Office of the Petroleum Coordinator for War should issue appropriate information clearly showing that unless the Mid-West shared in the rationing program, consumption of fuel oil in the Eastern Area would have to be curtailed below a minimum required for maintenance of health and workers' efficiency.

To Mr. Jones' inquiry whether this decision extended the rationing of gasoline to the Mid-West, the Chairman replied that it involved only the rationing of fuel oil in Districts Nos. I and II, and that determination of the need for extension of gasoline rationing beyond the present rationing area would await the report of the Baruch Committee.

The Chairman stated that announcement of the rationing program at the earliest possible moment was advisable to permit the populations of Districts Nos. I and II to make appropriate arrangements promptly. Owners of about 18 percent of present oil burners have retained the grates, doors and other parts from the earlier conversion to oil burning equipment and can reconvert to coal consumption without additional materials. It may be more difficult to serve these home-owners with coal after the cold weather sets in than now.

The Petroleum Coordinator for War believed strongly that conversion of furnaces from oil to coal should be stimulated by announcing promptly that oil would be denied those who could convert but failed to do so. The Committee felt that such action was too drastic and preferred to in-

form those who could convert that although they would receive a basic ration of fuel oil, supplemental rations would be denied them because they had failed to convert.

After further discussion it was agreed that:

The action of the Committee designated by the Chairman of the War Production Board to select a plan for curtailing consumption of fuel oil in the East Coast Area is approved, that a coupon rationing system be instituted in District No. I and in such part of District No. II as is deemed advisable which will limit the distribution of fuel oil in the rationed area to the available supply, and that the Office of the Petroleum Coordinator for War shall issue promptly appropriate announcements and information to explain to the population of the proposed extended rationing area the need for the curtailment of fuel oil distribution.

3. Anti-Trust Actions

The Chairman referred to the increasing difficulty of obtaining the best men available for service with the War Production Board because of certain activities of the Anti-Trust Division of the Department of Justice. He said that recently there had been several instances in which men had declined to come with the Board because they feared they [fol. 2405] would be wrongly subjected to attack by the members of the staff of the Department of Justice. He said that he, himself, had no recommendation to make, but he would like the members of the War Production Board to think over the matter in the hope that some helpful suggestions might result which would obviate these difficulties.

4. Visits of War Production Board Officials to Army Camps

The Chairman called attention to a letter received *from* Under Secretary of War Patterson dated August 19, 1942, in which members of the Board and its key personnel were invited to visit certain Army camps to inspect the equipment being used in the cantonments and for training purposes. He suggested that any members of the Board wishing to take advantage of this offer should let him know as soon as possible so appropriate arrangments can be made.

G. Lyle Belsley, Executive Secretary.

Approved: D. M. Nelson, Chairman.

[fol. 2406] PLAINTIFF'S EXHIBIT 82

Interdepartmental Committee on Non-Ferrous Metals
Meeting September 15, 1942

H. O. King, Chairman

Wilbur A. Nelson, Special Assistant to Director General of Operations, War Production Board.

Russell W. Nauman, Services of Supply, U. S. Army.

James Newman, Planning Committee, War Production Board.

Lt. A. C. Wolf, Army & Navy Munitions Board.

C. G. Holmquist, Office of Price Administration.

John D. Sumner, Office of Price Administration.

W. H. McPherson, War Manpower Commission.

R. B. Coons, Selective Service.

Frederick Harbison, Services of Supply, U. S. Army.

Richard A. Lester, Alternate for Gen. McSherry, War Manpower Commission.

Walter C. Page, Zinc Branch, War Production Board.

R. J. Lund, Miscellaneous Minerals Branch, War Production Board.

C. A. Wright, Lead-Tin Branch, War Production Board.

E. Vogelsang, Lead Branch, War Production Board.

Marcellus H. Stow, Mining Branch, War Production Board.

Henry Gaskin, Labor Production Division, War Production Board.

Samuel Lipkowitz, Labor Production Division, War Production Board.

Joseph Tufts, Housing & Transportation Section, War Manpower Commission.

F. D. Cannon, Copper Branch, War Production Board.

Lousi Lister, Labor Production Division, War Production Board.

Bela Low, Labor Production Division, War Production Board.

William J. Hoff, Legal Division, WPB.

Mr. Harry King was absent due to illness and Dr. Wilbur Nelson acted as chairman.

Dr. M. Stow presented a report on the proposed order to curtail gold mining operations. He distributed a copy of

the proposed order which, he said, had been brought up for consideration before the Clearance Committee.

[fol. 2407] Dr. Stow explained that the persons responsible for drafting the order favored the method of curtailing gold mines by denying them serial numbers under P-56, rather than the type of blanket order which would shut down any gold mine whose gold ore production was above a stipulated proportion of its total production by dollar value. Under the former type of order the gold mines would be closed by being denied serial numbers under P-56, as a result of which they would be unable to obtain either supplies or equipment and would be prohibited from using their present supplies and equipment.

Mr. Harbison expressed some concern over the delay in issuing the gold order. He outlined the steps that various agencies had taken to meet the manpower shortage in nonferrous metal mines, and pointed out that the transfer of gold miners to essential mining was being held up by the lack of a gold curtailment order. He pointed out that the U. S. Employment Service had been unable to obtain many recruits at Rapid City, South Dakota, because the gold mines had not been closed down, although Anaconda Copper Mining Company had agreed to pay transportation costs. He made it clear that the War Department was impatient at the delay.

Mr. Lester of the War Manpower Commission asked that his organization be kept informed of which mines would be affected by the directive, in order that representatives of the Employment Service might be on the spot beforehand.

In this connection, since the primary purpose of the order was to free manpower rather than to curtail materials, Mr. Lipkowitz suggested that an advisory committee be established with representatives from Labor Production Division and War Manpower Commission. The func-

[fol. 2408] tions of the committee were designated as follows: (1) to review the extension of serial numbers to gold mines, in order to close as many of them as possible for the purpose of freeing the maximum number of men, and (2) to recommend the establishment of machinery for transferring gold miners. Dr. Nelson, and the other members of the committee, agreed to this suggestion and the committee created a sub-committee of six members; one from War Manpower Commission to be designated by General

McSherry; one from Labor Production Division to be designated by Wendell Lund; one each from the Copper Branch; one to represent both the Lead and Zinc branches; one from the various Ferro-Alloys Branches, and one from the Mining Branch. The first meeting of this sub-committee was called for Wednesday, September 16, at 10 o'clock.

It was suggested that even if the gold miners were not directly transferred to other essential mines, they still would be serving a more useful function in the aircraft or shipbuilding industries than they would in gold mining.

Mr. Joseph Tufts, of the War Manpower Commission, then outlined the steps that could be taken to meet housing and transportation problems in mining areas. He distributed a statement summarizing the machinery that was being set up to secure adequate housing at mining camps. (See Exhibit A). A copy of this statement is attached hereto.

He then asked the committee members whether they could supply him with any data on specific housing shortages. It was agreed that the committee would advise him of any situation that required action. Mr. Tufts indicated [fol. 2409] that he was attempting to establish a working crew composed of one representative from the National Housing Agency, one from the War Manpower Commission, and one from War Production Board, who would be empowered to give AA-3 ratings. This crew would go into the field with authority to allocate between 10,000 and 15,000 dwelling units. National Housing Agency, however, had not yet replied to his proposal. Mr. Tufts indicated that he would have a report at a future meeting on the progress he had made in establishing a working crew.

Mr. Bela Low, who had recently returned from a trip to mining properties in Utah, Nevada, Arizona, and New Mexico, then reported on his observations concerning the labor supply problem. He and Mr. George Holderer of the Copper Branch had embarked on this field trip in order to investigate the possibility of increasing the production of copper, lead and zinc, and to establish labor management committees. However, upon reaching these states, they found that due to the shortage of labor, the problem rather was to keep production from declining further. The underground mines, he indicated, had been much more severely affected by the shortage of labor than the open pits.

In order to overcome this shortage of labor, some of the mines had embarked on a training program. As a result of having hired untrained men, labor productivity had decreased from fifteen to twenty percent this summer. A sixty to seventy percent turnover of the working force every three months was not at all unusual.

[fol. 2410] Dr. Nelson reported that the several metals branches had given the following estimates concerning the affect of labor shortage upon production. If adequate labor were available, the output of copper could be increased by 6 to 10%, that of lead by 10%, that of zinc by 20%, that of magnesite by 20%, that of tungsten by 20%, that of molybdenum by 25%, that of manganese by 30%, that of fluorspar by 20%. He also indicated that there would be a precipitous drop in production early in 1943, because of the curtailment of development and exploration work.

Problems concerning draft deferment were discussed next. One concerned the recent order by the head of the Selective Service System requiring the local draft boards to reclassify mine workers who had been given occupational deferments. Major Coon explained that this applied only to those employees who otherwise would have been eligible for induction. Another problem concerned the question of reducing the induction quota in areas where a great proportion of the residents are engaged in mining or smelting industries. This problem had arisen in Carteret, New Jersey where most of the inhabitants are engaged in smelting and refining activities. Major Coon agreed to look into that specific situation and to report at a subsequent meeting.

Difficulties over the interpretation of the employment stabilization order came up for discussion. It was reported that in several areas the employment service was faced with the problem of ascertaining which of the non-ferrous metals are included under its terms, since they were not sure whether it included all of them, or whether non-metallic minerals were included. An additional problem of this nature was whether the order applied to both primary [fol. 2411] and secondary refining establishments or whether it was restricted only to the first type. Representatives of the War Manpower Commission agreed to

obtain some clarification and to report at a subsequent meeting.

Mr. Harbison expressed his belief that the Employment Service officers in Regions X, XI, and XII, should be supplied with a uniform policy concerning the extension or denial of certificates of separation. He urged the necessity of supplying mining areas with uniform statements concerning the policy which was being followed. He considered it advisable to present the employees with statements concerning the necessity of the stabilization order to bolster their morale. He suggested that the Morale Section, and the Services of Supply of the War Department, the Mining Branches, the Labor Production Division of the War Manpower Commission draw up a statement explaining the procedure, and that this be distributed to the miners.

On the problem of releasing miners from the Army for work in the mines, Mr. Harbison indicated that the War Department was unequivocally opposed in principle to any such measure.

The meeting was then adjourned. The next meeting was called for Tuesday, September 22, at 2 P. M.

[fol. 2412] PLAINTIFF'S EXHIBIT 83

Policy Doc. File Log No. 607 Class No.

September 17, 1942.

Received, Sep. 18, 1942.

Memorandum

To: Dr. M. H. Stow

From: J. M. Scribner

Subject: Gold Limitation Order

Acting in accordance with instructions received from Mr. Donald Nelson's office this morning, please be advised that the gold order is to be cleared with all of the branches involved as promptly as possible, but it is not to be presented to the Clearance Committee for clearance until further word is received from Mr. Nelson's office.

The order is to be held in the branch in such shape that it may be presented to the Clearance Committee for action immediately upon advice from Mr. Nelson's office that it is to go through.

cc: D. M. Nelson, A. I. Henderson, Dr. W. A. Nelson, James Cooley, Kenneth Berkey, Churchill J. Owen.

[fol. 2413] PLAINTIFF'S EXHIBIT 87

September 25, 1942.

Memorandum

To: Mr. A. I. Henderson

From: W. L. Batt

I have told the Chairman that my judgment is that the limitation order on gold mining should be released at the appropriate time, and he has agreed. It was the concensus of opinion that we should wait until the War Labor Board had acted on certain wage matters, and I shall expect to be advised when the situation is clear on this point.

It seems to me imperative that we very carefully word our press release so that the predominant objective, namely of releasing less essential labor for more essential requirements, shall be clearly evident. And I particularly direct the attention of those who have to do with this matter at this point.

It is also important that General McSherry be notified several days in advance in order that he may take such steps as he outlined.

I shall advise Senator Gurney a day or so in advance so that he learns it from us and not in the newspapers. Please see that I am protected on this point.

Copy to: Mr. J. M. Scribner, Dr. Wilbur Nelson, Mr. Steve Fitzgerald.

[fol. 2414] PLAINTIFF'S EXHIBIT 88

War Production Board

Interbranch Meeting of Branches Concerned with Mineral Production

Monday, September 28, 1942. 9 A.M.

Present:

Mica-Graphite, M. H. Billings, S. A. Montague, H. F. Wierum, E. H. Dawson.
Mining, M. H. Stow, J. J. McCabe
Copper, Frank Ayer, F. H. Hayes.
Tin-Lead, C. A. Wright.
Zinc, G. C. Heikes, W. C. Page.
Ferro-Alloys, E. F. Hatch, Miles K. Smith, O. N. Rove.
Misc. Minerals, J. S. Macgregor, R. J. Lund.
Office of Deputy, Director General Wilbur A. Nelson.
Presiding: Wilbur A. Nelson.

Resolution on the Gold Mining Limitation Order Mr. Nelson opened the meeting with the announcement that the Joint Resolution adopted by this group last Friday, September 25, was turned down by Mr. William Batt. The Resolution reads as follows:

Resolved that before the Gold Mining Limitation Order L-208 is sent to clearance that:

1. Representatives of the gold mining companies be called to Washington immediately to confer with Government officials on the gold order so that:

A. Where possible, existing organizations may be utilized for important mining operations, or prospective operations, necessary in the war effort.

B. Labor, and especially experienced miners, can be made available to the mining industry, rather than lost to vital metal production.

The above resolution was extensively discussed by the group. It was the consensus of opinion that by calling together the leaders of the large gold mining companies, we could ask them to work as a unit, both management and miners, to produce strategic metals so necessary to the war

effort. We want to give management a chance to talk to the workers and ask them to cooperate and work systematically as one unit. We want to point out to the men that we feel that gold mining will come back after the war, and that by sticking together now they will be able to have their jobs back after this war is over.

Mr. Nelson advised that Mr. Batt was of the opinion that the Gold Mining Limitation Order was primarily a War Labor Board problem and they were handling it. Also, Mr. Batt said that he would not issue the Limitation Order to close down the gold mines, until the matter of a wage increase for miner's was decided. The decision on the wage increase is expected in a few days. The Order, now under consideration, allows the mines 30 days to shut down.

General McSherry, at last Saturday's meeting, said that the machinery was already set up so that the gold miners would go over and work the mines producing strategic metals. The U. S. Employment Service will have their men at the gold mines the day the mine is scheduled to shut down. The ship yards, and all Government projects were forbidden to hire gold miners. In this way, General McSherry felt, the gold miners would go to work in other mines. Mr. Nelson pointed out that the nearest cities to the largest gold mines were Des Moines and Kansas City. [fol. 2415] Mr. Miles K. Smith advised that so many Climax Molybdenum Company miners were employed by the contractors erecting the ski line for the U. S. Army at Panda, Colorado, that Climax complained to the WPB saying that these miners were needed to produce strategic metals. We complained to the ANMB and ANMB issued an order forbidding the contractors from hiring miners. Yet, even after this oder was issued by the ANMB, since September 1st, ten Climax miners whose identity are known, were hired by these contractors, and the chances are many other Climax miners were hired for this work.

It was the consensus of opinion of the group that they should have a hearing with Mr. William Batt on the Resolution adopted Friday, September 25th.

It was suggested that everyone have a list of the properties he would like to have worked by gold miners.

Freeze Order—Mr. Nelson said that he was advised by Mr.

Adams of the United Mine Workers that the "freeze order" was not very effective. Mr. Adams said that if a miner wanted to change over into another industry all he had to do was change his name.

Discrimination—Mr. Adams of the UMW charged that the Mining Branch was discriminating against one shift mines, and the matter would be brought up on the floor of the UMW's Convention next week. Mr. Nelson said that that was not so, and that materials are allocated to the mines according to their production records. Mr. Nelson will write a letter to that effect, and Mr. Adams feels that this will close the matter.

Draft Boards—It was brought out at the meeting that recently some experienced copper wheel casters in the New Jersey area were drafted. Their Local Draft Board was not informed that the plant was a 100% essential war plant.

It was suggested that we write a memorandum to the King committee stating that this group is unanimously in favor of having them appoint field men to inform the Local Draft Boards and State Boards that mining districts, smelters, refiners of non-ferrous metals are 100% essential war plants.

The meeting was adjourned at 10:10 A.M. until Friday, October 2nd, at 9 A.M.

[fol. 2416] PLAINTIFF'S EXHIBIT 89

1445

War Production Board

Class No. 2934

Interbranch Meeting of Branches Concerned With Mineral Production

Friday, October 2, 1942. 9 A.M.

Present:

Tin-Lead, Erwin Vogelsang, C. A. Wright.
Zinc, George C. Heikes, W. C. Page.
Copper, Frank A. Ayer, Frank H. Hayes.
Ferro-Alloys, Olaf N. Rove.
Misc. Minerals, J. S. Macgregor, R. J. Lund.
Mining, L. W. Hildreth, F. S. Miller.
Cork-Asbestos, W. T. Meloy.
Presiding: George C. Heikes.

Mexican Labor. Mr. Ayer suggested that since the lack of labor in the southwestern area is holding up copper production Mr. Nelson vigorously follow up the possibility of getting some 4,000 to 5,000 miners and laborers from Mexico. Mr. Ayer pointed out that yesterday General McSherry stated arrangements had been completed for recruiting 3,000 Mexican laborers from Mexico for the California farms, and that if this can be done it should be possible to get labor for the copper mines. He mentioned that these Mexican laborers would be easily assimilated in the border states since there are so many Mexicans there now. Most of the Mexicans in the southwest are American citizens.

Gold Miners. Mr. Heikes discussed yesterday's gold miners meeting and mentioned that some of the operators expressed their pleasure that a meeting had been called. Some expressed a willingness to move their workmen as a unit to other mines. Other gold mine operators were not as optimistic as to this possibility. One gold mine at Grass Valley, California, closed down and out of 267 men, were able to transfer 20 men to a copper mine operated by the company 350 miles away.

A survey was made of all gold mining states. In a total of 19 states where there are gold mines there were only 2,020 deep mine workers, and 700 dredge workers who would be released if the gold mines were shut down, of these only 696 were miners and muckers.

We came to the conclusion that there would be only 700 miners with no assurance that they would go to other mines.

Gold mine operators present at the meeting represented approximately 75% of the industry according to the tonnage of ore hoisted or treated.

National Service Act. Mr. Frank H. Hayes made a motion, which was seconded by Mr. Frank A. Ayer, and unanimously adopted, that a resolution be sent to the top authorities of the W.P.B. advising that this group is unanimously in favor of a National Service Act that will control manpower in all industries for the duration of the War.

Resolutions. It was the unanimous opinion of the group that each resolution adopted at these meetings be presented by Mr. Wilbur A. Nelson as a separate communication or memorandum to the higher officials in the W.P.B.

[fol. 2417] "*Freeze Order*". Mr. R. J. Lund made a motion, seconded by Mr. J. S. Macgregor and unanimously adopted, that a resolution be sent to General McSherry requesting that steatite talc, kyanite, and spodumene be added to the list of critical minerals to be covered by the labor "freeze order". An amendment is being drawn up by Mr. Lester adding mica, fluorspar, magnesite, tantalum and graphite. (See Minutes of 9/18/42).

Block Leasing. Mr. Heikes advised that he attended a meeting at Internal Revenue office. This office agreed to hold off the collection of certain taxes. An effort will be made to have state legislation altered in regard to block leasing as said legislation is impeding the discovery of new ore deposits.

The meeting was adjourned at 10 A.M. until Monday, October 5, 1942, at 9 A.M.

[fol. 2418] PLAINTIFF'S EXHIBIT 92

Minutes of War Production Board

Meeting XXXIV

October 6, 1942.

Present: Board Members, Alternates and Staff

Mr. Donald M. Nelson, Chairman.

Vice President Henry A. Wallace, Chairman, Board of Economic Warfare.

Mr. Robert P. Patterson, Under Secretary of War, acting for Mr. Henry L. Stimson, Secretary of War.

Vice Adm. S. M. Robinson, Chief of the Office of Procurement and Material, Navy Department, acting for Mr. Frank Knox, Secretary of the Navy.

Mr. Jesse H. Jones, Secretary of Commerce.

Lt. Gen. William S. Knudsen, Director of Production, War Department.

Mr. Isador Lubin, acting for Mr. Harry L. Hopkins, Special Assistant to the President supervising the Defense Aid Program.

Mr. Leon Henderson, Administrator, Office of Price Administration.

Mr. John Lord O'Brian, General Counsel, War Production Board.

Mr. W. L. Batt, Vice Chairman, War Production Board.

Mr. Ferdinand Eberstadt, Vice Chairman, War Production Board.

Mr. Milton Katz, Solicitor, War Production Board, acting for Mr. J. S. Knowlson, Vice Chairman, War Production Board.

Mr. Charles E. Wilson, Vice Chairman, War Production Board.

Mr. Ernest Kanzler, Director General for Operations, War Production Board.

Mr. G. Lyle Belsley, Executive Secretary, War Production Board.

By Invitation

Lt. Gen. Brehon B. Somervell, Commanding General, Services of Supply, War Department.

Rear Adm. H. L. Vickery, Vice Chairman, U. S. Maritime Commission.

Brig. Gen. Oliver P. Echols, Assistant for Procurement Services, Office of Chief of Air Corps, War Department.

Mr. Will Clayton, Assistant Secretary of Commerce.

Mr. Paul V. McNutt, Chairman, War Manpower Commission.

Lt. William A. Weber, Assistant to the Vice Chairman, U. S. Maritime Commission.

Mr. Wayne Coy, Assistant Director, Bureau of the Budget.

Mr. Donald R. Belcher, Assistant Chief in Charge of Planning and Statistics, Navy Department.

Mr. A. I. Henderson, Deputy Director General for Industry Operations, War Production Board.

Mr. Robert R. Nathan, Chairman, Planning Committee, War Production Board.

Mr. Simon Kuznets, Chief, Program Analysis and Research Section, Planning Committee, War Production Board.

Mr. Wilbur Nelson, Administrator, Mining Branch, War Production Board.

Mr. Stacy May, Statistics Division, War Production Board.

Mr. Joseph L. Weiner, Deputy Director, Office of Civilian Supply, War Production Board.

Mr. Thomas C. Blaisdell, Jr., Member, Planning Committee, War Production Board.

Mr. Fred Searls, Jr., Member, Planning Committee, War Production Board.

Mr. Frederick Roe, Assistant Executive Secretary, War Production Board.

1. Gold Mining

Mr. Batt reported that the matter of shutting down United States gold mines had been receiving detailed attention. On conferring with Brigadier General McSherry of the War Manpower Commission and representatives of the gold mining companies, it had been found that at present the gold mining industry employs 3,270 workers; 750 are engaged in dredging and only 896 are hard-rock miners. Loss of labor to the Services and to war industries, and

higher costs have already sharply curtailed operations of all domestic mines except Homestake. Homestake's labor force has dropped from a peak of slightly over 2,000 workers to 1,876, including lumbermen and machine shop workers. If Homestake were shut down except for standby operations, all but 500 of these workers could be released for work elsewhere. Lead and Deadwood, South Dakota, with aggregate populations of 16,000 are totally dependent on the mine's operation.

Although it has recently emphasized other forms of production, the State Department, because of broad international considerations, heretofore has urged that gold mining in South Africa and Honduras be maintained. The South African economy and the stability of the present government are largely dependent on gold mining. The basic industries of Honduras are the cultivation of bananas, of which exportation to the United States has been reduced to 20 percent of normal, and gold mining. Mr. Leon Henderson reported that Canadian gold mining is being curtailed very sharply. The Vice President pointed out that questions pertaining to production of gold abroad should appropriately be discussed with the Board of Economic Warfare.

[fol. 2419] Mr. Batt stated that after investigation he recommends that: (1) all non-essential domestic mining of gold other than that incident to the mining of critical metals be stopped as soon as possible and not later than within 60 days; and (2) gold mines not producing critical metals be allowed to continue standby maintenance operations lest it be impossible to reopen them at the close of the war.

General Somervell stated that because of the critical shortage of copper, which is drastically curtailing ammunition production, the Army has taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines and that, under these conditions, failure to stop gold production immediately would be inexcusable.

After further discussion it was agreed that:

An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within 60 days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition.

2. Feasibility of the War Production Program

In reviewing the development of the war production program, Mr. Nathan pointed out that appropriated funds increased during 1941 from 20 billion dollars in March to 50 billion dollars in June and to 80 billion dollars in December. After Pearl Harbor, the acceleration increased and by the middle of 1942, appropriated funds have mounted to approximately 225 billion dollars. The magnitude of the increase has, of course, created serious problems.

Mr. Nathan emphasized that in reviewing the feasibility of the war production program, the Planning Committee has assumed that: (1) the country must engage in an all-out war effort and do everything possible to attain maximum production of munitions; and (2) the civilian economy must be reduced to the lowest level consistent with the largest possible production of munitions.

He pointed out that an overly large program has the advantage of acting as an incentive to total production and heretofore it has compelled curtailment in civilian economy and conservation in war production. However, as far as metal consumption is concerned, most of the possible curtailment in the civilian economy already has been accomplished and there is not the continued need for the same degree of pressure in this direction as prevailed many months ago. Much pressure for conservation can now be expected from the fact that some plants will be operating below capacity. On the other hand, an overly large program has these disadvantages:

(1) Creation of lack of balance in end items, complementary items, and components. This is already in evidence.

(2) Creation of excess fabricating capacity. This results, in turn, in wastage of materials entering into construction and impairment of the morale of labor and management as plants slow down and close down.

(3) Failure to meet the objectives of the most important segments of the program while meeting less urgently needed items, relatively easy to produce. An outstanding example at present is the aircraft program which is not receiving all the machine tools and metals required to meet the objective; merchant shipbuilding is being similarly restricted.

(4) Lack of flexibility with consequent difficulty in introducing new items whose needs are dictated by battle experience.

(5) Increased difficulty in effectively controlling the flow and distribution of materials.

(6) Inability to coordinate and integrate the production program of the United States with those of other nations.

Mr. Nathan pointed out that the study of the Planning Committee (WPB Doc. 146), although necessarily not precise as to every detail, does indicate some serious basic problems. Existing schedules for 1942 call for over 14 billion dollars of construction and over 40 billion dollars of munitions. It is currently estimated that the construction program (based on schedules) will be met, but that munitions production will fall short of schedules by 7 billion dollars, or 17 percent. Objectives call for munitions production to a value of 22 billion dollars during the last four months of 1942; it is estimated that only 15 billion dollars will be produced.

For 1943, objectives shown in the report call for war construction and munitions production of 87½ billion dollars of present purchasing power. Recent reviews of these objectives indicate they underestimate the actual program by several billion dollars. If the deficiency in 1942 production were carried over to 1943, another 7 billion dollars would be added. In addition, present plans call for 18 billion dollars of non-munitions items such as pay, food, et cetera, so that the total outlay for war purposes in 1943 would have to aggregate 115 billion dollars, requiring average monthly expenditures of 9½ billion dollars. Because total war expenditures in December 1942 are estimated at not over 6½ billion dollars, expenditures in December 1943 would have to amount to well over 12 billion dollars to achieve this average. For war construction and munitions alone, expenditures next year would have to average 8 billion dollars per month. Since expenditures for these items in December 1942 are estimated at not over 5½ billion dollars, they would have to rise to 10½ billion dollars in December 1943.

Studies of the Planning Committee indicate that a rate of gross national output of about 148 billion dollars prevailed in the first half of 1942 and that a level of 168 bil-

lion dollars might be reached in December 1942. Admitting that comparisons of the national product of various countries are imperfect, Mr. Nathan pointed out that with total war expenditures of 115 billion dollars in 1943 and civilian outlays reduced to the 1932 level, gross national product [fol. 2420] would have to reach 183 billion dollars and war expenditures would amount to 63 percent of the total. The total might be accomplished, but the composition appears wholly impossible. To achieve this level of war expenditures for the year as a whole, monthly outlay would have to rise throughout the year to a level of 196 billion dollars in December 1943, of which war expenditures would represent 147 billion dollars. Consumer outlays would fall to the wholly untenable level of 35 billion dollars, or one-third below the 1932 figure. If the 1932 level of consumers' outlays were to prevail in December 1943, the gross national product would have to reach 213 billion dollars. This means war expenditures would absorb not less than 75 percent of the national product in December 1943, an impossible portion. This compares with 27 percent in the first half of 1942, and a likelihood of 46 percent in December 1942. It is estimated that 1942 war outlay in the United Kingdom will be 44 percent of that country's national product. For Canada, this figure is estimated at 43 percent and for Germany, 50 percent. Whether any economy can devote much more than one-half of its output to war production is extremely doubtful. The Planning Committee regards as an outside and all-out and stimulating objective a total of 75 billion dollars of munitions and war construction and 18 billion dollars of non-munitions expenditures in 1943.

Exhibiting charts on the supply and requirements of metals (Doc. 149), Mr. Nathan forecast that on the basis of present schedules, there would be a serious shortage of alloy steel and copper, which will increase cumulatively through 1943. He pointed out that the estimates in these charts reveal large deficits in the next two or three quarters in these metals and in carbon steel and aluminum and, therefore, indicate that scheduling of production has not been closely correlated with available supplies. He stated further that although the overall shortage of key metals is serious, it is even more severe when considered in specific shapes and sizes, such as aluminum extrusions and forgings.

Moreover, supplies already had been estimated optimistically, especially in view of delays now being encountered in completing expansion projects.

Discussing the feasibility of the present war production program from the point of view of labor requirements, Mr. Nathan pointed out that analysis is complicated by lack of authoritative information on the proposed size of the Army. Assuming a total armed strength of 10 million by the end of 1943 and a war production during the year of 75 billion dollars, a labor deficiency by the end of 1943 of 7 million workers, relative to the normal labor force, is indicated. To achieve objectives, not what is feasible, would necessitate a steady rise in production to a rate in December 1943 of 126 billion dollars, which would call for an additional labor force of at least 7 million, making a total labor deficiency of 14 million, a gap that is probably impossible to fill. The potential reserve of labor in women, older people, and others is considerable, but while the overall shortage may be partially overcome, labor problems in specific occupations, industries and areas are certain to be acute and prevent the attainment of present objectives. Mr. Lubin pointed out that if munitions production and war construction aggregate not more than 75 billion dollars in 1943, the labor supply probably would be adequate. Mr. Nathan again emphasized that the shortage in special areas would be more serious than revealed by the overall analysis.

Examining the feasibility of the program in terms of available facilities, Mr. Nathan pointed out that the question can hardly be answered from an overall analysis, but inadequacies of facilities in specific areas are already indicated and will impose major limitations upon production. In machine tools, for example, critical items of high quality and special type tools will be in inadequate supply for most of the 18-month period ending December 1943. Scheduled completion dates for 30 percent of all facilities projects have been postponed by an average of 3 months. Even with the scarcity of statistical data on facilities, Mr. Nathan stated, it is clear that inadequacy of facilities will limit production in specific and important areas in 1943, especially during the early part of the year.

In concluding his presentation, Mr. Nathan urged the development of better scheduling and the provision of an

administrative mechanism to combine strategy and production.

Mr. Weiner pointed out that if a national product of 183 billion dollars a year is feasible at all, it could be achieved only by moving large masses of the population into areas of intensive production. This would require substantial increases in housing, transportation, and other facilities which would absorb large amounts of materials and therefore restrict, for an extended period, the proportion of national product originally conceived for direct war expenditures, probably nullifying for the time being the benefits of the increase in output.

Mr. Coy inquired whether the Army and Navy admit that the present program is too large to be feasible. General Somervell replied that while the report of the Planning Committee demonstrates the absolute necessity of utilizing all possible means to achieve the program, he believes that 90 percent of the munitions program for 1942 will be completed by the end of the year, in contrast to only 81 percent as estimated by Mr. Nathan and, consequently, it will be necessary to carry over a smaller deficiency into 1943 than that estimated by Mr. Nathan. Moreover, excluding the deficiency to be carried over from 1942, the program next year is not materially larger than the Planning Committee estimated as feasible. General Somervell said he is not so despondent about the War Production Board as to feel that with more effective controls over the distribution of materials to be attained through the quota system of allo- [fol. 2421] cating materials to each agency, production goals cannot be met. Because of continuing changes in specifications which are being effected daily, it is unwise to assume that the supply of alloys will be inadequate. The amount of copper which can be used through the substitution of steel cartridge and shell cases may well be larger than estimated. The production and fabrication of aluminum, too, may exceed expectations.

In General Somervell's opinion, requirements, which are the needs of the soldiers and sailors, should not be reduced, and all efforts must be concentrated on increasing supply. It would be most difficult, involving millions of recomputations, to reduce the requirements program or change the schedule prepared by the Joint Chiefs of Staff in any way,

since all items in the program are important. Military requirements have been computed realistically, not theoretically; they have been fully coordinated.

To a comment by General Somervell that he was not impressed with the dollar figures in the Planning Committee report, Mr. Henderson replied that the dollar and national income figures seem to be the best common denominators of capacity. General Somervell predicted that it will be possible to reduce dollar costs by 10 percent from existing prices.

General Somervell saw no need for the creation of a new organization in which strategy and production possibilities could be correlated as recommended by Mr. Nathan. Already there are the Combined Chiefs of Staff, the Joint Chiefs of Staff, the Combined Production and Resources Board, the Munitions Assignments Board, the Army and Navy Munitions Board, and the War Production Board. He failed to see what benefit would be derived from a board composed of an economist, a politician, and a soldier who does not know production. Mr. Nathan emphasized that the production authorities should not and could not question strategy, but he inquired whether the Joint Chiefs of Staff, in establishing military requirements, had taken full account of feasibility.

General Somervell said the supply programs submitted to the War Production Board adequately represent the material expressions of strategy, and he saw no need for the Board concerning itself with strategic considerations. In reply to a question from Mr. Coy as to what steps should be taken if production falls below the strategic requirements set by the Chiefs of Staff, General Somervell stated that all that need be done is to change the supply programs presented to the War Production Board.

Admiral Robinson stated that the Army and Navy will be able to keep the production program in balance and expressed confidence that the entire munitions program will be more effectively scheduled. Mr. Henderson said that for a long time better scheduling of production had been promised, and he wondered just when this would be accomplished.

Mr. Patterson expressed the view that a body consisting of production and strategy authorities would not be more fruitful in adjusting the program than the existing mecha-

nism, and he urged that no new agency be created for this purpose. However, he stated that it would be beneficial to have the officials of the War Production Board meet with the Joint Chiefs of Staff from time to time for an exchange of attitudes. Mr. Lubin pointed out that failure to meet the production schedules on time means that the Joint Chiefs of Staff will not have the munitions available in the time required by them, and the Joint Chiefs of Staff should be informed of this.

Mr. McNutt pointed out that despite repeated efforts, the War Manpower Commission has not been able to obtain reliable data on the manpower needs of the Army and Navy. He inquired of Admiral Robinson and Mr. Belcher whether they could inform him of the number of men which it is planned will be in the Navy at the end of 1943, but they were unable to give him this information. Mr. McNutt said that as far as manpower is concerned, the existing Boards referred to by General Somervell have not been fully coordinated. General Somervell promised Mr. McNutt that the War Manpower Commission would be informed of the Army's manpower needs. Mr. McNutt pointed out that already there is a serious general shortage of manpower and that the specific shortages are even more critical; although labor shortages exist in 35 areas, 500,000 workers are idle in New York City. The Chairman observed that the War Production Board had not been informed of the recent proposal to increase the size of the Army, although this proposal vitally affects the production program.

Mr. Henderson pointed out that he had been one of the first to advocate the largest possible military program, but that in order to meet the established program, the nation has been forced to sacrifice expansion of certain basic materials such as steel and copper. In his opinion, it is most unlikely that the nation can support a war outlay in 1943 of more than 90 billion dollars, and he inquired whether such an outlay, involving a production of 90 million tons of steel and a supply of over 2,600,000 tons of copper, is not enough to defeat our enemies who have limited resources. Mr. Patterson pointed out that comparisons with our enemies have limited significance because we were forced to start our armament program at zero and, in addition, we now have to supply not only the needs of our own Armed Forces,

but also those of the other United Nations. He recommended giving the Armed Services all the materials they request and ensuring that the materials are not wasted.

Mr. Coy inquired whether the size of the Army should not be determined by the probable supply of available equipment and whether the men who could not be fully supplied should not be retained in production. General Somervell replied that the size of the Army should not be determined [fol. 2422] by the availability of equipment and that it would be useful to train, even with partial equipment, all the men the Army can induct. Mr. Coy inquired as to the magnitude of probable future increases in the program. As recently as September 17, the President had indicated that he contemplates raising the 1943 airplane objective by 6,000 airplanes and 8,000 gliders, and Mr. Coy predicted that further additions to the munitions program would be made from time to time.

The Chairman stated that his policies and actions had been based on the strong conviction that the most the country can produce is the least with which it can be satisfied. Every effort must be made to obtain the maximum production, provided the program is not thrown out of balance. Giving effect to the recent proposal for augmentation, the airplane program alone would call for an expenditure of over 30 billion dollars in 1943 or 40 percent of what the Planning Committee regards as a feasible total for munitions and war production. A program of this magnitude is bound to impinge on other items and appropriate adjustments will have to be made. In addition, if essential civilian functions, such as transportation, communication, repairs and maintenance, are curtailed too severely, it will be impossible to support the maximum war production program.

The Vice President pointed out that to accomplish a 115 billion dollar production program next year, it would be necessary to have a national product of 183 billion dollars and to cut consumers' expenditures progressively so that by the end of 1943 they will be at a rate 40 percent below the 1932 level. He asked if Mr. Jones thought that the public could be brought to accept such a reduction in consumer expenditures in any one year. Mr. Jones replied

that in his opinion, the largest cut that could be imposed in one year is 25 percent.

Mr. Jones observed that if the munitions program were properly balanced, it would be more advisable to be two or three months behind schedule than to cut the program. Mr. May stated that the program could be met if it is redesigned to produce in 15 months what is now scheduled for 12 months. The Vice President and Mr. Patterson pointed out that it is most important that the President be informed of any rescheduling that deferred accomplishment of presently stated objectives.

G. Lyle Belsley, Executive Secretary.

Approved: D. M. Nelson, Chairman.

[fol. 2423] PLAINTIFF'S EXHIBIT 94

War Production Board

Friday, October 9, 1942. 9 A.M.

Interbranch Meeting of Branches Concerned with Mineral Production

Present:

E. H. Dawson, S. A. Montague, Mica-Graphite.
C. A. Wright, E. Vogelsang, Tin-Lead.
E. F. Hatch, Ferro-Alloys.
Wilbur A. Nelson, Marcellus H. Stow, Mining.
Frank A. Ayer, H. O. King, Copper.
James S. Macgregor, R. J. Lund, Misc. Minerals.
Fred W. Gardner, Cork-Asbestos.
Samuel Weiss, F. E. Vigor, Iron & Steel.
T. E. Covil, Aluminum.
H. T. Mudd, Fluorspar.
George C. Heikes, Zinc Branch.
A. I. Henderson, Director.
H. W. Dodge, Deputy Director.
W. J. Keary, Special Assistant.
J. Reed Lane, Theodore A. Peck, Executive Assistants.
C. Stocking, D. Amato, War Manpower Comm.
Joe Tufts, Housing, War Manpower.
Henri Sokolove, War Manpower Comm.
Allen Buchanan, Samuel Lipkowitz, Irving Lipkowitz. Labor Prod. Div.
L. S. Thompson, E. Kanzler's office.
D. D. Davis, B. Smith, Program Determination.
And others who failed to sign register.
Presiding: Wilbur A. Nelson.

Lack of Cooperation—Mr. E. H. Dawson reported that he was unable to secure a report from a Bureau of Mines man. Mr. Dawson will have the complete story at our meeting next Friday.

Extension of Labor "Freeze Order"—Mr. E. F. Hatch made a motion, seconded by Mr. E. Vogelsang, and after a brief discussion, unanimously passed, that a resolution be sent to General McSherry requesting that the "freeze

order" be extended to cover all the mines of the United States producing strategic metals.

Copper, Lead, and Zinc Prices—Mr. Frank A. Ayer stated that most of the members of the Interbranch Group are not in favor of recommending any change in the base prices immediately. Mr. Ayer is of the opinion that the situation will be handled as well as possible, and as judiciously as possible, by changing the quota price. The Quota Committee can adjust quotas to take care of increased mining costs due to increases in wages which have been authorized by the War Labor Board.

There is also the question of extending the period.

Mr. Ayer mentioned that a higher premium price would no doubt attract some new properties into production.

Block Leasing—Mr. George Heikes advised that the Internal Revenue office agreed to hold off the collection of certain taxes in Utah, for the present, until the Courts in Utah decide whether Block Leasing is going to be permitted or not.

Re-Negotiation of Contracts—Mr. E. Vogelsang said that he attended a Lead Industry Advisory meeting yesterday. The lead producers said that they did not understand the re-negotiation clause, but they were quite disturbed over it. There is a legal question involved, and the matter has not as yet been settled.

[fol. 2424] Mr. H. W. Dodge then introduced Mr. Theodore A. Peck to the meeting. Mr. Peck has been asked by Mr. Donald Nelson to look at the labor situation and see what the needs of industry and the mines are.

Mr. Peck said that first we should direct our attention to the fact that the U. S. Employment Service has some 1500 officers, and that a great many of them are rotating officers. The U. S. E. S. has a good opportunity to mobilize labor, and we will want to exhaust our present means before adopting new measures.

Mr. Peck went on to say that the labor shortage in copper production has received an undue amount of attention.

Mr. Peck mentioned the wage question. He said that we live in a free society and a man can look around and work where he wants to. The fact is the men are not staying in the mines. Mr. Peck said that he did not think that miners

should be paid less than other workers. The mining community is not the best place to live in, and now that they have an opportunity to get out, many of them are doing it. We should try to handle the problem in a comprehensive way, and stress the problem of housing.

Then Mr. Peck mentioned the Selective Service Act. When you take a miner from his work you cannot substitute a woman in his place. We can substitute women for men in some industries, but in mining it looks very doubtful. General Hershey has instructed the Local Draft Boards to select the miner for mining rather than for the infantry.

We all have a tendency, Mr. Peck remarked, to think that our problem is the most important. If we are short of men we will have to ration the supply. If we cannot develop additional labor we will have to make up our minds, or rather the Labor Committee of the W.P.B. or somebody, will have to tell us which work is the most important. Lead and silver are not as important as tungsten or copper, but someone has to make that decision.

Mr. Peck said there are all sorts of proposals that come up. We may have to take drastic means, but before we do that we have got to go into the problem and handle our resources the best way we can.

Labor Shortage in Copper, Lead and Zinc—Mr. H. O. King of the Copper Branch said that the indications are that in the Western states producing copper, lead and zinc, there is a shortage of approximately 7,000 men. This figure does not include smelters, or refineries. The situation is rapidly becoming worse.

Mr. George Heikes reported that the situation is so serious in Butte that the Anaconda Copper Company practically cut out important development work to find men to work in stopes. Mr. Heikes said that there were still many places in the country where they do not consider a zinc mine a war plant or a man working in a zinc or smelter as a war worker.

In order to bring copper, lead and zinc production up to normal, and to provide for the necessary increased development work, it is necessary that they employ 9,000 to 10,000 more men.

Aluminum Labor Shortage—Mr. T. C. Covel of the Aluminum Branch said that we are planning to expand very

rapidly and that our problems will come when we try to expand. The housing problem in the Arkansas area is terrible, Mr. Covel said. We are trying to work low grade ore for the first time. We fear that we will have to attract workers from the Tri-State area, and there is already a serious labor shortage in the zinc mines of that area. Mr. Covel said that there is not much of a labor shortage in aluminum right now, but there will be a terrific shortage when we start to expand. The expansion program has just started.

[fol. 2425] *Tungsten and Molybdenum Labor Shortage*—Mr. E. F. Hatch of the Ferro-Alloy Branch advised that we are short about 750 men to bring the tungsten and molybdenum production up to normal, and we need another 750 men for the expansion program. In all, we need approximately 1,500 men.

Mica Problem—Mr. Montague advised that it was not so much a specific labor shortage in mica production. We want them to go on two or three shift operations, and there does not seem to be an available labor supply for that expansion.

Graphite—Mr. E. H. Dawson reported that there is no labor shortage in the graphite operations.

Labor Shortage in Fluorspar Industry—Mr. H. T. Mudd of the Fluorspar Section reported that there are 2,500 men presently employed in fluorspar operations. Some 250 men are needed at once to bring operations up to capacity, and 1,500 men will be needed within the next six months. Mr. Mudd said that the principal shortages are in Illinois and Kentucky, although smaller shortages are making themselves apparent in Colorado and New Mexico.

Mercury Labor Shortage—Mr. R. J. Lund reported that we need 350 men to bring production up to capacity. Mr. Lund said there are some 70 mines employing 2,100 men at the present time. The labor shortage has affected production locally, the biggest problem is that the labor shortage is holding up important development work. About two-thirds of production is in California. The ship yards have drawn heavily on the mercury workers in that area.

Mr. Lund went on to say that we have a fairly good Government stockpile, and at the present time production is running ahead of consumption. But that does not tell the whole story because mercury is very erratic in the ground.

Many of the mines will be depleted unless we get the men necessary to carry on a very lively exploration and development program.

U. S. Employment Service—Mr. C. Stocking of the U. S. Employment said that this meeting was very enlightening as well as astonishing. He said that he could not understand why we do not have more cooperation, and unless we get closer cooperation we will have confusion. Mr. Stocking asked if we do not have cooperation here in Washington how are we going to have cooperation out in the fields.

Mr. Stocking said that when the U.S.E.S. advertises for men in newspapers, as they did in Joplin, Missouri, the ad specifically mentions that "those engaged in war work are not considered eligible for positions listed by the U.S.E.S." However, Mr. Stocking mentioned that sometimes mistakes are made as to the relative importance of zinc and other metals.

Mr. Stocking remarked that the Gold Limitation Order was effective October 8, 1942. Gold mining operations are being closed in the twelve western states, west of the Mississippi River, and no employer may hire any of these gold miners except by being referred to them by the U.S.E.S. Mr. Stocking said that since we have the necessary funds to transport some 5,000 workers, their dependents and household belongings, we expect to overcome some of the difficulties.

[fol. 2426] Mr. Stocking also said that the U.S.E.S. has arranged for pool interviewing. They get the gold miners together and the representatives of the mines producing critical metals, and the gold miners may be hired on the spot. If the mine producing critical metals cannot have a representative on the spot, he can give the U.S.E.S. the power of attorney, and U.S.E.S. can hire them. If the gold mine is not situated near a local U.S.E.S. office we send out a register to list these miners since they are eligible for employment benefits.

Mr. Dodge asked Mr. Stocking "assuming that the problem is wages and living conditions, how long do you think it would take to settle these problems and get some of the miners back to the mines?" Mr. Stocking said that he

could not answer that question since it depended on how long it would take for the construction plants to taper off.

Mr. Stocking advised that the U.S.E.S. labor figures are very complete. Their labor shortage figures are not merely estimates but actual orders from the mine operators for more men. The U.S.E.S. has specific figures showing how many men are needed, in exactly what category or particular skill they are needed, and in what location. Consequently, the U.S.E.S. figures have a very definite relation to production.

In reply to a question Mr. Stocking stated that no arrangements are made for a physical examination of the gold miners before hiring them. When they are hired, they sign a contract for 90 days regardless.

Two Main Points—Mr. Peck said that since Mr. Alex Henderson was here he would like to turn the discussion into two directions.

1. Present the whole picture to the W.P.B. Chief statistically, so that he can, in his dealings with General Hershey and Mr. McNutt, show why it is so important. We should be able to have figures to present to Mr. Donald Nelson to show that because of a shortage of so many men approximately so many tons of such critical metal is being lost. Also, we should be able to show that with an additional labor supply of so many men we would be able to increase production so much, without new machinery or equipment.

2. If we have to resort to rationing, somebody has got to decide what metals are most important.

Mr. Alex Henderson said that he agrees with Mr. Dodge inasmuch as we should present significant figures to Mr. Donald Nelson. Mr. Henderson went on to say that he would like to confirm even more his own views that we exhaust every other possible means. We have got to be sure that we are doing everything we can, before we can start ordering people to other places. W.P.B.'s job is to go after the employers and the unions to make every effort to get rid of prejudices and precedents that have existed in peace times, without taking into consideration the post-war problems. Mr. Henderson said that he thinks we need a field organization to go out in the fields and try to iron out these difficulties.

Each Branch present at this meeting should have an estimate of the number of men needed to bring production up to capacity, and the number of men required to carry out the needed expansion program. Also, if possible, we would like figures showing the amount of ore that we are being deprived of on account of the lack of men.

The meeting was adjourned at 11:30 A.M. The Interbranch Group meets every Monday and Friday morning at 9 A.M. in room 1057, Tempo. R.

James J. McCabe, Ext. 5892.

[fol. 2427] PLAINTIFF'S EXHIBIT 95

War Production Board

Interbranch Meeting of Branches Concerned with Mineral Production

Friday, October 16, 1942. 9 A.M.

Present:

David Amato, War Manpower Comp.
F. D. Cannon, F. H. Hayes, G. B. Holderer, Copper Branch.
C. A. Wright, E. Vogelsang, Tin-Lead.
Olaf N. Rove, Ferro-Alloys.
James S. Macgregor, R. J. Lund, Misc. Minerals.
E. F. Hatch, Ferro-Alloys.
Marcellus H. Stow, L. W. Hildreth, Mining Branch.
H. T. Mudd, Mica Graphite.
W. C. Page, Zinc Branch.
Presiding: E. F. Hatch.

Transportation Problem—Mr. Hatch opened the meeting by calling for a discussion of the transportation problem. Dr. Stow mentioned the fact that Mr. Gillinghan of the Transportation Unit said that since tank cars are being rationed and box cars are getting scarce, we ought to set up committee to deal with the Office of Defense Transportation. Mr. Gillinghan said that we ought to have committees dealing with ODT instead of individuals. Mr. Lund mentioned that his branch is setting up a transportation com-

mittee. Mr. Mudd advised that there is a box car shortage in some of the fluorspar regions.

Draft Deferments—The next topic Mr. Hatch brought up for discussion was the Draft and Draft Deferment. Mr. Hatch remarked that many people in industry have no idea as to the correct procedure to follow in taking up the matter of draft deferment of essential employees.

Mr. Wright mentioned the fact that the Zinc industry, worried over the induction of many of their workers, was instrumental in securing a telegraphic notice from General Hershey instructing local draft boards to defer all skilled or unskilled employees of the non-ferrous metal mining industry. Mr. Wright then read excerpts from his letter to Mr. W. Earl Greenough, which reads as follows:

Telegrams to the State Directors of Selective Service of the twelve states that were specified in the freeze order of the Manpower Board were sent out by General Hershey, Director of the Selective Service System, on October 8, instructing all local boards in their respective states to defer all employees, skilled or unskilled, of the non-ferrous metal mining industry whose removal would in any way affect the productivity of the operations.

It was explained that this also applied to men who were not actually working at the time but had made definite arrangements to do work in the mines and that any pending cases not previously decided upon would come under this same order.

If cooperation on the part of the local boards is found to be unsatisfactory or there is a misinterpretation of the telegram sent out by General Hershey, it would be well to let us know so that we can take the necessary action with the National Headquarters here in Washington.

Occupational Deferment Procedure—Mr. Hatch read a memorandum from Mr. Miles K. Smith addressed to the Non-Ferrous Metal Mine Operators recommending a procedure to secure the occupational deferment of key men essential to non-ferrous metal mining operations. (A copy of the memorandum is attached to these minutes).

[fol. 2428] Mr. Hayes remarked that the Copper Branch arranged with General Hershey a procedure to handle deferments. The idea was to have every mine, which included mining operations, milling, smelting and refinery opera-

tions, submit form 42A for every man they wanted to get occupational deferment. The form is sent to the local board, and every company is responsible for putting it in. If the local board denies the deferment request, the company must make an immediate appeal to the local board and the State Director. If that appeal is denied we take the matter up here in Washington.

Mr. Hayes said that an appeal from the local decision of the local draft board would tend to delay the induction of the man into the service, but that is not always the case. The local board sets a date for induction even though the appeal is pending.

Mr. Vigor of the Iron and Steel Branch remarked that as far as draft deferments were concerned in the Iron and Steel industry, practically everybody stopped at the local board, and then sent a man down to Washington. We have no case, Mr. Vigor went on to say, where we requested a deferment for a man and he was turned down after going to the State Board. In some cases we get actual deferments and in others the man is deferred for three to six months to give us time to train a new man.

It was brought out at the meeting that as yet we have no definite procedure as to what to do when the State Director denies a deferment request, and the matter is brought to Washington. Some members of the group get in touch with Lt. Col. George H. Baker, Chief of the Manpower Division of Selective Service, Ext. 40. Col. Baker's address is 21 & C Sts., Room 700.

It was the consensus of opinion of the group that we invite Col. Baker to our next meeting to discuss deferment procedures.

War Manpower Commission—Mr. Amato representing W. M. C. discussed a procedure for more cooperation by the mine operator with the U. S. Employment Service.

Mr. Hatch said that he disagreed with Mr. Stocking's position of last Friday. (See minutes of October 9), and remarked that he is of the opinion that Mr. Stocking's position was unjustified. However, Mr. Hatch remarked that some of our miners and smelters are not cooperating with the U.S.E.S. as well as they should.

Mr. Amato said that the same picture of lack of cooperation with the local draft board prevailed as far as the

U.S.E.S. is concerned. The U.S.E.S. works hand-in-hand with the draft boards. For example, the draft boards ask U.S.E.S. if the particular worker is replaceable in the area. Mr. Amato is of the opinion that a letter should be sent to the mine operators advising them of the importance of cooperating with the U.S.E.S.

Mr. Hatch said that he thinks the U.S.E.S. has done an excellent job in getting figures on labor in many mines.

Mr. Amato advised that the reports received by the W.M.C. indicate that there is some misunderstanding and lack of cooperation by both the workers and the operators in achieving the objectives of the employment stabilization plan. The Armed Services have issued directives to shipbuilding yards, construction projects, etc., not to hire workers who have left the mines.

Mr. Amato went on to say that we all have the same goal. With closer cooperation we can make the plan work more efficiently. It is obvious that many operators do not understand the plan, some employers seem to think they can issue certificates of separation. The U.S.E.S. has issued copies of the Stabilization Order, but coming from the U.S.E.S. the operator, in many instances, may not give it the attention it deserves. The same instructions coming from the industry Branch of the W.P.B. might have a better psychological effect. Mr. Hatch suggested that Mr. Amato prepare a one-page letter of explanation and discuss it at our next meeting.

[fol. 2429] PLAINTIFF'S EXHIBIT 96

War Production Board

Interbranch Meeting of Branches Concerned with Mineral Production

Monday, October 19, 1942, 9 A. M.

Present:

E. F. Hatch, Ferro-Alloys.
W. S. Papworth, Information.
W. C. Page, George C. Heikes, Zinc Branch.
Frank Ayer, F. H. Hayes, Copper Branch.
E. H. Dawson, Mica-Graphite.
David Amato, War Manpower Comm.
Wilbur A. Nelson, Marcellus H. Stow, L. W. Hildreth, Mining Branch.
R. J. Lund, James S. Macgregor, Misc. Minerals.
E. Vogelsang, C. A. Wright, Tin-Lead.
Presiding: Wilbur A. Nelson.

Draft Deferment Procdure—Dr. Marcellus H. Stow announced that Col. Baker, Chief of the Manpower Division of Selective Service, is out of town and will not be back until November 1st.

Mr. E. F. Hatch, who had previous dealings with Col. Baker's office, will contact Col. Baker's office and ask that a man be present at our next meeting to discuss a procedure to follow when the State Board turns down a request for re-classification and the matter is brought to Washington.

Additional Stabilization Order—Mr. Wilbur A. Nelson announced that on October 9th he wrote General McSherry requesting that he add those eight metals to the stabilization order. (See minutes of October 2) Mr. Nelson was advised that Mr. Sam Hill is working on such a stabilization order. At Mr. Nelson's request Mr. Amato, of the War Manpower Commission, will report the latest developments on this matter at our next Friday's meeting.

Labor "Freeze Order"—On October 12th, Mr. Nelson wrote General McSherry requesting that the labor "freeze order" be extended to cover all the mines of the United

States producing strategic metals. Mr. Amato will follow up the matter and report at our next Friday's meeting.

Mexican Labor—Mr. Nelson advised that Mr. Lane of Mr. Dodge's office is working on the Mexican labor situation. Mr. Nelson will check with Mr. Lane and report at our next Friday's meeting.

New Tax Bill—Mr. Nelson remarked that the new tax bill, as it passed the Conference Committee, includes a 3% tax on freight. That means that the mine operator who ships ore to the smelter will have to absorb that tax and that will effect the premium prices. This means that we will have to reduce the quotas again.

Silver Prices—Mr. R. J. Lund announced that he appeared before a Senate Committee last week. Passage of the Greene Bill was approved if a change were incorporated into the Bill which would authorize sales of Treasury silver only upon the recommendation of the Chairman of the War Production Board.

Mr. Nelson asked Mr. Lund what was the policy of the Misc. Minerals Branch concerning mines producing gold and silver. In general, Mr. Lund said we need the silver until legislation is passed opening up the Treasury stocks. Therefore, until such legislation is passed, our informal policy should be to recommend keeping such mines open.

[fol. 2430] Mr. Nelson said that one gold mine is producing concentrates which produce 10,000 lbs. of copper a month. These concentrates are shipped to the Anaconda Company. We told them that they could continue to operate for 60 days while we investigate.

Mr. Nelson said that some gold mines are producing commercial silicious ore or fluxing ore. At present we are keeping these mines going until we can make a study of the situation. Mr. Nelson advised that Mr. Douglas is making a study in Arizona right now. Mr. Ayer said that we should keep the gold and silver silicious ores out, if we can get silicious ore from other sources.

U. S. Employment Service—In reply to a question Mr. Amato advised the U.S.E.S. has authority to take labor across State lines if necessary. Mr. Amato said that in addition to the local and state offices, the U.S.E.S. has regional offices. The local and state offices report labor

conditions to the regional offices. Consequently, the regional offices have a pretty good idea as to where the labor is needed most.

Mr. Ayer said that at present the U.S.E.S. works rather slowly, and that it would be a good idea to give the U.S.E.S. the authority and the funds to transport workers from one area to another. Mr. Amato advised that the U.S.E.S. has funds to pay for the transportation of gold miners, and they are working on plans to secure funds to pay for transporting other workers.

In reply Mr. Ayer's statement that the slowness of the U.S.E.S. causes a loss of production Mr. Amato replied that the employer has a pretty good idea of his employment picture for the next three months, and he can present the picture to the U.S.E.S.

Mr. Ayer remarked that he was not criticising the U.S.E.S., but that he wanted the U.S.E.S. to be granted more authority and funds necessary to pay the transportation costs of transferring a worker from one area to another. Many workers do not have the funds to move to another community to look for a job, and if the U.S.E.S. will pay the transportation he will be more inclined to go where there is labor shortage.

Mr. Amato passed around copies of a "suggested letter of the War Manpower Commission to be sent by the War Production Board to all mining operators". (See minutes of October 16th). Mr. Nelson asked the group to study the letter, and if there are any suggestions or changes that they give them to Mr. McCabe. We will discuss the letter at our meeting next Friday.

The meeting was adjourned at 10:15 until Friday, October 23, at 9 A. M.

Mr. James J. McCabe—Ext. 5892.

[fol. 2431] PLAINTIFF'S EXHIBIT 98

War Production Board

Interbranch Meeting of Branches Concerned with Mineral Production

Monday, October 26, 1942. 9 A.M.

Present:

F. H. Hayes, G. B. Holderer, F. D. Cannon, Frank A. Ayer, Copper Branch.
Archibald Little, W. C. Page, G. C. Heikes, Zinc Branch.
R. D. Parks, Misc. Minerals.
Wilbur A. Nelson, Marcellus H. Stow, Mining Branch.
Marcellus H. Stow, Mining Branch.
E. Vogelsang, Tin-Lead.
T. E. Covil, Aluminum-Magnesium.
I. Lipkowitz, Labor Prod. Div.
S. A. Montague, M. H. Billings, Mica-Graphite.
L. A. Levensaler, Ferro-Alloys.
David Amato, War Manpower Comm.
Mrs. Ethel Fuller, U.S.E.S.
T. W. Page, Iron and Steel.
Quincy Adams, Statistics Div.
W. J. Keary, Special Asst.
Will Dodge, Asst. Dep. Director.
J. R. Lane, Executive Asst.
Presiding: Wilbur A. Nelson.

W.P.B.—U. S. E. S. Form Letter—The first subject discussed was the form letter prepared by Mr. W. Papworth, WPB Information Division, to be sent by W.P.B. to all mining operators urging closer cooperation with the U.S.E.S. After a few slight modifications the letter was agreed upon. However, a new paragraph informing the operators of the federal funds now available to the U.S.E.S. to transport workers, is being worked on by Mrs. Ethel Fuller and Mr. Amato. The finished form letter will be ready for our Friday meeting, or before.

Furloughing Soldiers—Mr. Wilbur A. Nelson remarked that several hundred soldiers in the West have been furloughed by the Army to allow them to go back to the mines.

Hundreds of them are already back in the mines working.

Coke Labor Shortage—Mr. T. W. Page of the Iron and Steel Branch will make a report listing the labor shortage in the coke ovens.

Labor in the Tri-State Area—Mr. David Amato said that we get reports from operators stating there is a labor shortage in the Tri-State area. Yet, the Local Employment office claims there is no shortage. Mr. W. C. Page stated that that has been his experience too, just last Saturday operators called up Washington for men, and he spent all Saturday afternoon in vain trying to reach some one in the Local U.S.E.S. office. Mr. W. C. Page remarked that there has been a lack of cooperation by the operator and the U.S.E.S.

Mrs. Ethel Fuller of the U.S.E.S. asked if these operators knew of their labor needs before last Saturday, and if so, why did they not make a request before that date.. Mrs. Fuller said that the ideal situation would be to let the Local U.S.E.S. office know of the demands for labor ahead of time and that the operators should maintain a continuous relationship to the end that the U.S.E.S. can give them more service.

Mrs. Ethel Fuller, in answer to Mr. Nelson's request, advised that she would furnish each Branch with a list showing the Local U.S.E.S. offices and the men in charge.

[fol. 2432] Mrs. Fuller also discussed the War Manpower Commission's "Contract of Employment and Transportation Agreement". A contract is attached to these minutes. For additional copies place orders with James J. McCabe, Ext. 5892, Room 1407 Tempo R.

Confidential Statistics—Mr. Quincy Adams of the Statistics Division then read off some confidential figures showing the supply and demand of some of our most critical metals and minerals.

Mr. H. W. Dodge said that we cannot say any one metal is more important than others, and consequently, we must make a horizontal listing. Also, since the W.M.C. wants to know at what mines the labor shortage is most critical we must make a beginning, even though the list may change. With that thought in mind the group decided on the following horizontal listings: in alphabetical order.

List No. 1 "Critical Labor Shortage"—aluminum, coal (metallurgical), copper, fluorspar, magnesium, mercury, molybdenum, tungsten, zinc.

List No. 2 "Serious Labor Shortage"—beryllium, chrome, coal (other than metallurgical), manganese, mica.

List No. 3 "Anticipated Labor Shortage"—*antimony*, iron ore, lead, lithium, magnesite (ref.), spodumene, vanadium.

It should be pointed out that the above listings are very flexible. And as conditions in the various mines change, so will the listings change. It is our job to keep these lists up-to-date.

8,500 Men From Pando—Mr. Wilbur A. Nelson advised that some 8,500 men will soon be released from the U. S. Army Ski-Tow project in Pando, Colorado. Mr. Nelson requested that the U.S.E.S. send a representative from Washington to Pando, Colorado, to be there on the spot, and try to get some of these workers for the mines. It was suggested that a man be sent from the Materials group of the W.P.B. and that he and the U.S.E.S. man stay out there in Pando until November 15th, and try to funnel a large percentage of these men to the right mines, according to our listings. Mr. Nelson pointed out that many of these men have been working in the fresh air for about a year, they are used to working at high altitudes, and many of them have previously worked in the mines. Consequently, in Pando, we have an excellent pilot plant to work on, and the results of this test will serve as a guide in funneling labor from other construction projects to the mines.

Resolution—It was the unanimous opinion of the group that we ask the U. S. Employment Service to extend the Stabilization Order to cover the Pando, Colorado, construction camp, and other construction projects.

It was pointed out to the group that Climax should have first call on these Pando workers, since Climax is also located at a high altitude, and many of the workers previously came from Climax.

It was suggested that Lt. Hall, the ANMB man for the Mining Branch, be sent to Pando, Colorado, also.

[fol. 2433] *From Pando to the Mines*—Mr. Nelson pointed out that since 8,500 men are to be released from the Pando, Colorado, Ski-Tow project, and that it is obvious that we

will not get all of them, we must have a preference list to work from. It was suggested that we include the critical mines in the vicinity of Pando. The group suggested the following mines, in order of importance, but subject to change.

1.	Climax Mining Co.	Climax, Colo.	250 men
2.	Empire Zinc,	Gilman, Colo.	150
3.	Nev.-Mass. Mines, (located near	Winnemucca Office Lovelock, Nev.)	80
4.	U.S. Vanadium,	Pine Creek, Calif.	131
5.	Bradley Mining Co.,	Yellow Pine Idaho	61
6.	Park City District,	Utah.	250
7.	Tacoma Smelters,	Tacoma, Wash.	200
8.	Anaconda Smelters,		320
9.	Basic Magnesium Inc.		450
			1,892

Mr. Nelson requested that all the branches send in a list to James J. McCabe, Room 1407, Tempo. R, Ext. 5892, showing the men they would like to have from Pando. Of course, we cannot guarantee that the men will go to these mines, but we know they will not go, if we fail and do not prepare a list. This is our big chance to get men for the mines. We must have a definite place to send the men, if we expect to make this plan a success. According to the latest check-up, Mr. Frank A. Ayer, Mr. Miles K. Smith, and Mr. T. E. Covil have already submitted such a list. Other Branches are urgently requested to file their "Men from Pando" list promptly.

Recommended Procedure for Occupational Deferment Forms—If any of the Branches would l — some of the above mentioned forms contact James J. McCabe of the Mining Branch.

The meeting was adjourned at 11:30 A.M. until Friday, Oct. 30, 9 A.M., Room 1057 R.

James J. McCabe, Ext. 5892, Room 1407, R.

The secretary of these meetings wishes to thank all Branches concerned for their splendid cooperation last Monday in securing the valuable statistics covering the current "Estimated Labor Shortages in the Mines".

[fol. 2434] PLAINTIFF'S EXHIBIT 99

In Reply Refer to File No. 13:L

Federal Security Agency
Social Security Board
Washington

United States Employment Service

November 5, 1942.

To: Mr. Donald M. Nelson, Chairman, War Production Board.

From: John J. Corson, Director, U. S. Employment Service.

Subject: Gold Mine Workers Who Have Been Placed in Non-ferrous Metal Mines.

Yesterday you inquired as to the number of workers from the gold mines who have been placed in non-ferrous metal mines. The accompanying brief summary which was prepared yesterday will give you a preliminary indication of the results obtained to date.

John J. Corson.

Attachment.
cc—Mr. Gus Peck.

[fol. 2435] Summary of USES Reports on Placement of Gold Miners Displaced by WPB Order 1-208

Reports from only 40 local offices have been received to date (Oct. 30). These indicate that 642 gold mine workers are known to have been displaced at the time of the reports. Of the 642, only 281 have registered with the Employment Service. By the time the reports were sent to Washington, 206 of the 281 registrants had been placed, with 188 of the 206 going to non-ferrous metal mines. A tabulation is attached showing the disposition of the displaced gold miners by State.

The most important development was at Lead, South Dakota, where the great Homestake mine began to close down. As of October 21, Homestake had displaced 334 workers, with 309 of these workers from the mining depart-

ment. Other mines in the area displaced 91 workers. Employment contracts had already been signed by 121 of the displaced miners, with 55 still on referral. The Anaconda Copper Mining Company hired 81 workers and the Climax Molybdenum Company hired 40 more. Many more workers are expected to come from the Lead area, but inasmuch as 60 days has been allowed the gold mines for clean-up operations, the full details will not be available for some time.

Approximately 2,000 workers were employed by Homestake in July.[1] How many of these will be available for other non-ferrous metal mines is unknown. Under the terms of WPB Order L-208, every mine is authorized to retain some men for maintenance purposes. Reports from Lead indicate that Homestake's lumber and timber department will continue to operate at capacity; the company owned coal mine will also remain in operation. The shops [fol. 2436] and foundry will work on war materials and are expected to expand; the power plant will operate to provide power for these other operations, and some men will be transferred to Wyoming to work on another Homestake Company operation in that State.

The regional representative for Region VIII states that the cooperation given by Homestake has been most helpful. His report reads in part:

> "The extent to which the Homestake Mining Company cooperated in effecting the transfers to the copper mines can only be fully realized by those persons who have been closely associated with this company during the past year. In previous negotiations with the Homestake, this office has had informal reports that Washington had the impression that the Homestake Company and the South Dakota Employment Service were not cooperating in effecting transfers to the copper mines at Butte, Montana. Such reports certainly had no foundation in fact. Everything that possibly could be done under the circumstances was done by the Employment Service. The Homestake Mine could not have been expected to close down their operations willingly, but a reading of the statement will reveal that *the company has asked the employees to go to the copper*

[1] Only 850 were underground miners.

mines and to do so by means of the referral system of the United States Employment Service." [1]

A copy of the notice posted by the Homestake Company, notifying the workers of the halting of operations is attached.

One other significant comment made by the regional representative should be mentioned. This relates to the ultimate transfer possibilities of the Homestake workers. The following comment is made:

> "The number of actual contracts between the Homestake miners and the Anaconda Copper Company (to which the Employment Service is attempting to direct all miners) will be much smaller than the figures reported in various news stories from Washington. *The low wage scale, together with the poor working conditions at the Butte, Montana mines, will act as a great handicap in negotiating these transfers.* Special efforts will be made by the local employment office to encourage the miners to go to Butte." [1]

[fol. 2437] Other States have had no significant facts to report concerning operating problems or developments. This is probably due to the limited number of reports which have been received. Another important factor is the 60 day period allowed by the suspension order for tapering off operations and taking protective measures to protect investments.

However, a disturbing factor is the very few displaced gold miners who have registered with the Employment Service in California. Only 7 of 160 known displaced miners have registered. This may be attributable to ignorance of the War Manpower Commission directive, or it may be the result of direct migration to shipyard centers. Later reports may provide an explanation.

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[1] Italics ours.

[fol. 2438] PLAINTIFF'S EXHIBIT 100

War Production Board

Inter-Division Meeting of Divisions Concerned With Mineral Production

Monday, November 23, 1942, 9 A.M.

Present:

Ethel H. Fuller, U.S.E.S.
E. R. Lerner, W.M.C.
C. A. Wright, Tin-Lead.
Archibald Little, Zinc.
E. F. Hatch, Ferro-Alloys.
W. S. Papworth, W.P.B. Info.
S. H. Ball, Off. of Ind. Oper.
Wilbur A. Nelson, Mining.
Marcellus H. Stow, Mining.
James S. Macgregor, Misc. Minerals.
Olaf N. Rove, Ferro-Alloys.
Presiding: Wilbur A. Nelson.

Strategic Materials Charts—A chart list from Mr. Dodge's office was discussed by the group. Some materials were delated from the list, and a few changes were proposed. The list was then returned to Mr. Dodge's office.

Seven Day Week—Mr. Wilbur A. Nelson mentioned that he talked with a lot of people in the West and he was of the opinion that many of them want to work a seven day week. Mr. E. R. Lerner stated that the matter of a seven day week depends to a large extent on the area and the particular industry. Mr. Nelson said that Climax works a full seven day week, and until just recently, they allowed men who worked five days in some other mine, to work Saturday and Sunday at Climax.

Longer Work Day—Mr. E. R. Lerner suggested that perhaps it might be a better idea to lengthen the hours of labor a day, instead of having a seven day week. Mr. C. A. Wright read part of a telegram from Mr. W. Earl Greenough, dated October 10, which states: "At my solicitation, Governor Maw of Utah October 9, obtained ruling from the Attorney General of Utah holding that because of war,

miners, millmen, and smeltermen may contract with their employers to work longer than eight hours per day, and that women may do certain work in mills and plant offices. The statute, limiting the work of underground miners to eight hours per day, collar to collar, provides that the time may be lengthened 'in cases of emergency where life or property is in imminent danger', and the Attorney declared that the War is such an emergency".

Unequal Mine Wages—Mr. Nelson said that many mines in the West are losing their labor due to the fact that they are prohibited from paying higher wages, even though due to the Panal Agreement mines in the same area producing certain non-ferrous metals were allowed to raise wages.

The Pando Story—Mr. Wilbur A. Nelson stated that the U.S.E.S. fell down terribly in the Pando project. No one was sent to Pando from Washington by the U.S.E.S. as requested by this group. (See minutes of October 26, October 30, and November 6). Mr. Nelson said that the men started to leave Pando at the rate of 500 a day from October 15th. Mr. Nelson explained that he received this information from a sub-contractor on the Pando job, and when he advised Mr. Stockton of this fact, Mr. Stockton said that our information was all wrong and that the men would start leaving November 15th. The men, however, did start leaving October 15th.

[fol. 2439] *Type of U.S.E.S. Office at Pando*—Furthermore, Mr. Nelson went on to say, the U.S.E.S. did not set up an office at Pando until after November 4th. And the type of office they did set up would have had no effect on getting workers. The office looked like a shotgun shack, had a very small Employment Service sign, and was located about 100 yards from the gate. Mr. Nelson explained that the men got into cars or busses at the gate and passed the office without stopping.

The Army did not allow the U.S.E.S. to set up an office within the Pando camp, but, Mr. Nelson remarked, that that is no reason why the U.S.E.S. had to set it up 100 yards from the gate.

No Attempt Made to Get Miners—Mr. Nelson explained that the U.S.E.S. office at Pando was staffed by two men who investigated in a most perfunctory way. No attempt

was made to get miners. Mr. Nelson and others watched the U.S.E.S. men handle about twelve cases. The U.S.E.S. man asked the worker what his occupation was, and if the man said he was a carpenter, the U.S.E.S. man told him where carpenters were needed. No attempt was made to get men for the mines, and the workers were not even asked if they wanted to work in the mines. The U.S.E.S. office was very much like an information bureau and no attempt was made to sell the workers to the jobs.

Mr. Nelson said that the two U.S.E.S. representatives were courteous and were doing the best they could under the circumstances, but the U.S.E.S. men should be trained not just to give information but to talk it up and recruit workers. Mr. Nelson mentioned that the failure at Pando rests not with these two individual men, but with the Regional office and the Washington headquarters.

Mr. W. S. Papworth, in answer to Mr. Nelson's question, stated that he thought the U.S.E.S. missed an opportunity at Pando to sell the mines to the workers. Also, that if the U.S.E.S. had a few pictures of Climax on hand, they would do much towards correcting the wrong impression many workers have about the mines.

Elucidation—Mrs. Ethel Fuller requests that the next to the last paragraph on page 2 of the minutes of November 16, about her realizing that the U.S.E.S. is not perfect, etc., be stricken from the records and the following inserted:

"Mrs. Fuller said that like every other agency there are cases when the U.S.E.S. fails to do a good job on a particular project. However, this is the exception rather than the rule and we feel that on the whole our representatives do extremely well. In many instances they have been known to refuse jobs paying considerably higher salary in order to remain with the U.S.E.S., and it should be remembered that their training and experience makes them sought after by many companies. They are in constant contact with job openings and this plus Selective Service has caused a large percentage of personnel turnover, so that our staff now includes many persons new to the U.S.E.S. These factors should be borne in mind before criticism is aimed too strongly at our field offices".

Absenteeism—Mr. Hatch stated that in one very large mining operation, for the week ending November 7, 10% of the men were off the payrolls due to absenteeism. Mr. Lerner said that according to our figures we find that there is more time being lost by absenteeism than there is being made by the furloughed soldiers.

The meeting was adjourned until next Friday, November 27, 1942, at 9 A.M.

James J. McCabe—5892.

[tol. 2440] PLAINTIFF'S EXHIBIT 101

November 24, 1942.

Memorandum

To: Mr. H. W. Dodge, Deputy Director General for Staff.

From: Wilbur Nelson, Chief Mining Division.

Following your suggestion, F. M. Eaton and I visited the Army Construction Projects at Pando, Colorado, on November 18 to investigate the manner in which the manpower problem has been handled there. The following is a summary of my observations:

1. During the period of October 15 to November 1 when the employment of approximately 7,000 men was terminated in line with the plans for completion of the camp, no representative of the U. S. Employment Service, or Manpower Commission was at the camp.

2. On November 3 two offices of the Employment Service were established outside of the two gates. These gates, however, were some four or five miles from the camp itself and from the termination windows.

3. On November 18 the office at the west gate had already been closed because so few persons stopped there. The office outside the east gate was open.

4. The only transportation the men had was by passenger car or bus and the bus didn't stop near the offices.

5. There was but one small sign on the far end of the east gate office stating it was an employment office but no other sign nor indication of its purpose.

6. The representative of the employment service was courteous and completely cooperative but had very little information. We asked how many men were needed at the Climax Mine which is only twenty miles away and, although the agent searched for some little time in the one volume which had been given to him, this information was not available.

[fol. 2441] 8. There was no effort being made to place placards up indicating that jobs were available in nearby areas nor in any other way was a real atempt being made to place such men as happened into the office.

It is my conclusion that no substantial help was afforded in solving the mine manpower problem from the efforts of the employment service at the Pando Camp, at least up to November 18.

I have a few tentative suggestions to make for study by competent people as a result of this trip:

1. Some government employment agency must be stationed right at the termination windows where the men get their paychecks and are discharged.

2. Mine job opportunities in the immediate area should be posted in conspicuous places at the employment office; this to be broken down by classification and wage scale.

3. There was an indication that most of the men expected to take a two weeks vacation before starting a new job. As an inducement to the men, instead of continuing at the much more profitable carpenter trade, consideration might be given to having an offer made by the mines of a week or ten days free vacation period with pay.

4. The carpenter work available pays high wages $12 to $14 a day) but is short-lived and consideration might therefore be given to having the mines which are badly in need of men offer six months or longer contracts. One mine which we visited indicated it would be willing to make such offer for work seven days a week, eight hours a day, overtime for the sixth day, and double time for the seventh day.

5. Mining is generally looked on as a very unattractive alternative from the type of work which the men have been

doing on the construction projects. Placards, etc., might be posted around the employment service office of such camps at Climax, Utah, etc., to offset the above feeling.

6. Some thought might be given to using women in the employment office rather than men.

The above are intended only as food for thought as I do not feel qualified to speak other than as a matter of impression from a very short stay.

[fol. 2442] PLAINTIFF'S EXHIBIT 125

War Production Board

Washington, D. C.

Copy No. 12

Planning Committee Document 236

April 22, 1943.

Memorandum

To: Mr. William L. Batt, Vice Chairman, War Production Board.

From Edward T. Dickinson, Jr., Executive Director, Planning Committee.

Subject: Effectiveness of Gold Curtailment Order, L-208.

Pursuant to your directive of March 13, 1943, requesting that the Planning Committee prepare a report on the effectiveness of the Gold Curtailment Order, L-208, I asked the branches concerned with the administration of the Order to report on the transfer of manpower from the gold mines to essential war industries and the release of equipment and materials to essential uses.

A. *Summary of Findings.*

1. Displacement of Labor by the Order and Results.

a. The Gold Order was responsible for the transfer of

approximately 2000 gold miners * to war industries, at least 1200 of these going to copper and other essential non-ferrous metal mines.

b. As a result of the labor transferred from gold mines, more than 11,000 tons of copper, 4,000 tons of zinc, 2,400 tons of lead, 13,000 tons of tungsten, and 6,000,000 pounds [fol. 2443] of molybdenum have been added to the annual production of these metals.**

2. Release of Equipment and Materials by the Order.

a. One and a half million dollars in equipment has been transferred from the gold mines to essential non-ferrous mines and has accelerated strategic metal development.

b. Approximately $15,000,000 worth of strategic material has been released from gold mines that were closed.

B. *Criticism of the Reports Made by the Mining Equipment and Labor Production Divisions.*

Despite these clear gains, the report of the Mining Equipment Division argues that the Gold Order has accomplished little and that Preference Rating Order, P-56 would have been an adequate device to curtail operations in the gold mines. The report is to some extent vitiated by the following arguments which are not sustained by the facts:

1. On Page 4, it is stated that damages incurred by the operators in closing the mines may lead to post war claims for reimbursement. Aside from the irrelevance of this statement, such claims could, theoretically, have been put forth for losses sustained under the operation of P-56 or any other order.

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* 1156 placed in other non-ferrous mines;
515 placed in other essential industries;
500 in other war industries and copper mines (of 650 registered, the transfer of 500 to war industries is assumed since registration is necessary to get unemployment benefits; the transfer to war industries is assumed due to high wage rates).

2171 Total

** From a sample study of 1000 gold miners displaced. Report of the Labor Production Division.

[fol. 2444] 2. On Page 6, it is argued that P-56 was an adequate instrument to curtail gold mining operations and the proof offered is that employment in gold mines declined from 38,771 in 1941 to 12,286 in September, 1942.* But this comparison is misleading since the first figure, compiled by the Bureau of Mines, uses a different definition of a gold mine than is used by the War Manpower Commission in arriving at the figure for 1942. In other words, the decline in gold mine employment is not measured by these figures.* The inescapable fact is that at the time the Gold Order was instituted, the labor shortage in copper mines made immediate action imperative. Nor could this have been accomplished by restricted priority assistance since most producers had large stocks of raw materials on hand and P-56 gave no authority to requisition these stocks.

3. On Page 3, it is implied that only 3217 laborers were displaced out of a total of 12,286.** But approximately half of the 12,286 includes employees working in gold mines which were not encompassed by the Order. Thus the displacement of 3217 out of about 6500 miners is therefore a more accurate ratio.***

[fol. 2445] Copies of the reports made by the Labor Production and Mining Equipment Divisions have been transmitted to you. The Planning Committee believes that to measure the full effectiveness of the Order, the following additional information is necessary and is requesting that it be prepared:

1. The total productivity of all labor displaced.

2. A breakdown of the $15,000,000 of strategic materials released, to determine specifically the kind and quantities of critical materials affected.

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* The Bureau of Mine's figure includes both lode and placer operations; whereas, the War Manpower Commission's figure represents those employed only in lode mines in twelve Western States and South Dakota.

** Represents the period ending March 31, 1942, instead of September 1942 and covers a period just prior to the acute labor situation.

*** Derived by excluding those mines which were not affected by the Gold Order and are still in operation.

3. The quantities of idle equipment that are still available for transfer.

C. *Conclusions.*

There can be no doubt that the contributions made by the Gold Order are significant. It substantially accomplished the purposes for which it was passed. The amount of manpower released under the Order coincides with the estimates made prior to its issuance * and the miners transferred from gold to copper have been responsible for important increases in the production of critical non-ferrous metals. The data presented above indicates that to implement the administration of the Order and enhance its effectiveness, rigorous tightening of controls is necessary. This should result in the requisitioning of huge quantities [fol. 2446] of equipment still lying idle in the gold mines, badly needed in essential industries. A periodic review of serial numbers, issued under P-56, should also be made to ascertain whether or not mines holding these serial numbers are continuing to perform essential operations.
[fol. 2447] The figures in the table and chart which follow are an indication of the trend in copper employment and production. The increase for the last quarter of 1942 was caused by two factors: the furloughing of soldiers and the release of gold miners. Approximately 2900 soldiers (decreased to 1950 by February, 1943) and 525 gold miners.** were placed in copper mines.

From an examination of the figures on Page 1 of the report, it is obvious that the rise in copper employment for that period was not caused solely by the placement of gold

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* WPB Press Release, Oct. 8, 1942 (WPB, 1989). It was estimated that between 3000 and 4000 gold miners would be made available for other work.

** Of 1000 referrals made by U.S.E.S., 454 were to copper mines. Assuming that 1000 is a representative sample; then, of the total referrals (1600) to non-ferrous mines, it is likely that 720 were made to copper mines. To determine actual placements in copper mines, the overall proportion of placement to referrals (72%) has been used.

miners, since the total number of gold miners that were transferred to all non-ferrous mines (1156) is less than the increase for copper employment (2171) alone.

[fol. 2448] PLAINTIFF'S EXHIBIT 126

October 10, 1942.

The President, The White House, Washington, D. C.

MY DEAR MR. PRESIDENT:

Some days ago the War Production Board announced a decision to close all gold mining operations in the United States. This order was made by the Board against the the emphatic protest of those representing the largest mining operations engaged in the mining of gold from lode and placer operations.

The largest mining operations affected by this order are in the states of South Dakota, California, and Colorado.

The Homestake Mine in South Dakota has been operating for some sixty years and has supported a community immediately surrounding the operation of some sixteen or eighteen thousand souls.

The Mother Lode Mines in California extend along the western base of the Sierra-Nevada range of mountains for a distance of 150 miles or more. These mines have been depended upon by communities the total of which would approximate one hundred thousand souls.

The population dependent on the Cripple Creek Mines of Colorado has varied from time to time and is not definite at this moment. Suffice it to say that it would be in the neighborhood of five or six thousand souls.

The economy of communities and states in which these mining operations are located has depended largely upon these operations, in that all of these mines have contributed materially by way of taxation to the states, counties, and municipalities in which they are located.

[fol. 2449] The labor employed by these mining operations in the respective states has been to a very large extent contributed by the communities that surround the respective

mine operations. Homes have grown up through the years in each of these communities, and sons followed their fathers into the mines.

The record made before the War Production Board discloses that in each of these mining communities the young men, that is, men under 50 or thereabouts, have already either gone into the military branches of the United States, or have gone into war activities where alluring wages attracted them. The record discloses that the men now engaged in mining operations in the mines affected by the order are by and large about 50 years of age or over. The record before the War Production Board discloses that the men now engaged in mining operations in these localities have, with but rare exception, been employed in the mines of the respective localities for many years.

It is stated that the object of the order made by the War Production Board closing down these gold mines is because of a shortage in supply of critical materials for defense, and the making of the order is supported by the theory that the labor employed in these gold mines will go into mines of copper or lead or zinc.

We respectfully draw your attention, Mr. President, to the record as made before the War Production Board that if all of the gold mines affected by the order of the Board are put on a stand-by basis, that is, if they are permitted to retain only enough labor to keep the mines from becoming flooded and caved, there will be in all about 2,020 of all types put out of employment.

The record before the Board shows that there may be another 500 men put out of employment from other mines of smaller capacity, making a total of 2,520 men put out of employment from lode mines.

It is estimated that the number of men put out of employment from dredger operations will be about 750 men. The men engaged in dredger operations are as a rule much older than those engaged in lode mining, at the present time. [fol. 2450] It is estimated that the total number of men put out of employment by the order of the War Production Board will be approximately 3,270. The record before the Board establishes that of this number about 900 are miners and muckers.

From this number, it is estimated that between 150 and 200 miners and muckers would be necessary to retain the

gold mines and dredges in a stand-by condition; hence, not to exceed 750 men, accustomed to actual mining and generally termed "miners" and "muckers" would be available for employment in mines of copper, lead or zinc.

The record made before the War Production Board discloses that miners, who have been for a long time engaged in gold mining, do not go into the mining of other minerals, such as copper, lead and zinc. There are many reasons stated for this custom.

It is emphatically stated before the War Production Board that if this mine labor population is released from employment in the gold mines in the respective states, only a negligible number, if any at all, will seek employment or remain employed in mining operations of other metals.

The impairment of the morale of communities in the states affected by the order of the War Production Board; the far-reaching effect upon the economic structure of the communities; the irreparable destruction of private property that will be accomplished by the flooding and caving of gold mines; the discouragement and heartache that will come into thousands of homes, many of them the homes of boys now in the military service of this country, but whose parents and relatives remain in the communities affected by this order,—all of these things will not be compensated by the negligible number, if any, of mine laborers who will go from the closed mines to communities far remote to engage in other mining activities.

We respectfully draw your attention to the fact that at this very time Great Britain is urging and aiding the production of more gold by the gold mining operators of South Africa.

We respectfully draw your attention to the fact that our neighbor ally in this war, the Dominion of Canada, is [fol. 2451] going forward and encouraging the production of gold in that country, and in a telephonic communication within the past few days with those in authority on the subject in Canada, the information was received that the Canadian government has no intention of closing down its gold mine operations.

We respectfully urge that no beneficial result inuring to the defense of the United States in its time of war will flow from the order made by the War Production Board

closing the gold mines of this country. The record needs no emphasis that great and irreparable injury will result.

We respectfully bring this matter to your attention with the request that you stay the order made by the War Production Board affecting the gold mine operations of the United States, at least until the whole subject of marshalling of manpower and the allocation of labor may be considered and the vital questions involved, concluded; thus that the gold mining industry of the United States may not be subjected to unwarranted and unusual hardship and injury which may not eventually be considered necessary, and which may not be equitably borne by other industries.

Respectfully, (Signed) Messrs. McCarran (Nevada); Johnson (Colorado); Millikin (Colorado); Johnson (California); Langer (North Dakota); Thomas (Idaho); Chavez (New Mexico); Hayden (Arizonia); Murray (Montana); Wallgren (Washington); Hatch (New Mexico); Bone (Washington); McNary (Oregon); Murdock (Utah); Nye (North Dakota); Holman (Oregon); Downey (California); McFarland (Arizona); Gurney (South Dakota); Bulow (South Dakota); Thomas (Utah).

[fol. 2452] PLAINTIFF'S EXHIBIT 127

Oct. 11, 1942.

Honorable Chan Gurney, United States Senate, Washington, D. C.

DEAR SENATOR GURNEY:

Reference is made to your letter of October 2, 1942, regarding the curtailment of gold mines. As you point out, no argument can be made for the need of gold in the war effort.

Nevertheless, as you probably know, the Army has been forced to take drastic and unprecedented action to meet the manpower crisis in the non-ferrous metal mining industry which has already seriously curtailed production of ammunition and other war materiel. The Secretary of

War has requested that 4,000 soldiers who have "hard rock" mining experience be furloughed from the armed forces to work in the copper mines.

Since such drastic measures have been taken by the Army to meet an urgent situation, similarly drastic measures must be taken to recruit all qualified civilian workers employed in non-essential activities such as gold mines. It will be impossible to secure from the Army a sufficient number of "hard rock" miners to meet the demands of the non-ferrous metal mines. Nearly all the workers now presently employed in the gold mines are urgently needed and can be used immediately in the copper mines.

In the light of the facts set forth above, I know that you will understand why the War Department feels that military necessity demands the immediate curtailment of the gold mines. The gold mining industry has been singled for curtailment only because it constitutes the most readily available pool of "hard rock" miners who are so urgently needed to further the war effort.

Sincerely yours, Brehon Somervell, Lieutenant General, Commanding.

[fol. 2453] PLAINTIFF'S EXHIBIT 128

War Department, The Chief of Staff, Washington

October 12, 1942.

Honorable Chan Gurney, United States Senate.

DEAR SENATOR GURNEY:

In your letter of October 2nd you pointed out the adverse effects of the closing of gold mines on the economic conditions in Lawrence County, South Dakota, and urged that such a decision be deferred until the entire manpower question has been considered.

It is my understanding that the War Production Board has ruled that the gold mining industry be closed down in the hopes that this action will release experienced mine labor for employment in the mining of the basic strategic

materials essential to our war production program. I am sure that this action was taken only after careful consideration of all the factors involved.

As you know, our war production effort is dependent to a large extent on the availablity of copper and molybdenum. The loss of mine labor to other industries has made it extremely difficult to maintain even present rates of production, which are insufficient to meet our war requirements. Drastic measures have been necessary to relieve the situation and the War Department has taken the extreme step of furloughing miners for this purpose. I trust sincerely that other war construction activities under way in South Dakota may to some extent relieve such distress as may be occasioned by the closing of the gold mine.

Faithfully yours, (Signed) G. C. Marshall, Chief of Staff.

[fol. 2454] PLAINTIFF'S EXHIBIT 129

Interdepartmental Committee on Non-Ferrous Metals

Meeting August 25, 1942

H. O. King, Chairman

The following were present:

Mr. H. O. King, Chairman, W. P. B.
Mr. Allen Buchanan, Industry Branch Consultant Service, W. P. B.
Mr. R. D. Parks, Miscellaneous Minerals Branch, W. P. B.
Mr. William Remington, Planning Committee, W. P. B.
Mr. Robert Abelow, War Labor Board.
Mr. R. J. McEwen, Miscellaneous Mining Branch, W. P. B.
Mr. M. K. Smith, Tungsten, Molybdenum and Vanadium Branch, W. P. B.
Mr. Louis Lister, Labor Production Division, W. P. B.
Mr. Samuel Lipkowitz, Labor Production Division, W. P. B.
Mr. Paul H. Norgren, Labor Production Division, W. P. B.
Dr. Wilbur A. Nelson, Industry Operations, W. P. B.

Mr. Stephen Raushenbush, Bureau of Mines, Department of Interior.

Major R. B. Coons, Selective Service.

Mr. Leo Werts, War Manpower Commission.

Capt. Sidney C. Sufrin, Civilian Personnel Division War Dept.

Capt. Russel W. Nauman, Service of Supply War Dept.

Mr. Robert R. R. Brooks, Labor Office, O. P. A.

Mr. King opened the meeting and explained that the agenda was primarily concerned with reports on the progress of particular measures already discussed or undertaken by the committee to alleviate the manpower shortage. [fol. 2455] The first report was devoted to the four letters that had been prepared for circulation among the mineworkers, emphasizing the importance of their work and informing them of the steps that are being taken on the Washington level to deal with the manpower wage problem. Copies of the letters prepared by Mr. McNutt, Mr. Davis and General Hershey were distributed to the committee. It was reported that the letter from Mr. Donald Nelson would be ready shortly.

The problem of a uniform salutation on each letter was discussed and the chairman was given authority to make revisions to achieve desired uniformity. It was agreed that a set of the four letters would be distributed to local unions through the medium of their International Unions, to the operators through the several Branch Chiefs, and to the mayors of mining towns and local draft boards in mining areas. It was decided that about 2,500 copies of each letter should be prepared.

Mr. King reported that another series of statements was being prepared for distribution among the mining operators. First, a letter from Mr. King urging employers to use the U. S. Employment Service, and second, a statement from General McSherry's office and another from General Hershey's office, each to accompany Mr. King's letter. The statement from General McSherry will inform operators of the clearance procedure under the U.S.E.S. for obtaining referrals; that from General Hershey will outline the procedure for obtaining occupational deferments for mine workers. It was agreed that copies of these statements would be ready before the next meeting and that this series

would be mimeographed and distributed to the operators by the Branch Chiefs.

[fol. 2456] Mr. King then asked for a report on labor shortages in mines other than copper, lead and zinc. Mr. McEwen of the Mercury Section of the Miscellaneous Metals Branch presented some data on the shortage of labor in mercury mines. He pointed out that 80 percent of the mercury production occurs within an area only about 200 miles from San Francisco and that the shipbuilding and aircraft industries on the Pacific Coast had drawn away a great many workers. He said there was a present shortage of 600 to 800 men and that this shortage represented 25 percent of the industry's present manpower. Development work in mercury mines has stopped completely as a result of the shortage. Mr. M. K. Smith of the Tungsten, Molybdenum and Vanadium Branch reported on labor shortages in those industries. He pointed out that although several new mill projects had been completed recently there was great difficulty at present in supplying these mills with sufficient ore as a result of the shortage of labor and that production therefore was far below capacity. At its next meeting, Mr. Smith agreed to furnish the committee with data on labor requirements in tungsten, molybdenum and vanadium operations.

The Gold Curtailment Order then came up for discussion. Dr. Wilbur Nelson read a copy of the tentative draft of the proposed order which had been written by the office of the chief of the mining branch. He explained that it would apply to all gold mines (except those which produced 1200 tons or less of commercial ore in the year 1941 or which are producing commercial ore at the rate of 100 tons [fol. 2457] or less per month). He pointed out that the proposed order did not apply to any operator who was the holder of a serial number issued under Preference Rating Order P-56, as amended.

Mr. King asked for a report at the next meeting on gold mine operators who come under the definitions of the P-56 order and its amendments and on the procedure in determining the serial number. The problem of the gradual versus the sudden curtailment of gold operations was brought up. It was the tentative decision of the group that it would be better to curtail them suddenly and to make

certain that the measures necessary to recruit the gold miners were prepared by U.S.E.S.

Mr. Raushenbush asked for some information of the probable number of gold mine workers who could be transferred. There was no definite agreement on just how many would be obtained. Data from the Bureau of Employment Security as of March 31, 1942 indicated that there were some 12,000 workers employed in lode gold mines and probably an additional 6,000 in placer operations but these totals have to be revised because there has been a heavy withdrawal of workers from the gold mine industry since then. Mr. Leo Werts from General McSherry's office reported that machinery to recruit gold miners was being set up and indicated that a report on the recruitment procedure to be followed would be presented at a subsequent meeting. Mr. King pointed out that the employment service would provide the gold miners with information on wages, rents and housing at the prospective place of employment when recruiting was started at the gold mines.

[fol. 2458] The committee then turned to consideration of the policy of having war contractors discontinue hiring miners. Mr. Werts reported that General McSherry was at the very moment discussing this problem with representatives of the Defense Plant Corporation, the Navy Department and the War Department and that General McSherry would have a report on the interview at the next meeting.

Mr. Buchanan pointed out that if a directive to war contractors ordering them not to hire miners was issued at this time it might embarrass the position of the union which is now arguing its case on wage disputes before the war Labor Board. He suggested that such a directive should be withheld at least until after the hearings on the cases were completed. Mr. Abelow of the War Labor Board also indicated that it would be desirable to postpone announcement of such a directive until after the panel had closed hearings.

The problem of allocating labor supply among the various metal mines was also brought up and in view of the labor shortage common to all of them it was agreed that closer cooperation between the mining branches affected by this problem would have to be secured.

The meeting was then adjourned and Mr. King announced that the next meeting would be held on the following Tuesday, September 1, at 2 o'clock.

[fol. 2459] PLAINTIFF'S EXHIBIT 132

Signal Corps, United States Army

IF NOT DELIVERED WITHIN 24 HOURS Return to:

Signal Corps, US Army Telegraph Office, Room 118 Custom House, San Francisco, California.

Received at HD11 131 WD, WASHN.DC OCT 1942 100003Z
MR EDWARD H CLARK PRESIDENT.

HOMESTAKE MINING CO 485 CALIF ST SANFRAN CALIF. Room 950. Hotel Fairmont—Room 470

FACED WITH A SERIOUS SHORTAGE OF COPPER AND MOLYBDENUM FOR OUR ARMAMENT PROGRAM STOP THE WAR PRODUCTION BOARD HAS ORDERED THE CLOSING OF GOLD MINES TO PROVIDE ADDITIONAL TRAINED LABOR FOR THE NON FERROUS METAL MINES STOP THE SECRETARY OF WAR HAS ALSO TAKEN THE UNPRECEDENTED ACTION OF FURLOUGHING MINERS IN MILITARY SERVICE STOP I HAVE DIRECTED IMMEDIATE ACTION TO BRING OFFICIALS OF THE WAR DEPARTMENT AND OF THE ANACONDA COPPER MINING CO IN COOPERATION WITH YOUR LOCAL MANAGEMENT AT LEAD COMMA SODAK STOP I AM ASKING YOU TO TAKE THE LEADERSHIP IN EFFECTIVE THE QUICKEST AND LEAST DISTURBING TRANSFER OF WORKERS FROM THE [fol. 2460] NATIONS GOLD MINES TO NONFERROUS MINES STOP I WILL APPRECIATE PROMPT MEASURES ON YOUR PART TO INSURE FULL COOPERATION OF YOUR LOCAL MANAGEMENT AT LEAD STOP.

ROBERT P PATTERSON UNDER SECRETARY OF WAR. 10/1511Z

TELEPHONED: TO Mr. E. H. Clark. PHONE NO. DO 8800. TIME 1143AM. BY Clarkson.

[fol.2461] PLAINTIFF'S EXHIBIT 133

Homestake Mining Company

Lead, South Dakota

October 15, 1942.

Notice to Employees

On October 8, 1942 the War Production Board issued an order for the closing of all of the larger gold mines of the United States. This order requires that the breaking of new ore must stop on October 15, 1942 and all operations must cease within sixty days from date of order. The expressed purpose of this order is to obtain miners for non-ferrous mines, particularly copper mines.

The company has made every reasonable effort to present its case and that of our communities to the officials of the War Production Board. In this it has been ably supported by officials of the State of South Dakota and by many Senators and Congressmen, including Senator Gurney and Congressman Case. These representations have been of no avail.

For our mine we are authorized to retain only such men as are necessary for maintenance. Our lumber and timber department will, however, continue to operate at capacity. Our coal mine will remain in operation. Our shops and foundry will work on war materials. It is probable that the work in this department will materially increase. Our power plants will continue at the rate of output needed by these operations. We shall need some men for an operation in Wyoming.

We call the attention of all employees that we must release to the opportunities for employment in the copper mines. Government representatives state that there is great need for men at the copper mines. We have also been asked to call to your attention Directive 13 of the War Manpower Commission dated October 7, 1942. This Directive states;

"On and after the date hereof no employer shall hire in, or hire for work in Alaska or any state west of the Mississippi, any person who on or after October 7, 1942 has ceased to be employed as a production or

maintenance worker in connection with gold mining except upon referral of such worker to such employer by the United States Employment Service."

We greatly appreciate the loyal and efficient service of our many employees. We regret that we are forced to release many of you. It is our suggestion that you remain at your work until you are released and further, that you leave your families in your homes in Lead at least until you have an opportunity to investigate the available housing in the community in which you will be employed. We hope that when it is again possible for us to resume operations you will wish to return and that we may then have place for all of you.

Homestake Mining Company, by Guy N. Range, General Manager.

[fol. 2462] PLAINTIFF'S EXHIBIT 162

War Department

Office of the Under Secretary

Washington, D. C.

June 13, 1943.

Mr. H. O. King, Director, Copper Division, War Production Board, Washington, D. C.

Labor Shortage in Copper Mines

DEAR MR. KING:

I have your letter of June 10th, together with statements showing present shortage of labor in copper mines and estimated shortage for future months.

I am deeply concerned over the prospects of insufficient supply of copper. Our ability to produce the munitions necessary to win the war depends on getting enough copper. As you point out, the difficulty lies simply in shortage of manpower in the copper mines.

The War Department, however, must adhere to its decision not to furlough more soldiers to work in copper mines.

In the first place, the proposal would weaken our fighting forces at the time when every effort is being made to strengthen them. It should not be overlooked that the soldiers involved have been trained to fight, and the services of these trained men would be lost to the Army. If the Army is to release trained soldiers whenever there is a shortage of manpower in an essential industry, we might as well dissolve the Army. In the second place, the furloughing of more soldiers to work in the copper mines would do little toward production of more copper.

The causes of the shortage of miners are well known. For one thing, men have left to take employment in industries that offer better wages. Again, they have left to go to farms, having been assured that no farmers will be drafted into the Army. These factors have caused a drift away from the mines, and conditions cannot improve so long as the drift continues. The furloughing of soldiers to work in the mines will not stop the drift. The difficulties that are inherent in the present situation will not be remedied until effective measures are adopted to keep men at occupations as essential as that of copper mining and to recruit from less essential industries the additional men needed. The troubles in copper mining furnish a striking instance of the need of legislation along the lines of the Austin-Wadsworth bill.

[fol. 2463] Men with hard rock mining experience, I am told, are still engaged in mining gold, silver and other non-critical metals. I know of the arguments that are used in an effort to justify these operations, but the fact remains that their contribution toward prosecution of the war is very small. I submit that there is no warrant for asking that soldiers be turned over to work in copper mines as long as men with the very experience required for mining copper are permitted to work these non-essential mines.

Sincerely yours, (S.) Robert P. Patterson, Under Secretary of War.

RPP:er

Copy to Mr. C. E. Wilson, Mr. Ralph Cordiner.

[fol. 2464] PLAINTIFF'S EXHIBIT 164

Order Clearance Committee Meeting 902

May 4, 1945.

Orders

1. Orders Proposed for Revocation after V-E Day

Order L-208—Gold Mining

Lieutenant Tobias presented the objections of the Navy to revocation of Order L-208 on V-E Day. He declared that the Order, although framed ostensibly to conserve critical equipment and materials, was really issued to conserve manpower. He indicated that in the vicinity of the principal gold mines there are important Naval installations whose manpower needs might be jeopardized further if the gold mines are permitted to reopen in the near future. It is the view of the Navy Department that, although manpower needs of Naval installations might drop off immediately following V-E Day, nevertheless there remain more essential civilian needs which should be met from any manpower thus made available.

Mr. Lerner indicated that WMC endorses the views of the Navy on this point. There are many essential civilian items in short supply because of manpower limitations, which should be taken care of with manpower released on V-E Day before the question of opening the gold mines is considered. The WMC proposes to take the stand that if Order L-208 is revoked, WMC is absolved from any responsibility to keep base metal mines staffed. The crises is manpower in other mining areas continues, particularly in base metal mining areas. On the other hand, he wanted it clearly understood that WMC is agreeable to permitting the resumption of gold mining in due course, after more essential needs of the civilian economy have been met.

The Chairman observed that WPB, in the opinion of Mr. John Lord O'Brian, former WPB General Counsel, could not properly issue Orders on the basis of manpower con- [fol. 2465] siderations alone. Mr. Lerner contended that Mr. J. A. Krug has shown a willingness to base Orders on manpower considerations but that such policy has not in

fact been adopted because of European developments which give promise of early relief from manpower shortages. In response to a question as to the nature of the manpower ceilings imposed on the gold mines, he stated that these ceilings are imposed so that the mines may maintain a small force of employees for maintenance purposes only. They are not used for operating the mines.

Mr. Miller stated that if Order L-208 were revoked, gold mines, including those in Alaska, would operate under Order P-56 as non-serial number mines so that the Mining Division would still have effective control over their purchases of equipment. Only those mines which have serial numbers are able to buy equipment without special permission of the Division in each case. Mr. Miller pointed out that revocation of Order L-208 would not mean that the gold mines would immediately resume full operations—it would take several months of preparation before full employment would be possible. The need for additional workers would be progressive, with potential employment of about five thousand persons following revocation of the Order. He emphasized that many gold mines have lower wage rates than the base metal mines and, therefore, it is doubtful whether the gold mines could draw off workers from the base metal mines. So far, the gold mines have not been able to recruit up to the permitted manpower ceilings in order to get adequate maintenance crews.

In response to Captain Federa's inquiries, Mr. Lerner declared that WPB has asked deferment for all mine workers, especially requesting deferment for workers in lead mines. He pointed out that manpower ceilings, which would continue in effect after revocation of Order L-208, would be of some value in preventing newly opened gold mines from drawing off workers from essential industries. However, manpower ceilings are effective only on numbers, and not on types, of workers. Thus, ceilings would not control the return to the mines of skilled workers who might be needed in more essential industries. If Order L-208 is revoked, heavy pressure will be brought to bear on WMC to raise the present ceilings imposed upon gold mines. He doubted whether WMC would be able to resist this pressure. He stated that WMC requests retention of Order L-208 because of manpower considerations only.

Lieutenant Smith stated that Order L-208 was issued by WPB as the result of a commitment made to the Army in return for an undertaking on the part of the Army to furlough miners to go back to base metal mines. The Army and Navy had agreed to such furloughs if WPB would close the gold mines. It is clear, therefore, that Order L-208 was issued because of manpower considerations.

In response to Mr. Correll's question as to whether V-E Day cut-backs would relieve pressure on the mining employment situation in base metal mines, Lieutenant Beardman indicated that the Copper Division and the Tin, Lead and Zinc Division are assuming that, in order to meet [fol. 2466] essential civilian needs, the demand for base metals will continue unabated after V-E Day. Mr. Correll asked whether Order L-208 had diverted labor to copper, lead, and zinc mines. Mr. Miller reported that in general it had not been successful in accomplishing this objective. This was partly due to the fact that certain large gold producers, whose gold mining activities are incidental to their copper mining operations, continued in operation. He repeated that the low wage rates in the gold mines would prevent the drawing off of labor from war industries or other essential industries after V-E Day.

The various representatives invited for discussion of the proposed Order revocation left the meeting at this point.

The Chairman then reported that yesterday (May 3), Mr. J. A. Krug and Mr. William C. Keeley, Vice Chairman for Metals and Minerals, after extended conversations with WMC representatives, had agreed that the Order should be revoked when military cutbacks occur. He then referred to the conclusions reached with respect to the accomplishments of Order L-208, as contained in Report No. 9, "The Closing of the Gold Mines", prepared by the Policy Analysis and Records Branch, Office of the Executive Secretary.

However, Mr. Correll pointed out that these conclusions were merely judgments of the writer and that there was factual evidence to indicate that some manpower had been successfully transferred from gold mines to copper mines and other essential war industries. Further, Mr. Correll pointed out that this Order has been highly controversial; that it had not been circulated in the regular manner; and that the WPB Labor Offices had always felt that it was too

drastic and had proposed instead a progressive prohibition, but were overruled.

Mr. Randall stated that the Vice Chairman for Metals and Minerals was supporting the Mining Division's recommendation that Order L-208 be revoked subsequent to V-E Day. He was not modifying his position and would approve the revocation of Order L-208 "subject to Mr. Krug's review and decision".

Mr. Correll stated that the Offices of Labor Production and Manpower Requirements do not oppose revocation of the Order but he urged that the decision to revoke be made on the basis of the actual circumstances surrounding requirements for copper, lead, and zinc on V-E Day. At the present time there are no grounds for knowing what the specific conditions will be on V-E Day.

Mr. Calhoun felt that the basic question involved is whether WPB is willing to retain an Order because of manpower considerations only.

After further discussion, the Committee approved the V-E Day revocation of Order L-208; Major Booth, Commander Russ, and Mr. Calhoun dissented.

[fol. 2467] PLAINTIFF'S EXHIBIT 175

Calendar No. 65

Senate

81st Congress, 1st Session

Report No. 79

Relief of the Owners and Operators of Certain Gold Mines Which Were Closed or the Operations of Which Were Curtailed by War Production Board Limitation Order L-208

February 22 (legislative day, February 21), 1949.—Ordered to be printed

Mr. McCarran, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 45]

The Committee on the Judiciary, to whom was referred the bill (S. 45) for the relief of the owners and operators of certain gold mines which were closed or the operations of which were curtailed by War Production Board Limitation Order L-208, having considered the same, do now report the bill to the Senate favorably with amendments and recommend that the bill, as amended, do pass.

Amendments

On page 2, beginning with and including the word "property" on line 18 thereof, delete all through and including the comma following the word "period" on line 19.

On page 3, beginning with and including line 18, strike out all of section 2 down through and including line 8 on page 4, and insert in lieu thereof the following:

Sec. 2. The Secretary of the Treasury is authorized and directed to make use of the facilities of any Government agency to determine the validity and amount of claims. It

shall be the duty of the Secretary of the Treasury or the authority designated by the Secretary of the Treasury to render decisions on all claims filed within one year after date of filing thereof, except where prevented by unusual circumstances.

On page 4, line 16, delete "certified to him" and insert in lieu thereof the word "validated".

On page 4, line 20, delete the word "examiner" and insert in lieu thereof the following: "Secretary of the Treasury or the authority designated by him".

[fol. 2468] Purpose of Amendments

The purpose of the first amendment is self-evident. It corrects a typographical error in that the deleted phrase is repetitious of the identical phrase immediately preceding.

The purpose of the second amendment is to permit the Secretary of the Treasury, or an authority designated by him, to determine the validity and amount of claims. It is the concensus of the committee that the Secretary is properly equipped in his department to perform this function without additional legislation authorizing an examiner and staff specifically to undertake the work. In addition, the committee believes that the amendment permits the Secretary more discretion and flexibility in his endeavor to carry out the intent of the bill.

The third and fourth amendments are simple technicalities for the purpose of making sections 4 and 5 of the bill conform to section 2, as amended.

Statement

The reasons for enactment of this legislation are explained fully and completely in a unanimous subcommittee report of July 19, 1946, to the whole Committee on War Claims of the House of Representatives, following lengthy hearings on H. R. 4393 in the Seventy-ninth Congress, a bill similar in its purposes to the instant measure.

On October 8, 1942, the War Production Board issued order L-208, which summarily closed the gold mines in this country. The order was rescinded on July 1, 1945, having been in effect approximately 2½ years. The evidence in support of the bill shows that the gold-mining in-

dustry was selected as a guinea pig for the purpose of testing the feasibility of closing what was called nonessential industries. No similar order was issued against any other segment of American industry. The order completely failed to accomplish its purpose, or any purpose whatever, and inflicted irreparable and unjustified loss on the gold-mining industry. Your committee believes that this order inflicted a sacrifice on the gold-mining industry which the Federal Government in common fairness should try to relieve.

Four main points were developed at the hearings through the testimony of industry witnesses, Government witnesses, and the introduction of a detailed report on the history and operation of War Production Board Order L-208, known as the gold-mine-closing order. In the opinion of your committee the evidence presented, both oral and documentary, overwhelmingly supports the following contentions.

1. WPB Order L-208 was unique in that it was the only Government order closing a productive industry.

2. Issuance of the order was an administrative error, based upon a statistical misconception, and may, furthermore, have been illegal.

3. The net results of the order in accomplishing its avowed primary purpose of channeling manpower to "essential" mines were negligible.

4. The economic loss to the gold-mining industry has been great and in some cases the damage may be irreparable.

All the above points are discussed at length in the aforementioned WPB historical report on L-208, entitled "The Closing of the Gold Mines (August 1941 to March 1944)," June 1, 1944—Report No. 9, Policy Analysis and Records Branch, Office of the Executive Secretary, War Production Board, printed in the appendix of the hearings on H. R. 4393, and were generally corroborated by Dr. Wilbur A. Nelson, who administered L-208 for the War Production Board.

This report was writtten for the private use of WPB Chairman Donald M. Nelson and, until recently, was classified as "confidential." It is interesting to note that the testimony of both industry and Government witnesses

merely tended to corroborate the statements and conclu- [fol. 2469] sions from this WPB report which are quoted below in support of your committee's recommendations. Further corroboration may be found in Senate Subcommittee Print No. 6 of the Senate Small Business Committee, entitled "Survey of the Nation's Critical and Strategic Minerals and Metals Program," issued in June of 1944, in which the effect of L-208 is discussed in some detail.

An elaboration upon the four points outlined above follows.

The Uniqueness of the Order

The star witness at the hearings Dr. Wilbur A. Nelson, who was intimately connected with all phases of the issuance and administration of L-208 during his term with the War Production Board, participated in the following exchange:

"Mr. Engle: The fact that this industry was the test case—the guinea pig—for such policy, and that similar nonessential industries were not shut down, throws emphasis on the controversy as to the method of closing the gold mines, a controversy that otherwise might be passed lightly over.

"Mr. Nelson: I think that is a very true and correct statement.

"Mr. Engle: And it is true that the gold-mining industry was a guinea-pig?

"Mr. Nelson: Definitely.

"Mr. Engle: And no other segment of American industry was treated in an identical manner?

"Mr. Nelson: I know of no one."

The above opinion was corroborated by other witnesses and also by the special WPB report, to Donald M. Nelson, previously referred to. This adverse selective treatment, in the opinion of your committee, places the closed or curtailed gold mines in a special category and subject in turn to special treatment by the Congress.

Order L-208 Was An Administrative Error

The testimony before your committee conclusively showed L-208 to have been issued as the result of an error in com-

piling labor statistics. The agencies generally classified as gold mines those mines which produced a material amount of gold as well as strategic and critical minerals. The Mining Branch of WPB, which constantly fought against issuing L-208, took a more realistic viewpoint. The War Manpower Commission and the Labor Divisions of WPB had a wholly exaggerated idea of the number of miners to be released by closing what they considered "gold" mines, many of which were known by the Mining Branch of WPB to be producing essential minerals and which could not be closed without damaging the war effort. The figures furnished the Army and Navy by the agencies laboring under this misconceived definition indicated that a large pool of miners would be made available by the issuance of L-208. The voice of the Mining Branch of WPB was not strong enough to reach the higher policy levels, nor were the figures submitted by the industry credited. The Secretaries of War and Navy therefore demanded action and got it.

Gold-mine operators had informed the Government that if all gold mines and dredges in the United States were closed approximately 3,270 men would be released, of which only 896 would be miners and muckers. Some 300 of these would be required to maintain the larger mines on a stand-by basis. Of the balance some were physically unfit for work in copper mines. It appears from the record that as far as transferrals could be checked through USES, the operators' estimates exceeded the eventual results in manpower captured for strategic metal mines. The War Production Board report on L-208 reaches this conclusion:

"* * * it may be concluded that since the number of gold miners actually reemployed was negligible, their contribution in increased production of copper, lead, zinc, etc., was likewise small, and probably was counterbalanced by the loss of such metals as are normally produced as byproducts of gold mining."

This conclusion is amply supported by the evidence placed before your committee.

It appears from the above that the American gold-mining industry was wrecked to no good purpose, while at the same time presumedly precious mining equipment was being

steadily exported to keep whole our allies' gold-mining industries. Writing in May, 1943, Gustav Peck, labor adviser to Donald M. Nelson, stated in a memorandum to William L. Batt:

"The mines are beginning to deteriorate; if they are once allowed to cave or flood to any appreciable extent, subsequent dewatering and reopening operations costing millions of dollars may prove prohibitive."
[fol. 2470] In the 3 years which have since passed, this deterioration has become a very serious factor, as many industry witnesses informed your committee.

Dr. Peck raised still another issue when he stated:

"The political and economic factors underlying the continuance of foreign gold mining are recognized, but a long-range view of the domestic situation raises the issue of whether the domestic gold-mining industry may be facing extinction while foreign gold mining anticipates an early return to prewar status."

It may be noted that a distinct thread of thought runs through the testimony to the effect that certain economic forces were delighted at the prospect of cutting off the production of domestic gold by any excuse. In support of this contention it may be noted that Milo Perkins stated:

"It is essential * * * that a reduction in gold mining should be envisaged for the postwar period."

It is well know that the War Production Board has no authority to issue orders concerning manpower. That was a function of the War Manpower Commission. Yet it is a well-understood fact that Order L-208 was issued primarily for the purpose of reghanneling manpower, and at the imperative instance of the Army, which threatened otherwise to curtail essential copper production by refusing to return drafted miners to the mines.

The testimony and exhibits before your committee show that the then general counsel of the War Production Board, Mr. John Lord O'Brien, had grave doubts as to the legality and force of an order from WPB, an agency supposedly authorized to be concerned only with materials, but actually

designed to have the effect of a manpower directive. Dr. Wilbur A. Nelson stated before your committee:

"I can say it was a grave question in the minds of certain members of the War Production Board. They definitely used their priority authority to handle the manpower problem."

To further show the confusion in thinking among the agencies, the War Production Board report states flatly:

"The truth of the matter was that those concerned with the order did not agree among themselves as to its real purpose."

As a matter of fact the Army and Navy had made up their minds and the civilian agencies had to act, willy-nilly, and then attempt to justify the action at a later date if possible to do so. The WPB report states the results succinctly:

"The anticipated protests against the order materialized immediately; the benefits did not."

The testimony before your committee certainly indicates the benefits never materialized but vast damage to an important industry did.

Actual Results Show Few Miners Channeled Into Strategic Mineral Mines

It has been pointed out that gold-mine operators furnished the War Production Board with estimates of the potential manpower pool of miners and muckers which would be made available by L-208. This estimate amounted to less than 600 as against agency estimates ranging from 5,000 to 10,000. The Secretaries of War and Navy stated more modestly on October 5, 1942:

"There are 2,000 to 3,000 hard-rock miners engaged in gold mining, now of no use in war production."

Dr. Wilbur A. Nelson testified before your committee that his figures, compiled in April of 1943, showed that 497 gold-mine workers "probably were actually placed in metal mines due to the gold-mine closing order * * * which would be about 300 miners and muckers." He also testified that most of these did not remain in their new jobs any length of time.

It must be noted that one of the primary reasons for the loss of labor at copper, lead, and zinc mines, aside from the draft, had been the high-wage inducements of the Army construction projects. The War Production Board states that "less than a week after the gold mines had been closed, largely because of the insistence of the Army, the Army ski-tow construction project at Pando, Colo., was completed. In the period October 15 to November 1, 1942, some 7,000 workers were released. This project was located only 20 miles from the Climax molybdenum mine, one of those particularly in need of employees. It has been alleged, and the records seem to substantiate the allegation, that a few of 7,000 workers released by the completion of the project returned to the mines from which they originally came. There was thus allowed to be dissipated a labor force of more than double that which conceivably could have been obtained by the closing of the gold mines." It is clear that these workmen, as well as those released from the gold [fol. 2471] mines, went into more lucrative jobs than mining offered, and that the primary objective—or at least the announced objective—that of getting labor for the production of strategic metals, was not gained.

The most liberal figures which may be inferred from testimony before your committee indicates that perhaps as many as 500 miners and muckers may have been channeled into strategic metal mines, most of which did not stay long.

There has been some argument to the effect that the release of equipment due to the closing of the gold mines may have warranted the issuance of L-208. According to figures in the hands of your committee, complied by Edward H. Rott of the WPB, who was in direct charge of the administration of the order, the estimated value of the used equipment released under L-208 was $2,147,480. Much of the equipment rendered idle by L-208 was specialized and could not be utilized elsewhere than at gold mines. The West, all through the war and today, is dotted with idle milling plants and equipment which could not be disposed of. At the same time we exported about $100,000,000 of mining, well, and pumping equipment in the year 1943 alone, of which a considerable amount was mining equipment.

The wrecking of the American gold-mining industry evidently was not warranted from the standpoint of freeing equipment for other uses, especially when it is evident from the testimony before your committee that great quantities of new machinery and tools were being exported for the maintenance of gold mining abroad.

Great, and in Some Cases Irreparable, Damage Has Been Done to the Gold-mining Industry

The report (No. 6) of the Senate Small Business Committee issued in June of 1944 states "the gold-mining industry has suffered heavy losses in physical assets, in market valuations and in income. Stockholders have been greatly distressed. The opportunity has been perfect for mines and mining securities to be picked up by large financial interests at low values. * * * Many mines cut off from current income and unable to sustain high maintenance costs have been abandoned with consequent heavy loss of investments. Some mines so abandoned may never be reopened because of the prohibitive cost of dewatering and restoring the caved and flooded workings. Some mining companies continue the losing battle to maintain their mines in working condition. * * * Most of the damage has been done and the principal victims were the smaller operators."

The testimony given at the hearings on H. R. 4393 before your committee bears out the above statements in detail. Witness after witness appeared and explained in detail the physical damage and financial loss resulting from L-208. This testimany not only was not controverted by any Government witness but was largely substantiated by the WPB report on L-208.

David Strickler, president of the Stratton Cripple Creek Mining & Development Co., stated:

"* * * it affected the little fellow worse than it did the big fellow. The big fellow * * * had some money in reserve, but the little fellow busted: that is what it did to him."

According to Julian D. Conover, secretary, American Mining Congress:

"The gold mines had already contributed a major part of their manpower to the armed services and to war industries. The order did not accomplish its purpose. It was

arbitrary and no provision was made for reimbursement."

Neil O'Donnell, of Idaho Maryland Mines, showed that the entire cash reserve of his company, amounting to $451,845, had been spent on maintenance by June of 1944, and the company had to resort to borrowing to preserve the mine. Up to January 1, 1946, $726,843 had been paid out for maintenance and repair of the mine. In spite of these expenditures, a further $694,045 is estimated to be necessary to rehabilitate the workings. This company is faced with a total loss of $1,419,000 and an empty treasury. It formerly gave employment to nearly 900 men.

The loss to small mines which were put out of business by foreclosure by creditors and forfeitures of leases and purchase contracts is impossible to estimate.

Philip R. Bradley, Jr. chairman of the mining board, State of California, while substantiating generally the situation outlined above, added, for an example, "the Central Eureka Mine in the Mother Lode District, which was one of the leading mines in the State, when L-208 shut them down; their expenditures for the maintenance of that mine averaged about $160,000 in each of the last 3 years. That company went broke.

[fol. 2472] Actual testimony by those who appeared before or filed statements with your committee showed losses of more than $2,816,000. Figures presented by the American Mining Congress gave an estimated total of $18,420,000 (including Alaska) as the probable aggregate of claims that might be payable under the proposed legislation. This does not, of course, include loss of production or profits. It represent out-of-pocket outlay to preserve mines in working order for stockholders, owners and operators.

Conclusion

In the opinion of your committee there is no better evidence substantiating the necessity for speedy passage of H.R. 4393 than the following statements from the War Production Board's report on L-208:

"With regard to the question as to whether or not the results achieved by L-208 compare favorably with the results anticipated at the time the order was issued, the answer would appear to be in the negative.

. . . . . .

"The effects of the closing of the gold mines on community and individual economy have been great. Gold mining was a major industry in many western States. State taxes on gross value of gold-mine output constituted a considerable proportion of State revenue. * * * It is impossible to estimate the loss to the individual miner and home owner in affected mining communities, but appeals and protests against the relinquishing of leases and the necessity for forfeiting equity in equipment are on file in the War Production Board."

* * * * * * * * *

It is clear, in the opinion of your committee, which opinion is supported by expert testimony and is uncontroverted by Government witnesses, that there was little or no basis for issuing Order L-208, and that it was not only an administrative error but that the War Production Board proceeded on dubious authority. The conclusion further has been reached that the order should have provided a mechanism for compensation and that, as such was not provided, the Congress should so provide, even while realizing that much of the loss and damage is irreparable. Your committee believes that the prompt repayment of such losses as are covered in the pending bill, H. R. 4393, will not only do substantial justice to an industry which was selected for a unique experiment, but will greatly aid in reestablishing an important industry, provide thousands of jobs to veterans and start a flow of taxes into county, State, and the Federal treasuries.

[fol. 2473] PLAINTIFF'S EXHIBIT 177

Senate

78th Congress, 2d Session

Report No. —

Survey of the Nation's Critical and Strategic Minerals and Metals Program

—— ——, 1944.—Ordered to be printed

Mr. Scrugham (for himself and Mr. Buck) submitted to the Special Committee to Study and Survey Problems of American Small Business the following

PRELIMINARY REPORT

Introduction

As the end of the year 1943 and the beginning of the year 1944 seemed to mark a distinct turn in the Nation's raw material program, especially as it concerned procurement of minerals and metals, a survey of the domestic mining situation at this time seems appropriate, not only to sum up what has been the experience of the domestic mining industry with the administration of the program, but also to indicate what changes may be advisable in order to keep a rational attitude throughout the approaching phase now that supply appears to be coming into a certain balance with requirements for war, and in some few instances exceeding such requirements.

I. DOMESTIC MINING AS A SMALL BUSINESS PROBLEM

As is the case with other American business, the majority of mining enterprises may be classified as small business. The many problems of small and marginal mine operators engaged in nonferrous and nonmetallic mineral production, exclusive of iron, coal, and petroleum, began to engage the attention of the Senate Small Business Committee soon after its establishment. The distress of this branch of small business enterprises became so apparent to Chairman James E. Murray and case referrals to the committee

were so numerous that early in 1943 a Subcommittee on Mining and Minerals Industry was appointed to give special attention to this important phase of domestic industry.

Senators James G. Scrugham, of Nevada, and C. Douglass Buck, of Delaware, were appointed to the subcommittee with Mr. Scrugham acting as chairman.

[fol. 2474] II. Manpower Problem in Small Mines

That there has been a serious over-all manpower shortage in the nonferrous mining industry is a well known and deplorable fact. It is also true that this shortage of labor has definitely limited the production of domestic ores and thereby would have limited the production of military matériel had imports been cut off.

Shortage of Manpower Limited Production

Early in 1943 the War Production Board stated that utilization of present manufacturing facilities was largely limited by the amounts of raw materials available and partly for this reason the Board ordered a cut-back in manufacturing facility expansion. At the same time the Facilities Bureau of the War Production Board gave labor shortages as the reason for the rejection of many worthy new projects placed before it during the past year which, if approved, could have produced and could now be producing large quantities of needed metals, if sufficient workers were available.

Reasons for Mining Manpower Shortages

The over-all manpower shortage is thought by your subcommittee to be due to two principal factors.

1. The early unrealistic attitude taken by Selective Service which resulted in the indiscriminate drafting of mine manpower, the bulk of which was taken before keyman deferment and other remedial measures were attempted. There is evidence to the effect that drafting of necessary mine, mill, and smelter employees has not yet entirely ceased.[19]

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[19] This was written prior to the "draft all men under 26" order.

It was short-sighted policy to draft skilled mine labor, only to have it become necessary to release soldiers already partly trained for military service, but unskilled in mining in order to restaff our strategic and critical metal mines.

2. The attraction of high-wage construction and defense industries for the lower-paid mine workers. Steps taken "too little and too late" to rectify this situation slowed up the drain but not until great numbers of valuable key-men and semiskilled laborers were lost.

The Minerals Classification List (a sort of labor priority list), issued periodically by the War Production Board, is designed to funnel men already in the industry into the most important mines. As a guide for United States Employment Service it has been valuable but has not stopped labor turn-over. The War Manpower Commission has made a rather optimistic report on the operation of this plan.[20]

The War Manpower Commission spawned many plans, most of them futile, to keep workers in the mines and to attract workers to mining. Clearly only three steps were practical:

1. The return of sufficient miners from the Army, under strict control to prevent drifting from the jobs.
2. Payment of wages comparable with those in construction and defense industries.
3. Importation of mine workers.

These three points are discussed briefly in order.

[fol. 2475] Action by the Army Discussed

The Army was extremely reluctant to permit any man to return to the mining industry even though the armed forces are dependent upon metals for their very existence. Neither did the War Department insist on speedy and firm steps to stop drafting of mine, mill, and smelter workers. Action in this respect was tardy and partial. Only after the issuance of War Production Board Order L-208, which closed our gold mines, could the Army be persuaded to release or furlough miners and send them back to the

[20] See p. 23.

mines. Finally, in October 1942, 4,200 soldiers were furloughed to the nonferrous mines—about half the amount necessary to bring substantial relief. It has been stated by the Office of Manpower Requirements of the War Production Board that by March 1943 approximately 60 percent of the soldiers released to the mines still were so employed, while about 40 percent were separated from the mining industry for one reason or another. The separation figure to May 1944 is unknown. Some of the workers undoubtedly had a legitimate reason for changing jobs but there appears to have been no study made of the present disposition of these 4,200 men or any reason given why they should have been so loosely controlled.

Conditions after 1942 grew progressively worse in spite of various plans proposed by the War Manpower Commission, production was further threatened, development work fell off, and future production estimates looked very black. The Army was again persuaded to release more men after months of negotiation. Ten thousand workers would have fully staffed the nonferrous mining industry; 6,500 would have staffed the principal producers. But only 4,700 men were promised and this was finally cut to 4,500 men, the releases beginning in August 1943, and being made to selected groups of molybdenum,[21] copper, and zinc mines.

Wage Differentials a Considerable Factor

No appreciable progress has been made in paying wages in the mining industry comparable with those paid elsewhere. In fact, in order to do so, prices for minerals and metals would have to be substantially increased.

Witnesses testified before the subcommittee that in their opinion there was no reason why cost-plus contracts should not be given to mines as well as to manufacturers of Army and Navy matériel. Saddling the mining industry with the cost-plus evil might make payment of high wages possible, but the cure would be worse than the disease. Already a tremendous portion of our manpower is thought to be tied up wastefuly by industries with cost-plus-fixed-fee

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[21] Molybdenum was shortly thereafter found to be "running out of our ears."

and similar types of contracts. Rewriting these contracts on a businesslike basis should release enormous amounts of labor.

The suggestion has been made that wages be raised to an attractive figure and paid by means of a special production premium earmarked for wages only, as mining companies obviously could not meet further wage demands, even should the War Labor Board be disposed to grant them.[22] Clearly, on any other basis, increases in wages [fol. 2476] should be accompanied by a simultaneous increase in prices or present premiums, as already has been pointed out by a member of the War Labor Board. It does not appear likely that any material relief can be expected from this quarter.

Mexican Labor Could Have Been Used

Importation of mine labor from Mexico for use in the southwestern areas long has been proposed. Agricultural and railroad labor has been imported, but not one miner, after 18 months of negotiation.

There is little reason to doubt that Mexican labor has been anxious to flow to mines in the United States. This labor would have had an important influence on production in the southwestern mines where climatic conditions are suitable; the furloughed soldiers could have been used in the North. It is also believed that this labor could have been selected so as not to interfere with Mexican mining enterprises. However, every possible objection has been interposed by the Mexican Government, and each time negotiations have reached a fruitful stage some new objection is raised to prevent closing a deal. As late as July 1943 it was expected by the War Manpower Commission that 2,000 Mexicans would be made available; but the Mexican Government, which consistently demanded equivalent standards of living for its nationals with those of United States workers, is said to have finally decided that the Mexicans might be spoiled by our standards of

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[22] This method of meeting wage increases would be simple and would insure the whole amount earmarked being credited to wages.

living. It has been suggested that labor organizations may have played a silent part in preventing the importation of Mexican labor.[22a]

War Production Board Minerals Classification List

A priority listing of mines in order of importance of metals produced and productivity per man in specific operations is the final outcome of plans to cause a flow of workers to key mines and to guide the United States Employment Service in steering new workers toward jobs in mines considered most important to the war effort.

This plan, worked up by the War Production Board Minerals Co-ordinating Division and the War Production Board Office of Manpower Requirements, provides the War Manpower Commission with a mineral priority listing, revised at monthly intervals, wherein mines are placed in a mineral classification list, in four classes as follows:

Class I operations,[23] listed within metals or minerals, are those operations which are considered at the time of issuance of each classification list to be the most critical to the war economy and are the operations upon which first efforts in recruitment should be concentrated.

Class II operations, listed within metals or minerals, are essential operations to which referrals may be made of applicants for employment who do not accept employment in class I operations whether for reasons of working conditions, location of domicile, climatic conditions, or other reasons. Certificates of availability are to be denied to employees of these operations, except in unusual cases wherein the transfer desired is to a class I operation.

Class III operations, not listed, are all operations not classified as 1, 2, or 4. Although no direct recruitment of employees from these operations is to be allowed, certificates of availability are to be granted to all voluntary withdrawals, provided the applicant is willing to accept referral to class 1 or class 2 establishments.

[22a] Labor from Puerto Rico is now being considered.

[23] Operation, as used herein, includes mining, milling, smelting and refining, or other treatment, or ores, concentrates, minerals of metals.

[fol. 2477] Class IV operations, listed as to operations, are operations whose contribution to the war effort is minor in proportion to the manpower and material utilized. Recruitment campaigns among workers at operations in this class is encouraged, when such recruitment is for operations in class 1 and class 2.

In general, it is desired that no certificates of availability be granted to workers in any mines, mills, smelters, or refineries (class 1, 2, 3, or 4) except for work at other mines, mills, smelters, or refineries, and except for such transfers as are mandatory under the rulings of the stabilization order. It is urged that every measure be taken to tighten the issuance of certificates of availability to workers who plan to leave the mining industry.

The intent of the classification is to focus attention on operations of first importance, but there is no intention to deny recruitment of workers from without the industry who desire employment at class 3 mines and are unwilling to accept employment in class 1 or class 2 mines for reasons of location of home, special qualifications, or other reasons.

Production from mines in class 2 is important to the war effort; therefore, there should be no direct solicitation. Transfer from such mines should be solely on a voluntary basis.

Mines in class 1, 2, and 4 are mentioned by their names and are chosen in order of the critical necessity of each mineral group, and then in order of the productivity per man of each mine within the group. The criticism has been offered that the listing of mines by productivity tables tends to encourage high grading in an attempt to remain in or to get into the higher brackets, thus discouraging necessary development work. Productivity tables must be worked out with a high degree of knowledge of mining problems and hair splitting should be discouraged. United States Employment Service offices are supplied with these mineral classification lists to guide them in issuing certificates of separation and in placing new workers. The plan has obvious flaws but it appears to be the most sensible yet proposed if not carried to extremes.

However, the priority system tends to drain men steadily from mines in class 3, which includes practically all small mines. There is a report by the War Manpower Commis-

sion on the effectiveness of the plan, the text of which follows:

Evaluation of the Effectiveness of the War Production Board's Mineral Classification List

I. Purpose and Description

The adequate production of minerals and metals is basic to the war effort and it is of primary concern that manpower needs for these activities be satisfied. However, the requirements of war production, in terms of kinds and quantity of minerals and metals needed, vary with changes in the scheduled production of war materials, availability of substitutes, and sources of supply. Therefore, although the production of all metals and minerals is important, the continued and increased production of some is more critically needed at times than that of others.

To enable the War Manpower Commission to allocate the limited available supply of mine and smelter labor to the best over-all advantage, the War Production Board has issued monthly, since June 1943, a mineral classification list listing all producers of metals and minerals (except coal) in the order of their importance to the war effort. The primary purpose of the mineral classification list is to focus first attention on operations of first importance in order that manpower will be supplied where it is most needed and where it will be most productive. The War Manpower Commission has used the list as a guide in the placement of mine and smelter workers, giving referral and recruitment priority within the industry to those establishments deemed by the War Production Board to be most [fol. 2478] productive of the metals and minerals most critically needed from time to time.

The mineral classification list is divided into four classes as follows:

Class 1 establishments are those which are most critical to the war economy and on which the first efforts in recruitment are concentrated. Within this list, establishments are listed in order of their importance to the war effort.

Class 2 establishments are also essential but are of somewhat less importance than the class 1 firms. Within this

list, establishments are listed in order of their importance to the war effort.

Class 3 establishments consist of all establishments not listed in classes 1, 2 or 4. These firms are not as essential as those in class 1 or class 2, but since they are making a certain contribution to the war effort, workers are not actively recruited away from them. However, certificates of separation are granted to all voluntary withdrawals when transfers to mines in class 1 or 2 are requested.

Class 4 establishments are those whose contribution to the war effort is minor in proportion to the manpower and material utilized. Recruitment campaigns among workers at mines in this class are encouraged. Such recruitment, however, must be for firms in class 1 or class 2 and not for industries other than mineral activities.

Each month since the first issue of the list in June, the War Production Board has changed the relative positions of critical minerals on the list as the demands of war production dictated. As soon as an adequate supply of a mineral was assured, it was moved to a lower position on the list, and conversely, when the supply-demand situation for any mineral deteriorated, its position was raised so that the War Manpower Commission would give it a higher priority in the referral of workers. In addition, although the relative positions of some minerals remained unchanged, various individual establishments within each mineral group were shifted either upward or downward on the list. For example, 29 copper mines were in class 1 in June, 31 in July, and 25 in August. During these months, 2 copper mines were elevated to class 1 while 6 others were shifted to class 2. Similarly, shifts in the relative positions of individual establishments producing tungsten and aluminum were effected during the period while the bulk of such establishments remained in class 1. For example, 3 tungsten operations were shifted downward to class 2, while 8 aluminum plants were promoted from class 2 to class 1. All such changes were made on the basis of the relative productivity of individual establishments producing strategic metals.

While the original function of the mineral-classification list was simply to serve as a guide in the selective referral of available labor, it has, in addition, been used as an ad-

ministrative tool in connection with two other programs designed to alleviate the manpower problems of metal mines and smelters—(1) the development of a preferential Selective Service policy and (2) the selective placement of soldiers released from the Army for work in the mines. These programs are discussed below.

II. Effect of Employment, Labor Needs, and Turn-over

The consistent downward shifting in the relative position of certain metals on the list is in itself evidence of the effectiveness of the priority-referral program based on the list. For example, the War Production Board assigned the most productive molybdenum, copper, and zinc mines, the top positions in the June issue of the Mineral Classification List because, in May 1943, the shortage of manpower for these critical metals constituted the most serious threat to the war effort. By the end of September, War Manpower Commission efforts to fill the labor needs of establishments on the list from the top down proved so successful that it was possible for the War Production Board to place molybdenum mines in class 2 and copper and zinc mines at the bottom of class 1 in the October issue of the list. Similarly, other metals and minerals, such as aluminum and bauxite, placed in key top positions in early issues of the list because of falling production due to manpower shortages, are currently occupying lower positions because the system of priority referral of workers has helped to raise employment to a point where these metals are in a less critical production position. At the same time, it has been possible for the War Production Board to raise the positions of other minerals—such as mica, arsenic, and talc—which are emerging as critical war products so that mines producing them may receive first attention from the War Manpower Commission in the referral of workers. As the manpower needs of establishments producing these products are met, they will in turn be shifted to lower positions on future lists.

[fol. 2479] June 1, 1943, employment for establishments in classes 1 and 2 of the Mineral Classification List totaled 124,000 while employment early in the fall totaled nearly 126,350, a net increase of 2,350 workers. At the same time that employment in class 1 and class 2 establishments rose,

it remained unchanged in class 3 operations. A sample survey of nonferrous mines in classes 1, 2, and 3, all located in the same general locality in Colorado, California, Montana, Idaho, Missouri, Utah, and Arizona, indicates that while employment increased by nearly 3 per cent in class 1 and class 2 establishments, it remained relatively stable in class 3 operations.

Simultaneously with the increase in employment, labor needs declined. In July, all class 1 and class 2 establishments (including both mines and smelters) reported a current need for approximately 15,110 workers, while by fall only 13,660 were required, a net decline of 1,450. This figure should decline still further when the full effect of the placement of the 4,500 released soldiers in molybdenum, copper, and zinc mines has been felt.

Hires in class 1 and class 2 firms exceeded separations by nearly 840 workers in June and latest reports indicate that the excess has increased to 1,960. Although the underlying function of the Mineral Classification List is not to reduce turn-over but rather to act as a guide in the referral of available manpower, those metals occupying top positions on the list actually showed a drop both in total separations and in separation rates. For example, classes 1 and 2 copper, zinc, and molybdenum mines hired 3,340 workers in June and, at the same time, had 3,990 separations, a net loss of 650 workers. During August, hires exceeded separations for the first time since February 1943—4,520 workers were hired while 3,585 separated. The monthly separation rate declined from 9.1 to 8.1 percent.

United States Employment Service placements in class 1 and class 2 establishments rose from 4,430 in May to 5,530 during August, an increase of 1,100. A table indicating the trend of United States Employment Service placements from May to August follows:

Number of U. S. Employment Service placements—Change from previous period

May	4,432	
June	4,806	+374
July	4,547	—269
August	5,528	+981

At the same time that United States Employment Service placements in class 1 and class 2 firms rose, they declined in class 3 establishments. A sample survey of class 3 establishments located in the vicinity of class 1 and class 2 firms indicates that placements at such establishments dropped from nearly 280 in June to 95 in September, a decline of 35 percent.

III. Selective Service Program

Prior to the issuance of the first Mineral Classification List, selective service national headquarters had developed a policy whereby all production and maintenance operations in nonferrous metals activities located in the 12 Western States were designated as "critical occupations" and the workers given generous selective service consideration for occupational deferment. With the issuance of the first Mineral Classification List in June, selective service headquarters issued State Director Advice No. 217 which specifies the names and locations of all nonferrous metal operations in the 12 Western States listed in class 1 and class 2 and provides that the most serious considerations for occupational deferment be given workers employed at these establishments.

Since June, State Director Advice No. 217 has been issued on a monthly basis and, in addition to listing for special consideration class 1 and class 2 establishments in the 12 Western States, it has been expanded to include other class 1 and class 2 firms outside the 12 Western States whose labor needs indicate that preferential selective-service treatment should be accorded them.

The result of operations under this bulletin has been a reduction in separations due to military induction in class 1 and class 2 firms covered by the bulletin from about 490 in May to 185 in August. Inductions which are occurring currently arise primarily out of (1) the failure of management to request deferment; (2) the desire of the worker to join the armed services; or (3) the youthfulness or inexperience of the registrant.

[fol. 2480] IV. Program for Release of Soldiers

During the spring and summer of 1943 the manpower situation in the nonferrous metal mines became more critical than at any time in the past. Production of strategic non-

ferrous metals lagged seriously behind requirements, due solely to a shortage of manpower, at a time when it should have been rising rapidly. To stem the downward employment trend, the War Manpower Commission developed a comprehensive program in cooperation with other interested Government agencies. Part of the program was to effect the release to the Enlisted Reserve, and the placement by the United States Employment Service of soldiers with previous mining experience for work in nonferrous metal mines.

The mineral-classification list was used as a guide in determining which establishments were entitled to receive released soldiers. Thus, the 4,500 soldiers released from the Army between mid-August and September 9, were placed in the copper, zinc, and molybdenum mines which were in class 1 or class 2 of the August 1 mineral-classification list. In accordance with the basic purpose of the list, soldiers were referred only to the most productive operations producing the most critically needed metals.

War Manpower Commission, Reports and Analysis Service, Industry Analysis Division.

November 27, 1943.

[fol. 2481] Such improvements to the tax laws as the amendment by Senator Johnson of Colorado to H. R. 3687, Seventy-eighth Congress, first session, "Gross income from the property for purposes of percentage depletion," are very helpful.

Representatives of the War Production Board have appeared before congressional committees to insist that strategic and critical mineral production should not be hampered by improper taxation.*

A more sympathetic attitude by the Treasury toward small mining ventures obviously is necessary if such ventures are to be encouraged.

XIII. The Gold Mine Closing Order L-208

War Production Board Order L-208 is believed by the mining industry to have failed its main purpose. It has

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* See appendix, exhibit 38, p. 134.

been subject to bitter criticism. Although this order was designed to force gold miners to seek employment in mines producing strategic and critical minerals, testimony indicates that a relatively small number of workers drifted in the desired direction. By the time the order was issued, most of the young, able-bodied employees of the gold mines had been recruited for war industries or the Army. Priority regulations already prevented the gold mines from consuming critical materials. Much of the equipment was not suitable for other purposes and a great deal of it lies idle today. Economic conditions would probably have forced the closing of most gold mines in the regular course of events without the tremendous dislocations which ensued after the promulgation of the closing order.

It is interesting to note that L-208 is the only order issued during this war which literally wiped out an industry by decree; an industry which by its very nature could not convert its facilities for war purposes. In the meantime foreign gold production has been fostered and equipment exported to aid in maintaining it.

The text of the order as amended will be found in the appendix as exhibit 31 on page 121.

The gold-mining industry has suffered heavy losses in physical assets, in market valuations, and in income. Stockholders have been greatly distressed. The opportunity has been perfect for mines and mining securities to be picked up by large financial interests at low values.

Only the larger, more productive mines with adequate financial reserves are expected to survive the emergency, although the postwar taxes, income, and jobs which would be created by all will be badly needed.

Many mines cut off from current income and unable to sustain high maintenance costs have been abandoned with consequent heavy loss of investments. Some mines so abandoned may never be reopened because of the prohibitive cost of dewatering and restoring the caved and flooded workings. Some mining companies continue the losing battle to maintain their mines in working condition. In certain cases the War Production Board has relaxed the order sufficiently to enable mines to be maintained in working condition.

A discussion of the War Production Board's attitude toward the gold mine closing order, L-208, is found in the published hearings of the Senate Small Business Committee, part 18, page 2446. Donald Nelson, Chairman of the War Production Board, remarked April 1, 1943, that [fol. 2482] he was making a full examination of the effect of the order to determine the advisability of relaxing it. On June 23, 1943, Mr. Nelson issued the following statement:

After a careful study of the effects of limitation order L-208 closing non-essential gold mines, the War Production Board today decided to continue the order in effect, and issued clarification of exemption appeals.

Evidence submitted to War Production Board revealed that the closing order has resulted in an increase in available labor supplies and stepped up production of other critical minerals such as copper, zinc, and lead.

Since the labor situation in the mining industry (especially copper) has been extremely critical for some time, it is imperative that every available relief be sought and every possible remedy be applied at this time in order to meet the essential needs of the armed forces, War Production Board has decided.

Investigation has revealed that, to date, at least 1,200 of the displaced gold miners have been moved into nonferrous metal mines, 500 have been placed in other essential industries and 800 referred to other jobs with placement not yet reported.

In addition to this valuable labor pool acquired by the closing order, much critical material has become available for essential uses. This material has been estimated as valued at some $75,000,000 and is moving into essential production at the rate of about $100,000 a week. Also, large quantities of critical materials heretofore consumed in gold-mine operations are now being saved. This saving has been estimated as high as $15,000,000 annually.

The War Production Board in its study of the gold-mine situation took cognizance of many proposals advanced toward a solution of the problems involved. A continuance

of the order was decided upon, with the right to appeal for exemption only if—

(a) The critical material output of the individual mine makes an equal or larger contribution to the war effort than the materials and labor absorbed in operations; and

(b) The necessary labor can be obtained without drawing upon any essential war activities, and certification to this effect can be obtained from the War Manpower Commission (WPB-3915).

And later, this correction:

The War Production Board today issued a correction to release War Production Board—3915, released Wednesday, June 23, 1943, concerning the basis for appeals from Limitation Order L-208, closing nonessential gold mines.

Appeals will be allowed only if—

(a) The critical material output of the individual mine makes an equal or larger contribution to the war effort than the materials, equipment, and labor used in operating the mine, considering the relative urgencies of the critical materials involved; or

(b) The necessary labor can be obtained without drawing upon any essential war activities, and certification to this effect can be obtained from the War Manpower Commission.

This was the final answer to the various attempts to have the War Production Board rectify what was, at least in part, a mistake.

Numerous witnesses at the field hearings expressed themselves as being in favor of Senator Murray's mine-relief bill, S. 344, and urged its speeding passage so as to avert further destruction of the industry. This bill is not designed to disturb in any way the limitation order L-208, but would authorize a moratorium on obligations and provide, through the Reconstruction Finance Corporation, funds for maintenance, payment of taxes, etc. Although the bill was introduced for the second time January 14, 1943 (it was first introduced late in 1942, but was lost when the first session of the Seventy-eighth Congress adjourned), and had the hearty support of the mining industry, it has not yet been reported upon by a special subcommittee of the

Senate Committee on Mines and Mining which has been considering it. In the meantime most of the damage has been done and the principal victims were the smaller operators.

[fol. 2483] California provides a good example of what has happened to gold producers. The United States Bureau of Mines reports "California gold production in 1943 fell below that for any year since 1848, the year James W. Marshall made his historic discovery in the gravels of the American River near Coloma. Preliminary figures show California gold production in 1943 as 148,000 fine ounces, valued at $5,180,000, compared with 847,997 ounces, valued at $29,679,895, produced in 1942. The decrease in value—$24,499,895—is greater than any ever experienced before in California."

The Bureau also states "California silver production in 1943 was 610,002 fine ounces, valued at $433,779, compared with 1,450,440 ounces, valued at $1,031,424, in 1942. The 1943 output marked the low point in quantity and value since 1933." A good deal of the California silver output was a byproduct of gold mining.

Similar drops in gold and silver production are found in other mining States except where these metals are produced principally as byproducts of base-metal mining.

Effect of L-208 on Silver Mining

As gold and silver so frequently are intimately mixed in the same ores, it is obvious that the gold closing order also affected silver production. It has been estimated that silver to the extent of more than 20,000,000 ounces has been lost as a result of general economic disturbances due to the war, including the restrictions placed by order L-208 on the mining industry. As silver is a metal of growing industrial importance, the drop in domestic production had to be balanced by increased importation and release of Treasury silver.

The importance of silver from an industrial standpoint aside from its fundamental value as a monetary metal is shown by the fact that around 25 percent of the current world production is consumed in the manufacture of engine bearings, which are of primary importance to the war effort. The industrial uses of silver are growing by leaps and

bounds and these uses will project into the post-war period in substantial competition with coinage uses.

The value of gold and silver mines to our national economy must not be overlooked and the necessary steps should be taken to preserve these mines in an operative condition.

Effect of L-208 on Fluxing Ores

A number of new operators caught by L-208 wished to mine gold or silver bearing siliceous fluxing ores badly needed by copper smelters and some were denied priorities and Government financing.

Clifford F. Smith, ore buyer for the Miami smelter, International Smelting & Refining Co., testified at Phoenix, Ariz.:[2]

Our problem is to purchase all of the copper ores of all these small mine operators, in order to continue this production without interruption or shut-down. The fluxing of these receipts becomes very important. These receipts vary in analysis from time to time so the required flux must vary also to keep the balance so no one ore can remain a flux. That causes us to mix our purchase of ores at various proportions, figuratively speaking, to a balanced diet.

We find that the copper ores purchased usually are low in silica content and high in alumina content, so we must find ore that is high in silica and low in alumina to mix with these copper ores to make the proper flux. Our experi- [fol. 2484] ence shows that these highly siliceous ores usually carry metal values in silver and gold and are very low in copper. Any curtailment of this ore with its silver and gold content would slow down our production at the smelter and increase our copper losses in our dross. Improper fluxing at this smelter would increase our copper loss to about 70,000 pounds of copper monthly.

Similar conditions were found at other smelters and certain fluxing problems were accentuated by increases in the amounts of concentrates to be smelted.

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[2] Pt. 26, hearings, Senate Small Business Committee, p. 3372.

Mr. Smith considered the War Production Board's proposal to substitute copper-bearing siliceous ores for silver and gold siliceous ores as not the proper solution.

The phrasing of L-208, its definition of nonessential mines, and its exclusion from the order of mines with P-56 serial numbers left the way open for the War Production Board to permit the mining and shipping of precious-metal-bearing siliceous ore for flux. However, the Primary Production Branch, Copper Division, War Production Board, with the help of the Special Additional Premium for Copper, embarked upon a campaign to substitute siliceous ores with over 1½ percent of copper wherever possible, to prevent loss of smelter capacity. This plan has worked out with reasonable satisfaction, but probably at a financial loss to the smelters.

A somewhat unexpected result was to reduce critical arsenic production which is gained as a byproduct of arsenical pyritic gold ores.

Summing up the testimony, it is the opinion of the subcommittee that L-208 has been anything but an unqualified success and that the gold-mining industry should have been left to work out its own adjustments under priority restrictions, rather than summarily forced to close. However, the permission to continue shipping up to 100 tons of commercial ore per month benefited the very small operator.

XIV. Government Forms and Red Tape

Frequent complaints were heard by your subcommittee that the reports, forms, questionnaires, and inquiries received from Government departments are too voluminous and elaborate. The information requested is often impossible for the smaller operator to supply accurately, if at all, and much valuable time is consumed in compilation which could be better applied to producing ore.

A typical statement is that of Fred I. Elliot, of Phoenix, Ariz.,[3] referring to the difficulties of small operators:

They must get along with a makeshift arrangement, practically no office equipment or accommodations, since their time is of greater value applied elsewhere. Also the

[3] Pt. 26, hearings, Senate Small Business Committee, p. 3346.

data required of them has no permanent value in the compilation of records or in arriving at weighted averages.

The small operator might be defined as one who cannot afford to retain an attorney, employ a full-time bookkeeper, periodically hire an accountant, and who must unload all these duties on someone who has many other duties such as purchases of supplies, arranging for truck hauls, attention to priorities and quotas, and correspondence. Unless there is a substantial profit involved, and that is too rare to be considered here, the small operator can seldom afford the above services until he has around 25 on the pay roll.

The statement on this same subject by S. H. Williston, president of the Oregon Mining Association,[4] also is worthy of notice, as it expresses a general feeling. The hearings of the subcommittee abound with comments indicating the [fol. 2485] discomforts suffered by the small mine operator because of the multiplicity of Government regulations which he must satisfy.

Small mines are numbered by thousands. At the same time, while these mines are of great importance to the war effort, they do not employ individually great numbers of men nor produce the bulk of our mineral requirements. Forms sent to their operators should be of the simplest possible nature. Much of the data collected from these small operators is actually worthless. Procuring it is generally a waste of their time and that of the government officials and clerks who have to handle the forms. The establishment of cut-off points, chosen according to the subject involved, would be of great help. For instance, reporting forms seldom need to be sent to mines employing 25 men or less. In some cases the dollar value or volume of production could be used as a cut-off indicator. Where certain classes of information are desired a system of sampling can be used wherein questionnaires are sent only to a predetermined percentage of small operators and the results calculated for the group.

There has been some improvement recently in handling questionnaires along this line but much remains to be accomplished.

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[4] Part 28, hearings, Senate Small Business Committee, p. 3651.

The industry committees set up by the Bureau of the Budget to advise it in carrying out the purposes of the Murray Federal Reports Act have been very helpful.

XV. Résumé of Conclusions

There follows a synopsis of your subcommittee's more pertinent conclusions, most of which already have been more fully stated in the various chapters of this report.

Manpower Problems in Small Mines

It must be recognized that manpower problems relating to small and large mine operations are not identical; that there are sources of labor available to small mines which are not available to large mining operations. Every effort should be made to procure the full benefit of maximum marginal small-mine production by utilization of the small-mine labor pools, arbitrary mine-to-mine shifts seldom are feasible.

Premium Price Plan for Copper, Lead, and Zinc

1. The administration of the premium price plan long ago should have been streamlined, policies clarified, and the case-handling time appreciably shortened. Constant attention to this problem still is imperative.

2. (*a*) The life of B, C, and special additional copper premiums should be announced as coextensive with A premiums, subject to necessary individual adjustments, or

(*b*) It should be announced that no cancelations of any premiums will be made prior to July 31, 1945, where such cancelations will close a mine in which there is an unrecovered wartime investment.

3. If it should be found necessary to extend the life of the entire plan to July 31, 1946, even though applications covering new operations are no longer authorized. This should be done without hesitation.

[fol. 2486] Metals Reserve Company Purchasing and Stock-piling

1. Intent to cancel Metals Reserve contracts should be announced at least 90 days in advance of the issuance of

the formal cancelation notice and every possible latitude should be allowed the producer by arranging liberal settlements where wartime investments still are unrecovered.

2. Necessary cancelations should be made as gradually as possible so as not to demoralize the industry. Jesse Jones concurred in this principle when he said:

> We have had requests from the War Production Board to stop some few contracts, stop production of this, that, and the other material, but we have done very little at it, and we do not intend summarily to shut a man off and let him go hungry.

3. The small-lot-purchase stock-pile program should be continued intact for the duration of the war.

4. Purchase contracts should not be terminated by taking advantage of technical flaws or breaches beyond the control of the contractor simply because the need for the particular mineral or metal no longer is as crucial as was the case at the time the contracts were entered into. Said Mr. Jones before the Senate Military Affairs Committee, "A little extra stock piling is not awfully serious."

Government Financing of Mining Projects

The Reconstruction Finance Corporation should continue independently the long-range program authorized by the Congress and should not be unduly influenced by the uncertainty and fluctuations of the War Production Board program.

Mine Access Roads Program

1. This program should be continued in force for the balance of the war.

2. Additional funds should be provided to the Public Roads Administration and earmarked for raw material access roads.

3. Immediate attention should be given to accomplishing further simplification of procedure and to planning the routing of applications so as to cut down processing time.

4. Roads should be constructed promptly and as cheaply as may be feasible for the service for which they are required.

Bureau of Mines Exploration and Development Programs

1. There should be less delay in approving programs and starting the work.

2. Information revealed by exploration and testing programs should be made available to authorized persons as quickly as possible.

Office of Price Administration Rationing and Mine Operation

1. So as to avoid interfering with production, rationing programs should entail as little delay and distress as possible.

2. The food-rationing program, especially meat rationing, should be realistic and should be tailored to suit workers in heavy industry and to the peculiarities of the mining business.

[fol. 2487]

Effect of Securities and Exchange Commission Laws and Regulations

1. Forms and procedures should be simplified to the greatest possible degree.

2. The rules of registration should not penalize the applicant by making him use a style of prospectus which may make the security issue appear to be unattractive.

3. Venture capital should be encouraged to invest when the enterprise frankly admits its promotional nature and states the facts accurately in its prospectus.

Transportation of Ores and Freight Rates

A study should be made of our system of freight rates for transportation of ores and concentrates with particular emphasis on the possible adverse effect upon the mining industry of freight rates as now graduated according to value of the product.

Mine Taxation

1. Taxation should be planned so that the operator can receive an adequate return on his investment commensurate with risk, depreciation, and depletion. Full consideration should be given to the short life of most small mines.

2. Venture capital should be encouraged.

3. Venture capital losses should be deductible to a greater degree than is now possible.

The Gold Mine Closing Order, L-208

The order should be continually under review with view to rescinding it the moment the labor and material situation so permit.

Government Forms and Red Tape

Every effort should be made to keep forms and questionnaires at a minimum, both in quantity and complexity. This is particularly true in the case of questionnaires to be sent to small mines. Spot sampling and arbitrary cut-off points should be resorted to at every opportunity.

General Conclusions

It is recommended that domestic mineral and metal production be given preferential treatment by the Government over imports. As far as is possible and compatible with the best conduct of the war, domestic metals and minerals should be utilized first. When the rate of consumption plus necessary additions to stock piles falls below the rate of imports plus domestic production; cut-backs should first be made in imports and cut-backs in domestic production should be ordered only when the rate of consumption falls below the rate of domestic production. Full consideration should be given to the advisability of maintaining domestic industry even when the cost of the domestic raw material appears to be somewhat higher than imported raw material. Taxes, consumption of materials, and jobs are the [fol. 2488] outcome of expenditures within the United States. Raw materials should be imported by the Government only when there is a real shortage of domestic products and when such importation is necessary for the conduct of the war.

It is imperative that the Congress as soon as is possible pass an adequate strategic and critical minerals and metals stock-piling act which will assume future national security and protect industry against the dumping of surpluses. It is recommended that S. 1582 which is designed to accomplish these ends, be passed immediately.

[fol. 2489] PLAINTIFF'S EXHIBIT 178

Calendar No. 1536

82d Congress, 2d Session

Report No. 1605

Gold Miners

May 28, 1952.—Order to be printed

Mr. McCarran, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 3195]

The Committee on the Judiciary, to which was referred the bill (S. 3195) granting jurisdiction to the Court of Claims to hear, determine, and render judgment upon certain claims, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

Purpose

The purpose of the proposed legislation is to authorize the United States Court of Claims to have jurisdiction to hear, determine, and render judgment, notwithstanding any statute of limitations, laches, or lapse of time on the claim of any owner or operator of a gold mine or gold placer operation for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions imposed by War Production Board Limitation Order L-208 during the effective life thereof.

Statement

On October 8, 1942, the War Production Board issued order L-208 which summarily closed the gold mines in this country. The order was rescinded on July 1, 1945, having been in effect approximately 2½ years.

The records of the War Production Board show that the gold mining industry was selected as a guinea pig to test

the policy of shutting down so-called nonessential industries during the war. The issuance of the order was based upon dubious if not nonexistent authority. The order failed [fol. 2490] completely to make any substantial contribution to the war effort and inflicted ruinous costs on the gold mining industry. No similar order was issued against any other industry in the Nation during the war years.

In the United States Court of Claims, War Production Board Limitation Order L-208 was the subject of the case of *Idaho Maryland Mines Corporation* v. *The United States*, and the court issued a decision on May 6, 1952, denying the defendant's motion to dismiss the amended petition of the plaintiff. The defendant's position was based upon a previous decision rendered in *Oro Fina Consolidated Mines, Inc.* v. *United States* (118 C. Cls. 18), but the United States Court of Claims in the instant case held in part as follows:

As stated above, on a motion to dismiss for failure to state a cause of action, all facts well pleaded must be deemed to be admitted for the purpose of such motion, although this does not constitute an admission of such facts upon which judgment can be rendered without adequate proof. A careful consideration of the facts alleged, and a comparison of those facts with the facts considered by the courts in analogous cases, persuades us that if plaintiff is able, by competent proof, to establish the existence of such facts, the result may follow that despite its ostensible purpose of protecting the public in time of war, the action of the War Production Board in issuing Limitation Order L-208 was not in fact reasonably calculated to accomplish such purpose and that no state of facts existed sufficient to justify the Board's order as an exercise of its war power, and that the action was in fact arbitrary. Under such circumstances as outlined in the petition, we believe the plaintiff is entitled to a trial on the merits to prove its claim that the action of the War Production Board was far more than a regulation and amounted to a taking of plaintiff's right to mine and sell gold. This is a valuable property right for which plaintiff would be entitled to just compensation under the Fifth Amendment to the Constitution, if there was a taking. *United States* v. *Dickinson*, (331 U.S. 745). The establishment at a trial on the merits of proof of facts by plaintiff to rebut the presumption that the particular exertion of the Government's war powers represented by L-208 was jus-

tified, is a most difficult burden, and it may well be that even then, as in such cases as *Hamilton* v. *Kentucky Distilleries Co.* (251 U. S. 146), *Perrin* v. *United States* (232 U. S. 478), and *United States* v. *Doremus* (249 U. S. 86), defendant will come forward with sufficient facts to justify Order L-208 as a proper regulation. At this stage of the proceeding, however, plaintiff has alleged facts sufficient to constitute a cause of action within the jurisdiction of this court and defendant's motion to dismiss the amended petition must be overruled.

A reading of the above clearly indicates that the court is of the opinion that sufficient facts have been alleged to justify a trial on the merits in the claim of the Idaho Maryland Mines Corp., which insofar as this legislation is concerned is one of the type of instances which require adjudication by the court.

At the present time many other claimants who may have as good a right for an adjudication of their claims as does the Idaho Maryland Mines Corp. may not prosecute such claims due to the running of the statute of limitations. Many of the claimants after the ruling in the Oro Fina case undoubtedly felt that to file in the Court of Claims would be useless and, therefore, allowed the statute to run against them. It must be noted that the great majority of the mine operators affected by the order were the small operators who were mining in many out-of-way places and did not have the facilities to employ legal staffs to keep them informed of their possible rights. They accepted the order under duress and then had no facilities with which to overcome the great prestige of Government.

In order that the background of this situation can be fully understood and appreciated, it is deemed proper to [fol. 2491] set forth in part the report on H. R. 4393 of the Seventy-ninth Congress, which deals with the promulgation and effects of Order L-208.

On October 8, 1942, the War Production Board issued Order L-208, which summarily closed the gold mines in this country. The order was rescinded on July 1, 1945, having been in effect approximately 2½ years. The evidence in support of the bill shows that the gold-mining industry was selected as a guinea pig for the purpose of testing the feasibility of closing what was called nonessential indus-

tries. No similar order was issued against any other segment of American industry. The order completely failed to accomplish its purpose, or any purpose whatever, and inflicted irreparable and unjustified loss on the gold-mining industry. Your committee believes that this order inflicted a sacrifice on the gold-mining industry which the Federal Government in common fairness should try to relieve.

Four main points were developed at the hearings through the testimony of industry witnesses, Government witnesses, and the introduction of a detailed report on the history and operation of War Production Board Order L-208, known as the gold-mine-closing order. In the opinion of your committee the evidence presented, both oral and documentary, overwhelmingly supports the following contentions:

1. WPB Order L-208 was unique in that it was the only Government order closing a productive industry.
2. Issuance of the order was an administrative error, based upon a statistical misconception, and may, furthermore, have been illegal.
3. The net results of the order in accomplishing its avowed primary purpose of channeling manpower to "essential" mines were negligible.
4. The economic loss to the gold-mining industry has been great and in some cases the damage may be irreparable.

All the above points are discussed at length in the aforementioned WPB historical report on L-208, entitled "The Closing of the Gold Mines (August 1941 to March 1944)," June 1, 1944—Report No. 9, Policy Analysis and Records Branch, Office of the Executtive Secretary, War Production Board, printed in the appendix of the hearings on H. R. 4393, and were generally corroborated by Dr. Wilbur A. Nelson, who administered L-208 for the War Production Board.

This report was written for the private use of WPB Chairman Donald M. Nelson and, until recently, was classified as "confidential." It is interesting to note that the testimony of both industry and Government witnesses merely tended to corroborate the statements and conclusions from this WPB report which are quoted below in support of your committee's recommendations. Further corroboration may be found in Senate Subcommittee Print No. 6

of the Senate Small Business Committee, entitled "Survey of the Nation's Critical and Strategic Minerals and Metals Program," issued in June of 1944, in which the effect of L-208 is discussed in some detail.

An elaboration upon the four points outlined above follows.

The Uniqueness of the Order

The star witness at the hearings, Dr. Wilbur A. Nelson, who was intimately connected with all phases of the issuance and administration of L-208 during his term with the War Production Board, participated in the following exchange:

"Mr. Engle. The fact that this industry was the test case—the guinea pig—for such policy, and that similar non-essential industries were not shut down, throws emphasis on the controversy as to the method of closing the gold mines, a controversy that otherwise might be passed lightly over.

"Mr. Nelson. I think that is a very true and correct statement.

"Mr. Engle. And it is true that the gold-mining industry was a guinea pig?

"Mr. Nelson. Definitely.

"Mr. Engle. And no other segment of American industry was treated in an identical manner?

"Mr. Nelson: I know of no one."

The above opinion was corroborated by other witnesses and also by the special WPB report, to Donald M. Nelson, previously referred to. This adverse selective treatment, in the opinion of your committee, places the closed or curtailed gold mines in a special category and subject in turn to special treatment by the Congress.

[fol. 2492] Order L-208 was an Administrative Error

The testimony before your committee conclusively showed L-208 to have been issued as the result of an error in compiling labor statistics. The agencies generally classified as gold mines those mines which produced a material amount of gold as well as strategic and critical minerals. The Mining Branch of WPB, which constantly fought against issuing L-208, took a more realistic viewpoint. The War Manpower Commission and the Labor Divisions of WPB had a wholly exaggerated idea of the number of

miners to be released by closing what they considered "gold" mines, many of which were known by the Mining Branch of WPB to be producing essential minerals and which could not be closed without damaging the war effort. The figures furnished the Army and Navy by the agencies laboring under this misconceived definition indicated that a large pool of miners would be made available by the issuance of L-208. The voice of the Mining Branch of WPB was not strong enough to reach the higher policy levels, nor were the figures submitted by the industry credited. The Secretaries of War and Navy therefore demanded action and got it.

Gold-mine operators had informed the Government that if all gold mines and dredges in the United States were closed approximately 3,270 men would be released, of which only 896 would be miners and muckers. Some 300 of these would be required to maintain the larger mines on a stand-by basis. Of the balance some were physically unfit for work in copper mines. It appears from the record that as far as transferrals could be checked through USES, the operators' estimates exceeded the eventual results in manpower captured for strategic metal mines. The War Production Board report on L-208 reaches this conclusion:

"* * * it may be concluded that since the number of gold miners actually reemployed was negligible, their contribution in increased production of copper, lead, zinc, etc., was likewise small, and probably was counterbalanced by the loss of such metals as are normally produced as byproducts of gold mining."

This conclusion is amply supported by the evidence placed before your committee.

It appears from the above that the American gold-mining industry was wrecked to no good purpose, while at the same time presumedly precious mining equipment was being steadily exported to keep whole our allies' gold mining industries. Writing in May 1943, Gustav Peck, labor adviser to Donald M. Nelson, stated in a memorandum to William L. Batt:

"The mines are beginning to deteriorate; if they are once allowed to cave or flood to any appreciable extent, sub-

sequent dewatering and reopening operations costing millions of dollars may prove prohibitive."

In the 3 years which have since passed, this deterioration has become a very serious factor, as many industry witnesses informed your committee.

Dr. Peck raised still another issue when he stated:

"The political and economic factors underlying the continuance of foreign gold mining are recognized, but a long-range view of the domestic situation raises the issue of whether the domestic gold-mining industry may be facing extinction while foreign gold mining anticipates an early return to prewar status.'

It may be noted that a distinct thread of thought runs through the testimony to the effect that certain economic forces were delighted at the prospect of cutting off the production of domestic gold by any excuse. In support of this contention it may be noted that Milo Perkins stated:

"It is essential * * * that a reduction in gold mining should be envisaged for the postwar period."

It is well known that the War Production Board had no authority to issue orders concerning manpower. That was a function of the War Manpower Commission. Yet it is a well-understood fact that Order L-208 was issued primarily for the purpose of rechanneling manpower, and at the imperative instance of the Army, which threatened otherwise to curtail essential copper production by refusing to return drafted miners to the mines.

The testimony and exhibits before your committee show that the then general counsel of the War Production Board, Mr. John Lord O'Brien, had grave doubts as to the legality and force of an order from WPB, an agency supposedly authorized to be concerned only with materials, but actually designed to have the effect of a manpower directive. Dr. Wilbur A. Nelson stated before your committee:

"I can say it was a grave question in the minds of certain members of the War Production Board. They definitely used their priority authority to handle the manpower problem."

[fol. 2493] To further show the confusion in thinking among the agencies, the War Production Board report states flatly:

"The truth of the matter was that those concerned with the order did not agree among themselves as to its real purpose."

As a matter of fact the Army and Navy had made up their minds and the civilian agencies had to act, willy-nilly, and then attempt to justify the action at a later date if possible to do so. The WPB report states the results succinctly:

"The anticipated protests against the order materialized immediately; the benefits did not."

The testimony before your committee certainly indicates the benefits never materialized but vast damage to an important industry did.

Actual Results Show Few Miners Channeled Into Strategic Mineral Mines

It has been pointed out that gold-mine operators furnished the War Production Board with estimates of the potential manpower pool of miners and muckers which would be made available by L-208. This estimate amounted to less than 600 as against agency estimates ranging from 5,000 to 10,000. The Secretaries of War and Navy stated more modestly on October 5, 1942:

"There are 2,000 to 3,000 hard-rock miners engaged in gold mining, now of no use in war production."

Dr. Wilbur A. Nelson testified before your committee that his figures, compiled in April of 1943, showed that 497 gold-mine workers "probably were actually placed in metal mines due to the gold-mine closing order * * * which would be about 300 miners and muckers." He also testified that most of these did not remain in their new jobs any length of time.

It must be noted that one of the primary reasons for the loss of labor at copper, lead, and zinc mines, aside from the draft, had been the high-wage inducements of the

Army construction projects. The War Production Board states that "less than a week after the gold mines had been closed, largely because of the insistence of the Army, the Army ski-tow construction project at Pando, Colo., was completed. In the period October 15 to November 1, 1942, some 7,000 workers were released. This project was located only 20 miles from the Climax molybdenum mine, one of those particularly in need of employees. It has been alleged, and the records seem to substantiate the allegation, that a few of the 7,000 workers released by the completion of the project returned to the mines from which they originally came. There was thus allowed to be dissipated a labor force of more than double that which conceivably could have been obtained by the closing of the gold mines." It is clear that these workers, as well as those released from the gold mines, went into more lucrative jobs than mining offered, and that the primary objective—or at least the announced objective—that of getting labor for the production of strategic metals, was not gained.

The most liberal figures which may be inferred from testimony before your committee indicates that perhaps as ma-y as 500 miners and muckers may have been channeled into strategic metal mines, most of which did not stay long.

There has been some argument to the effect that the release of equipment due to the closing of the gold mines may have warranted the issuance of L-208. According to figures in the hands of your committee, compiled by Edward H. Rott of the WPB, who was in direct charge of the administration of the order, the estimated value of the used equipment released under L-208 was $2,147,480. Much of the equipment rendered idle by L-208 was specialized and could not be utilized elsewhere than at gold mines. The West, all through the war and today, is dotted with idle milling plants and equipment which could not be disposed of. At the same time we exported about $100,000,000 of mining, well, and pumping equipment in the year 1943 alone, of which a considerable amount was mining equipment.

The wrecking of the American gold-mining industry evidently was not warranted from the standpoint of freeing equipment for other uses, especially when it is evident from the testimony before your committee that great quantities

of new machinery and tools were being exported for the maintenance of gold mining abroad.

Great, and in Some Cases Irreparable, Damage Has Been Done to the Gold-Mining Industry

The report (No. 6) of the Senate Small Business Committee issued in June of 1944 states "the gold-mining industry has suffered heavy losses in physical assets, in market valuations and in income. Stockholders have been greatly distressed. The opportunity has been perfect for [fol. 2494] mines and mining securities to be picked up by large financial interests at low values. * * * Many mines cut off from current income and unable to sustain high maintenance costs have been abandoned with consequent heavy loss of investments. Some mines so abandoned may never be reopened because of the prohibitive cost of dewatering and restoring the caved and flooded workings. Some mining companies continue the losing battle to maintain their mines in working condition. * * * Most of the damage has been done and the principal victims were the smaller operators."

The testimony given at the hearings on H. R. 4393 before your committee bears out the above statements in detail. Witness after witness appeared and explained in detail the physical damage and financial loss resulting from L-208. This testimony not only was not controverted by any Government witness but was largely substantiated by the WPB report on L-208.

David Strickler, president of the Stratton Cripple Creek Mining & Development Co., stated:

"* * * it affected the little fellow worse than it did the big fellow. The big fellow * * * had some money in reserve, but the little fellow busted: that is what it did to him."

According to Julian D. Conover, secretary, American Mining Congress:

"The gold mines had already contributed a major part of their manpower to the armed services and to war industries. The order did not accomplish its purpose. It was arbitrary and no provision was made for reimbursement."

Neil O'Donnell, of the Idaho Maryland Mines, showed that the entire cash reserve of his company, amounting to $451,845, had been spent on maintenance by June 1944, and the company had to resort to borrowing to preserve the mine. Up to January 1, 1946, $726,843 had been paid out for maintenance and repair of the mine. In spite of these expenditures, a further $694,045 is estimated to be necessary to rehabilitate the workings. This company is faced with a total loss of $1,419,000 and an empty treasury. It formerly gave emplpoyment to nearly 900 men.

The loss to small mines which were put out of business by foreclosure by creditors and forfeitures of leases and purchase contracts is impossible to estimate.

Philip R. Bradley, Jr., chairman of the mining board, State of California, while substantiating generally the situation outlined above, added, for an example, "the Central Eureka Mine in the Mother Lode District, which was one of the leading mines in the State, when L-208 shut them down; their expenditures for the maintenance of that mine averaged about $160,000 in each of the last 3 years. That company went broke."

Actual testimony by those who appeared before or filed statements with your committee showed losses of more than $2,816,000. Figures presented by the American Mining Congress gave an estimated total of $18,420,000 (including Alaska) as the probable aggregate of claims that might be payable under the proposed legislation. This does not, of course, include loss of production or profits. It represents out-of-pocket outlay to preserve mines in working order for stockholders, owners and operators.

Conclusion

In the opinion of your committee there is no better evidence substantiating the necessity for speedy passage of H. R. 4393 than the following statements from the War Production Board's report on L-208:

"With regard to the question as to whether or not the results achieved by L-208 compare favorably with the results anticipated at the time the order was issued, the answer would appear to be in the negative.

* * * * * * *

"The effects of the closing of the gold mines on community and individual economy have been great. Gold mining was a major industry in many western States. State taxes on gross value of gold-mine output constituted a considerable proportion of State revenue. * * * It is impossible to estimate the loss to the individual miner and home owner in affected mining communities, but appeals and protests against the relinquishing of leases and the necessity for forfeiting equity in equipment are on file in the War Production Board."

* * * * * * *

It is clear, in the opinion of your committee, which opinion is supported by expert testimony and is uncontroverted by Government witnesses, that there was little or no basis for issuing Order L-208, and that it was not only an administrative error but that the War Production Board [fol. 2495] proceeded on dubious authority. The conclusion further has been reached that the order should have provided a mechanism for compensation and that, as such was not provided, the Congress should so provide, even while realizing that much of the loss and damage is irreparable. Your committee believes that the prompt repayment of such losses as are covered in the pending bill, H. R. 4393, will not only do substantial justice to an industry which was selected for a unique experiment, but will greatly aid in reestablishing an important industry, provide thousands of jobs to veterans and start a flow of taxes into county, State, and the Federal treasuries.

The committee has carefully studied the facts relating to the situation that arose as a result of the proclamation of the War Production Board Limitation Order L-208 and is convinced that the gold mining industry was dealt with in a fashion which merits the consideration of the court in the adjudication of the losses which may have been occasioned by this order. The Idaho Maryland Mines Corp. decision is ample evidence of the fact that the least that can be done is to allow those persons affected by Order L-208 their day in court for such recompense as may seem justified. The committee further feels that in order to afford a more thorough understanding of the entire prob-

lem, the decision of the United States Court of Claims decided May 6, 1952, should be included as an appendix to this report.

The committee is of the opinion that the bill (S. 3195) is extremely meritorious, and urges favorable consideration of the measure by the Senate at an early date.

Appendix

In the United States Court of Claims

No. 50182

(Decided May 6, 1952)

Idaho Maryland Mines Corporation v. the United States

Mr. George Herrington for the plaintiff. Mr. Herbert H. Salinger; Bacigalupi, Elkus & Salinger; and Orrick, Dahlquist, Neff & Herrington, were on the briefs.

Mr. Thomas L. McKevitt, with whom were Mr. Assistant Attorney General Wm. Amory Underhill, and Mr. Assistant Attorney General Holmes Baldridge, for the defendant. Mr. R. W. Koskinen was on the brief.

On Defendant's Motion to Dismiss the Amended Petition

Littleton, *Judge*, delivered the opinion of the court:

This case arises out of an alleged taking, under and within the meaning of the Fifth Amendment to the Constitution, of plaintiff's gold mining properties in the County of Nevada, California, by virtue of the complete closing of plaintiff's mine by the War Production Board pursuant to Limitation Order L-208, issued by that Board, which order, plaintiff insists, upon the fact alleged, was arbitrary and violative of plaintiff's property rights with respect to the operation of its gold mining properties.

The original petition in this case was filed on June 4, 1951. Defendant's answer, filed August 3, 1951, contained special defenses challenging the sufficiency of the complaint and, upon defendant's motion, an order was entered

directing that the case be calendared for hearing by the court on the special defenses. Arguments in this case and in two other cases [1] involving similar issues were heard on November 5, 1951. At the oral argument, counsel for this petitioner and counsel for Central Eureka Mining Company (case No. 49468) were granted permission to file amended petitions. Plaintiff herein filed its amended petition on November 19, 1951.

Defendant has moved to dismiss the amended petition on the grounds that it fails to state a claim upon which relief can be granted and also fails to state a claim within the jurisdiction of this court.

[fol. 2496] PLAINTIFF'S EXHIBIT 336

Office for Emergency Management
War Manpower Commission
Washington, D. C.

July 9, 1942.

Chairman: Paul V. McNutt, Federal Security Administrator

To: Mr. Reginald G. Conley.
From: Bernard C. Gavit, General Counsel.
Subject: Release of Employees from Gold Mining Industry.

At a meeting of the War Manpower Commission, yesterday, the following problem was referred to this office.

General McSherry wishes to secure the release of men employed in the gold mining industry for transfer to the copper mining industry. Concededly the War Manpower Commission cannot accomplish this result directly. May the result be accomplished (1) by the War Production Board refusing to the gold mine operators critical materials used in their operations thus compelling the closing

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[1] *Central Eureka Mining Company* v. *United States*, case No. 49468, and *Homestake Mining Company* v. *United States*, case No. 50195.

of the mines; (2) may the Chairman of the War Manpower Commission direct the War Production Board to take that action?

The specific situation suggested is simply illustrative of the general problem in this field.

B. C. G.

Plaintiffs' Exhibit No. 336 rec. 4-7-53. J. B. P.

(Here follow 4 photolithographs, side folios, 2497, 2498, 2499, 2500)

Note:

Pages 1574A - 1574D are
exhibits at start of card 23.

[fol. 2501] C. Brief summary of action recommended:

Order L-208 should be amended in the following respects:

1. A formal change to take care of the situation where a gold mine, which is still operating under a serial number on the issuance date of the order, thereafter has that serial number cancelled. In such case, the period of permitted operation should begin to run from the date of cancellation rather than from the date of the original issuance of the order.

2. A provision freezing the machinery in nonessential mines. Operators of closed gold mines may wish to sell critical mining machinery or equipment. This should be controlled so that it will go to more essential rather than less essential mines. The proposed new paragraph freezes such machinery and equipment, but does not tie up small and standard operating supply items. Provision is made to have operators report promptly to the Mining Branch a description of all frozen machinery and equipment. The Mining Branch is setting up a unit to help in the speedy disposal of such machinery and equipment as the operator may wish to sell. The complete list will be available in case it becomes essential at a later date to requisition the other machinery and equipment.

3. An additional exception to permit the minimum assessment work required by Federal statute.

[fol. 2502] DEFENDANT'S EXHIBIT 33

July 7, 1942.

Memorandum

To: General Frank J. McSherry.
From: Richard A. Lester.

At Mr. Haber's suggestion, I drafted the attached general statement regarding curtailment of non-essential production and employment, and the attached statement illustrating the application of this general policy to gold mining and milling. These were handed to Mr. Haber this morning for consideration with a possibility for submitting them to the War Manpower Commission meeting tomorrow.

Attachments—2
Lester:mmm

[fol. 2503] Statement Regarding Curtailment of Non-Essential Production and Employment to Fill Critical Needs for War Production

It shall be the policy of the War Production Board and the War Manpower Commission to curtail non-essential production and employment in those industries and areas where labor shortages restrict or impede the production of war items or of critical materials for such items and where other methods of obtaining an adequate labor supply for the impeded war or critical-materials production are not feasible because they would involve an adverse effect upon war or essential activities, a long delay that would be detrimental to the war program, the use of a considerable amount of critical materials and labor for such items as housing and additional community services for in-migrants, or similar disadvantages to the war program.

In the selection of non-essential activities for curtailment in order to fill critical needs for war production and in determining the extent and methods of such curtailment, account shall be taken of the following factors:

1. The location of the labor that would be released.
2. The broad occupational pattern of the workers that would be released and their suitability for work in war and essential industries in the area.
3. The character and extent of the demand for labor in war and essential production in the area.
4. The extent to which such curtailment will save critical materials, power, and transportation.
5. The suitability of the equipment of the curtailed industry for war production.
6. The inventories of processed or semi-processed material and parts in the possession of firms in the non-essential industries.

[fol. 2504] Statement Regarding Curtailment of Non-Essential Production and Employment to Fill Critical Needs for War Production

It shall be the policy of the War Production Board and the War Manpower Commission to curtail non-essential production and employment where such non-essential activi-

ties involve the consumption of critical material or materials, providing all of the following conditions also prevail:

(1) The production of war items or critical materials for such items is being impeded for lack of an adequate labor supply.

(2) The labor supply in such non-essential activities is well adapted for use in the war or critical-materials industry which is being impeded by a critical labor shortage so that there is every likelihood, considering location and labor market conditions, that most of the employees laid off by curtailment of the non-essential activities can at once have jobs in the production of war items or of critical materials at comparable rates of pay.

(3) There is no alternative method of obtaining an adequate labor supply for the impeded war or critical-materials industry that does not involve (a) adversely affecting other essential activities, or (b) the use of a considerable amount of critical material, or (c) a long delay that would be detrimental to the war program.

In the selection of non-essential activities for curtailment in order to fill critical needs for war production and in determining the extent and methods of such curtailment, account shall be taken of the following factors:

(1) The extent to which such curtailment will save critical materials.

(2) The suitability of labor that would be released for the needs of the war or critical-materials industry suffering from a shortage of labor.

(3) The location of the labor that would be released.

(4) The feasibility of using the equipment of a curtailed industry in the war program, especially in the industry or industries suffering from a critical labor shortage.

(5) The inventories of processed or semi-processed material and parts in the possession of firms in the non-essential industries.

[fol. 2505] Gold Mining and Milling as an Illustration of the Policy of Curtailing Non-Essential Production and Employment to Fill Critical Needs for War Production

Further gold production within the continental United States is absolutely non-essential.

1. Copper and other base-metal production is being curtailed for lack of an adequate labor supply. A USES report on non-ferrous metal mining and milling for May 15 shows that of 30 operations with some 26,000 employees in Idaho, Montana, Utah, Nevada, Arizona, and New Mexico for which data were available, 15 reported a critical shortage of labor impeding production and 14 had standing orders for workers with the USES. A total of about 1,000 workers would have been required merely to relieve the critical shortages in these 15 operations. At least one mine and one smelter are reported to have been closed as a result of labor shortage.

2. It is estimated that there will be need for a net increase of over 7,000 in employment in non-ferrous mining and milling (copper, lead, zinc, tungsten, manganese, chrome, etc.) in the West during the next 10 or 12 months. In addition there is the need for replacement of withdrawals, which have been running as high as 15 and 25 per cent. Although some 50-odd establishments in copper, lead, and zinc hired over 4,000 workers in the 60-day period ending May 15, their total employment actually decreased about 340 because withdrawals averaged 13 per cent of total employment.

3. Workers in both open-cut and vein gold mining and in gold milling have, in general, the necessary training and qualifications for base-metal operations. Indeed, one company controlling both gold operations and base-metal operations is already arranging for the closing of its gold mine in one state and the transfer of its gold workers to its new base-metal operations in another state. Another company, however, closed its zinc operations and kept a nearby gold and silver mine open.

4. Most of the gold mining in the West occurs in the same states or in the same areas as do copper, lead, zinc, and other base-metal operations. Last year 15 large operators engaged over 90 per cent in gold mining and milling employed around 6,800 workers.

Women cannot be used extensively in base-metal mining or milling, and there is no other activity in the important copper-mining states that could be classified as non-essential as gold production and would release as many workers qualified for base-metal operations.

Alternative suggestions for supplying labor to base-metal operations, such as the use of Japanese, Mexicans, coal miners, and iron ore miners, prove upon investigation to involve many difficulties, perhaps considerable delays, transportation problems, and questions regarding the adequacy of the labor that might be so supplied both in terms of numbers and qualifications.

[fol. 2506] 5. The savings of critical materials with the curtailment of gold operations would be considerable, for such materials are still being obtained through priorities for maintenance, repair, and operating supplies in connection with gold production. This has involved the granting of priorities for such materials as tool steel, zinc dust, etc.

6. Part of the equipment, such as drills, mechanical loaders, etc., used in gold mining could be used in base-metal mining, thus saving metal and releasing for war work some important facilities now used for producing metal mining equipment. Gold milling facilities are also adaptable for the base metals.

7. The gold mining and milling industry would not present a problem of inventories of processed or semi-processed material and parts left in the manufacturers' hands as a result of curtailment. It would be necessary to make arrangements for a skeleton crew to pump out underground mines that were closed.

[fol. 2507] DEFENDANT'S EXHIBIT 34

July 4, 1942.

Memorandum

To: General Frank J. McSherry.
From: Richard A. Lester.
Subject: Critical Shortage of Labor in Non-ferrous Metal Mining and Employment in Nearby Gold and Silver Mines.

The May reports to the U. S. Employment Service indicate that copper and zinc production has already been retarded as a result of labor shortage in Idaho and Utah. For example, a very serious labor shortage, which is impeding production, is being experienced at the Morenci, Arizona

operations of Phelps-Dodge. Although an average of 30 workers a day were being hired there, employment dropped during the month prior to May 15 with a result that a shortage of 165 workers was causing a corresponding curtailment of production.

Reports from 50 odd establishments in copper, lead and zinc mining and refining show that total employment actually decreased by about 340 workers, although these establishments hired more than 4,000 workers in the 60-day period preceding the date of their report. In this 60-day period withdrawals amounted to 13 percent of total employment. Studies of the movement of workers out of the copper mines indicate that most of them are going into war plants and Selective Service with comparatively few of them going into other copper mines. A number of copper companies have placed standing orders with the Employment Service, and the local offices in Idaho and Arizona resorted to interstate clearance in May. A USES order for 100 miners and 100 muckers in Idaho was cleared through all western states but had brought no referrals by May 15. Companies were requesting the use of Japanese and Mexicans for their operations.

The 15 largest producers of gold in 7 western states employed in 1941 a total of approximately 6,700 workers in operations connected with gold mining. Fourteen large silver operations that produce mostly silver and comparatively little zinc, lead or copper employed in 1941 somewhat over 2,000 workers in 7 western states. In many cases the gold and silver mines are located near copper mines which are experiencing labor shortages or near lead, zinc, tungsten, chrome, or molybdenum mining operations which could absorb many additional miners and increase their output thereby.

[fol. 2508] Some companies operating gold or silver mines are owned or controlled by companies that are operating nearby copper and zinc mines. For example, the Anaconda Copper Mining Company is operating a gold mine and a silver mine in Montana, employing about 120 workers, in the vicinity of its copper operations where it reports a shortage of 400 employees and in the vicinity of a zinc mine which it recently closed because of insufficient labor. Also the company is starting two new chromite developments in Montana which will employ 400 miners. The Newmont

Mining Company, which owns a controlling interest in gold mines in California employing about 1000 men, owns an important copper project in California that will come into full operation by the end of this year, and also owns the Magma Copper Company in Arizona, which has placed a standing order with the Employment Service. The U. S. Smelting, Refining and Mining Company is closing down its gold mine employing some 200 workers in Arizona and arranging to transfer them to its new lead-zinc mine at Vanadium, New Mexico.

The biggest problem in connection with non-ferrous metal mining is the very high turnover rates ranging from 10 to 25 percent during a two-month period. In addition, there is the actual movement of experienced miners away from the mines. On the basis of existing labor needs and the new expansions, we estimate that there will be a need for a minimum net increase of 4,000 workers in copper mines and mills, and a minimum net increase of 2,000 in lead and zinc mines and mills during the next six months. With the additional needs in tungsten, chrome, manganese, and molybdenum, the net additional number of workers will probably range between 7,000 and 10,000 with no allowance for replacements with the high turnover rates. As already indicated, the total employment in the 15 largest gold and 14 largest silver operations in the region approximated 9,000 last year. At the present time there are about 30,000 employees in the copper mining and milling and about the same number in the lead and zinc operations.

Steps should be taken to remedy the critical labor situation in non-ferrous metal mining, including arrangements for the transfer of miners from gold and silver mining to copper, lead, zinc, tungsten, chrome, and molybdenum mining. This can be done through curtailment of gold and silver production, but it would be necessary to make sure that the workers released went into non-ferrous metal mining and did not go into war plants in the vicinity or on the West Coast. It has been customary for metal miners in the mountain states to move considerable distances with the opening and closing of mines and ordinary turnover.

Attached is the USES report on non-ferrous metals for May.

Attachment.
Lester:mmm

[fol. 2509] DEFENDANT'S EXHIBIT 35

August 25, 1942.

Memorandum

To: Brigadier General Frank J. McSherry.
From: Richard A. Lester.
Subject: Workers in the Homestake Mining Company.

Yesterday Mr. Guy Bjorge, manager of the Homestake Mining Company, visited me to explain the situation in his company and community with regard to labor supply. The company now has a little over 2,000 workers, having taken on 491 and having lost 631 workers in the last two years. There are 1150 workers in the Mining Department; and Mr. Bjorge says that they still have many employees who are under 35 years of age, although 50 per cent of their employees are over 40 years of age. Of those who left, for which records are available, 158 went into the Armed Forces, 163 went into war production jobs, and 46 left for farming or to return to school. The company also has 160 men in the Timber Department, logging its own lumber.

Mr. Bjorge indicated the importance of his company's payroll to the community, which consists of about 15,000 persons in and around Lead and Deadwood, South Dakota. He explained how much his company contributes in taxes; but readily recognizes that since the government buys all his products, the government is paying out much more than it takes in.

Mr. Bjorge said that there are three or four other gold mines in the district around Lead and Deadwood, which mines have a total of about 500 employees. There is one cooper property and one tungsten property in the area which his company was willing to buy and operate, but the owners were holding out such properties for a price which his company considered to be too high.

Lester/hn.

[fol. 2510] Data on Curtailment Program for Gold Mining

General McSherry discussed the question of curtailing gold mining at the War Manpower Commission meeting of July 8th. On the same date, the War Department, through an interdepartmental committee, presented a program for

increasing copper production which included under a recommendation to the War Production Board the request of "production of gold, with the exception of required amounts of essential silicious gold ores, should be curtailed by an order of the War Production Board to free labor which is urgently needed in the non-ferrous mines which are essential to the war effort."

On July 31st, Richard A. Lester sent to the Chief of the Mining Branch and to the Deputy Director for Operations in the War Production Board, tne outline of a proposed Limitation Order on Gold Mining.

On August 19th, the Chief of the Mining Branch of the War Production Board first submitted copies of a draft order for comment. Recently, those in charge of drafting the order have decided to base it as suggested in Mr. Lester's proposal on gold production rather than on the use of metal.

Most recent information is that a draft of an order to curtail gold mining is to be submitted to Donald Nelson along with a memorandum that will point out the adverse effects of curtailing gold mining in such States as South Dakota and Colorado, since a large portion of State and Local taxes are raised from gold mining, although all the income from gold mining is paid by the Federal Government. There is still considerable opposition in the War Production Board to issuing an order closing down gold mines.

It is estimated that there are between eight and ten thousand persons working in gold mining and milling operations in the United States at the present time. The attached memorandum on the Homestake Mining Company indicates that this company in August had over 2000 workers of whom 1150 were in the mining department. In gold mining and milling operations alone, it had a total of about 1700 workers. Other gold mines in that district had about 500 employees.

The following table indicates the number of mines and the output in the year 1940:

Mines in Continental United States	Number	Ore Production	Ounces of Gold
Mines producing less than 5,000 tons gold ore	3,437	1,661,370 tons	304,866
Mines producing more than 5,000 tons gold ore	221	10,715,224 "	2,017,648
Mines in Alaska	74	4,985,298 "	214,097

The transferring of workers from gold mining to nonferrous metal mining should be consummated before cold weather sets in.

Enclosure.
RLester/pkf.

[fol. 2511] DEFENDANT'S EXHIBIT 36

War Manpower Commission

Directive XIII

Employment of Workers Previously Employed as Production or Maintenance Workers in Gold Mines

By virtue of the authority vested in me as Chairman of the War Manpower Commission, and having found after consultation with the members of the War Manpower Commission that substantial numbers of persons, heretofore employed as production or maintenance workers in gold mines, are or will be unemployed, that such persons possess skills needed in and readily adaptable for use in essential non-ferrous metal industries, that critical labor shortages in essential nonferrous metal industries can be greatly alleviated by the employment in such industries of such persons, and that the measures hereinafter set forth are necessary to promote the effective mobilization and maximum utilization of the Nation's manpower in the prosecution of the war, it is hereby declared to be the policy of the War Manpower Commission that:

I. On and after the date hereof no employer shall hire in, or hire for work in, Alaska or any State west of the Mississippi River, any person who on or after October 7, 1942, has ceased to be employed as a production or maintenance worker in connection with gold mining except upon referral of such worker to such employer by the United States Employment Service.

[fol. 2512] II. No person who on or after October 7, 1942, has ceased to be employed as a production or maintenance worker in connection with gold mining shall be referred by the United States Employment Service to any work in Alaska or a State west of the Mississippi River other than

work in essential non-ferrous metal mining, milling, smelting, and refining activities unless such referral would be in the best interests of the war effort or unless the denial of such referral would entail an undue hardship upon the individual concerned, as determined in accordance with regulations and standards prescribed by the Chairman of the War Manpower Commission.

III. Any worker or employer, or group of workers or employers, dissatisfied with any act or failure to act pursuant to this directive shall be given a fair opportunity to present his or their case to the local area War Manpower Committee. Such Committee shall make recommendations concerning such cases as well as other matters pertaining to the carrying out of this directive in its area to the manager of the appropriate local employment office of the United States Employment Service. The Chairman of the War Manpower Commission shall prescribe regulations and procedures for the carrying out of the responsibilities of local area committees under this directive, including procedures for the review of the recommendations of such committees by Regional War Manpower Committees and by the National Management-Labor Policy Committee.

IV. All persons are hereby enjoined to observe strictly all provisions of this directive and all provisions of regulations and interpretations issued by the Chairman of the [fol. 2513] War Manpower Commission in implementation of this directive.

V. Each department and agency of the Federal Government is hereby directed to take all lawful and appropriate steps under authority vested in it by law to achieve and promote compliance with the provisions of this directive.

VI. This directive may be cited as the "Employment of Gold Mine Production and Maintenance Workers Directive."

Paul V. McNutt, Chairman.

October 7, 1942.

[F.R. Doc. 42-10123; Filed, October 9, 1942: 12:30 p.m.]

DEFENDANT'S EXHIBIT 2

(See instruction sheet on reverse side)

Subject of Order Gold Mining No. L-208

Branch Mining New ☒ Amendment ☐ Supplement ☐ Extension ☐ Revocation ☐

C. Brief summary of action recommended:

That attached order be issued by the Director General for Operations.

D. Persons consulted pursuant to Division Administrative Order No. 508–13:

Organization Unit	Name	Date	Agreed	Dissent Memo. Attached	No Recommendation Received
1. Civilian Supply Division					
2. Labor Division					
3. Materials Division (for new P Orders; for L and M Orders designed to save materials.)	[redacted]				
4. Bureau of Industrial Conservation, (for L and M Orders designed to save materials.)	[redacted] No. [redacted]				
5. Statistics Division	DEPT Ex. No. 2				
6. A. N. M. B.					
7. Office of Procedural Consultant Assistant General Counsel may specify additional consultations below:	[redacted]				
8.					
9.					
10.					

FILED
MAR 10 1953

E. The information required by section 2 of the instruction sheet (on reverse side) is attached. The persons named in section D (above) have been consulted as required by Division Administrative Order No. 508–13:

It is hereby recommended that the proposed action be taken.

Wilbur A. Nelson 10/7/42
Branch Chief. (Date)

Agreed ☐ Dissent ☐ Memo. attached ☐

Priority Specialist. (Date)

F. For the information of the Clearance Committee:

1. Record in Federal Register: Yes ☐ No ☐

2. Frederick M. Eaton 10/7/42
(Name of Branch Counsel) Date

3. (Checked by Review and Approval Branch)

4. (Name of Administrator of the Order)

G. The following persons concur in the action recommended:

	Signature	Date
1.	Assistant General Counsel for Industry Operations.	
2.	Clearance Committee.	
3.	Chief or Deputy Chief, Bureau of Priorities.	10/7

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SEC–4
Rev. 4/15/42

WAR PRODUCTION BOARD
DIVISION OF INDUSTRY OPERATIONS

RECOMMENDATION FOR ISSUANCE OF M, L, OR P ORDERS BY THE DIVISION OF INDUSTRY OPERATIONS

(See Reverse Side)

A. Instruction Sheet.

1. The Branch Chief or Administrator of the Order shall have prepared the Form SEC–4 (Rev. 4/15/42) in quadruplicate, the summary statement and supporting data (item 2 below) in triplicate, and the Order in sextuplicate. All dissenting memoranda (if any) shall be prepared in duplicate by the persons submitting such dissents. The Branch Chief or Administrator of the Order shall retain one carbon copy of all of the above material and transmit the remaining papers through the Priority Specialist to the Review and Approval Branch. On approval, one carbon copy each of the Form SEC–4, the Order, the summary statement, and supporting data shall be transmitted by the Office of the Deputy Chief, Bureau of Priorities, to the Division of Information.

2. Furnish a brief but specific summary covering the following information for the use of the Clearance Committee, attaching supporting data where necessary.

a. Purpose of Order in terms of one or more of the following:
(1) To facilitate essential production (such as P Orders).
(2) To limit nonessential production (such as L Orders).
(3) To conserve the supply and/or direct the distribution of critical materials or equipment (such as M or E Orders).
(4) For other reasons.

b. Scope of Order with respect to the following (describe briefly):
(1) Industry(s) or company(s) affected.
(2) Materials, products, or equipment covered.

c. Present and prospective supply and demand positions of items covered. (Give latest available data on stocks, production, requirements, etc.)

d. Effect of Order, if any, with respect to the following:
(1) Amounts of critical materials that will be saved.
(2) Amounts of critical materials that will be consumed under the Order.
(3) Existing inventories
(4) Extent and expected period of labor displacement.
(5) Industry conversion to war production.
Present spread of war orders in the industry.
Possible percentage of conversion to war production.
(6) Foreign requirements.

e. Describe the specific provisions of the Order with respect to the following:

b. Scope of Order with respect to the following (describe briefly):
(1) Industry(s) or company(s) affected.
(2) Materials, products, or equipment covered.

c. Present and prospective supply and demand positions of items covered. (Give latest available data on stocks, production, requirements, etc.)

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(5) Industry conversion to war production.
Present spread of war orders in the industry.
Possible percentage of conversion to war production.
(6) Foreign requirements.

e. Describe the specific provisions of the Order with respect to the following:
(1) Nature of the restrictions, prohibitions, or assistance provided.
(2) Inventory restrictions (if any).
(3) Reasons for selection of the particular base period (if any).
(4) Any unusual provisions.

f. Is this Order necessary, i. e., could the same results be accomplished by amendment or addition to existing Order(s)? If P Order, state reason for not using Production Requirements Plan.

g. Extent to which industry has been consulted.

h. Additional personnel required to administer the Order.

i. What forms and procedures are required and when will they be available for distribution?

3. Indicate in section D those persons consulted in the drafting of the Order and forms, attaching their memoranda if any.

4. The Branch Chief shall sign section E and transmit the papers to the Priority Specialist for signature and action.

5. Indicate in section F the information required by the Clearance Committee.

6. Submit the Order to the Review and Approval Branch, Office of the Deputy Chief, Bureau of Priorities.

7. Those persons required to clear the Order shall indicate such clearance by signature in section G.

16—28014-1

ORIGINAL—For Official Files.

DEFENDANT'S EXHIBIT 3

(See instruction sheet on reverse side)

B. Subject of Order Gold Mining No. L-208

Branch Mining New ☐ Amendment ☒ Supplement ☐ Extension ☐ Revocation ☐

C. Brief summary of action recommended:

See attached memorandum.

SEC–4
Rev. 4/15/42

WAR PRODUCTION BOARD
DIVISION OF INDUSTRY OPERATIONS

RECOMMENDATION FOR ISSUANCE OF M, L, OR P ORDERS BY THE DIVISION OF INDUSTRY OPERATIONS

(See Reverse Side)

A. Instruction Sheet.

1. The Branch Chief or Administrator of the Order shall have prepared the Form SEC–4 (Rev. 4/15/42) in quadruplicate, the summary statement and supporting data (item 2 below) in triplicate, and the Order in sextuplicate. All dissenting memoranda (if any) shall be prepared in duplicate by the persons submitting such dissents. The Branch Chief or Administrator of the Order shall retain one carbon copy of all of the above material and transmit the remaining papers through the Priority Specialist to the Review and Approval Branch. On approval, one carbon copy each of the Form SEC–4, the Order, the summary statement, and supporting data shall be transmitted by the Office of the Deputy Chief, Bureau of Priorities, to the Division of Information.

2. Furnish a brief but specific summary covering the following information for the use of the Clearance Committee, attaching supporting data where necessary.

   a. Purpose of Order in terms of one or more of the following:
   (1) To facilitate essential production (such as P Orders).
   (2) To limit nonessential production (such as L Orders).
   (3) To conserve the supply and/or direct the distribution of critical materials or equipment (such as M or E Orders).
   (4) For other reasons.

   b. Scope of Order with respect to the following (describe briefly):
   (1) Industry(s) or company(s) affected.
   (2) Materials, products, or equipment covered.

   c. Present and prospective supply and demand positions of items covered. (Give latest available data on stocks, production, requirements, etc.)

   d. Effect of Order, if any, with respect to the following:
   (1) Amounts of critical materials that will be saved.
   (2) Amounts of critical materials that will be consumed under the Order.
   (3) Existing inventories
   (4) Extent and expected period of labor displacement.
   (5) Industry conversion to war production.
   Present spread of war orders in the industry.
   Possible percentage of conversion to war production.
   (6) Foreign requirements.

   e. Describe the specific provisions of the Order with respect to the following:

b. Scope of Order with respect to the following (describe briefly):
(1) Industry(s) or company(s) affected.
(2) Materials, products, or equipment covered.

c. Present and prospective supply and demand positions of items covered. (Give latest available data on stocks, production, requirements, etc.)

d. Effect of Order, if any, with respect to the following:
(1) Amounts of critical materials that will be saved.
(2) Amounts of critical materials that will be consumed under the Order.
(3) Existing inventories
(4) Extent and expected period of labor displacement.
(5) Industry conversion to war production.
Present spread of war orders in the industry.
Possible percentage of conversion to war production.
(6) Foreign requirements.

e. Describe the specific provisions of the Order with respect to the following:
(1) Nature of the restrictions, prohibitions, or assistance provided.
(2) Inventory restrictions (if any).
(3) Reasons for selection of the particular base period (if any).
(4) Any unusual provisions.

f. Is this Order necessary, i. e., could the same results be accomplished by amendment or addition to existing Order(s)? If P Order, state reason for not using Production Requirements Plan.

g. Extent to which industry has been consulted.

h. Additional personnel required to administer the Order.

i. What forms and procedures are required and when will they be available for distribution?

3. Indicate in section D those persons consulted in the drafting of the Order and forms, attaching their memoranda if any.

4. The Branch Chief shall sign section E and transmit the papers to the Priority Specialist for signature and action.

5. Indicate in section F the information required by the Clearance Committee.

6. Submit the Order to the Review and Approval Branch, Office of the Deputy Chief, Bureau of Priorities.

7. Those persons required to clear the Order shall indicate such clearance by signature in section G.

16—28014–1

ORIGINAL—For Official Files.

2500

[fol. 2514] DEFENDANT'S EXHIBIT 42

Homestake Mining Company

Lead, South Dakota

Jan. 13, 1942.

Mr. Merle H. Guise, Technical Advisor, Mining Priorities Section, First Floor, Wing 1 Temporary Building E, 6th St. & Adams Drive, S. W., Washington, D. C.

DEAR MR. GUISE:

Your air mail inquiry of the 8th, addressed to Mr. Bjorge, was received the 10th. Mr. Bjorge is away from his office at present.

We have endeavored to "boil down" the figures you wish to the best of our ability in the short time allowed. In making such a study the mine operator is immediately confronted with the fact that the myriad of parts and types of materials may contain small percentages of alloys, which actual constituents are known only to the manufacturers. However, we feel safe in assuming that most of our repair parts are carbon steel (if not from castings). The actual alloy steels employed are negligible. In totalling iron and steel—straight, fabricated or machined, we have added the different types of steel and iron together and have noted the few exceptions where alloys are involved.

No attempt has been made to show "minimum tons required" from which "scrap return" would be subtracted to get "net requirements" inasmuch as our previous report (of Dec. 24, 1941) was predicated on a "net requirements" basis, taking into account the careful utilization of all scrap in our own foundry. We only realize about half the scrap needed and must make up the difference by purchase. Our realized scrap totals approximately 1,200 short tons per annum from iron and steel materials and supplies plus 12 tons of manganese scrap (from mill liners, etc.) and about a ton of copper scrap is obtained from divers parts of the operation.

Herewith please find rough tabulation of our "net requirements" for 1942.

[fol. 2515] Our 1942 ore tonnage production should be about the same as in 1941; namely, 1,500,000 tons.

In our Dec. 24th, 1941 report one chemical item of consumption for 1942 was overlooked and you may wish to add this to that report. This was sodium aluminate amounting to 3 tons and employed in boiler plant water treatment.

I trust the above will cover your requirements.

Yours very truly, H. A. Walker, Assistant General Manager.

HAW:F

encl.
1 copy air mail
1 copy reg. mail.

D. Persons consulted pursuant to Division Administrative Order No. 508–13:

Organization Unit	*Name*	*Date*	*Agreed*	*Dissent Memo. Attached*	*No Recommendation Received*
1. Civilian Supply Division					
2. Labor Division					
3. Materials Division (for new P Orders; for L and M Orders designed to save materials.)					
4. Bureau of Industrial Conservation, (for L and M Orders designed to save materials.)	[illegible]		[illegible]		
5. Statistics Division	The [illegible]				
6. A. N. M. B.	[illegible] Ex. No. 7				
7. Office of Procedural Consultant Assistant General Counsel may specify additional consultations below:					
8.					
9.					
10.					

signed to save materials.) [illegible]

5. Statistics Division — The [illegible]

6. A. N. M. B. — [illegible] Ex. No. 7

FILED
MAR 10 1953
CLERK OF COURT

E. The information required by section 2 of the instruction sheet (on reverse side) is attached. The persons named in section D (above) have been consulted as required by Division Administrative Order No. 508–13:

It is hereby recommended that the proposed action be taken.

William J. Nelson — 11/13/42
Branch Chief. (Date)

Agreed ☒ Dissent ☐ Memo. attached ☐

Alexander Pleasonton — 11/13/42
Priority Specialist. (Date)

F. For the information of the Clearance Committee:

1. Record in Federal Register: Yes ☒ No ☐

2. James Cooley — 11/16/42
(Name of Branch Counsel) Date

3. (Checked by Review and Approval Branch)

4. Wilbur A. Nelson
(Name of Administrator of the Order)

G. The following persons concur in the action recommended:

	Signature	*Date*
1.	J. H. Hollands *Assistant General Counsel for Industry Operations.*	11/12
2.	*Clearance Committee.*	
3.	*Chief or Deputy Chief, Bureau of Priorities.*	

U. S. GOVERNMENT PRINTING OFFICE 16—28014-1

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157[illegible]

[fol. 2516]

MINIMUM MATERIAL & SUPPLIES REQUIRED FOR 1942—— GOLD MINING ONLY (A)

Breakdown into basic items, whether straight, fabricated or machined

Iron & Steel

	Straight	Fabricated	Machined	Manganese Steel	Nickel Steel	Chrome Steel	Moly Steel	Tungsten Steel	Other Alloys	Copper	Lead	Tin	Zinc	Aluminum	Asbestos	Mercury	Rubber
Rough Estimate— Net Requirements Tons	43	8453	46	135	.....	.....	.....	.....	.....	12	13	0.50	28	0.14	0.75	80	11.75

(a) For continuing mining operations only; no expansion, no living quarters, not including fuel, gas, deisel oil or lubricant oil, lumber, chemicals, cement, or non-critical items.

[fol. 2517] DEFENDANT'S EXHIBIT 43

War Production Board

Memorandum

September 9, 1942.

To: Mr. A. I. Henderson
From: R. J. Lund
Subject: Gold Mining Order

At a meeting held in your office on September 4, attended by Messrs. Dodge and Scribner of your staff, Mr. Parks of the Miscellaneous Minerals Branch, and Mr. Stow of the Mining Branch, you issued instructions that an order be drawn up either by the Miscellaneous Minerals Branch or the Mining Branch which would curtail the output of gold and which would not be connected with Order P-56. You indicated that this Branch should prepare the order but that the order could be administered by this Branch or the Mining Branch as later determined.

It was understood that the purpose of the order was to make mining labor now producing gold available to copper and other strategic non-ferrous metal mines. This end can be attained by WPB only through its authority to control materials.

Attached is copy of the order for your consideration. This order has not been circulated, except in discussions with the Mining Branch.

The order is designed to close all mines producing gold to the extent of 50 percent or more of the value of the total output. In considering the order the following matters are pertinent:

(1) Number of mines affected

Based on 1940 production figures obtained from the Bureau of Mines, the latest they were able to supply, about 220 lode mines will be affected by the order. This figure is not exact, because production in the 1941 or 1942 base period specified in the order is not strictly comparable with the 1940 picture. Geographic distribution of these lode gold mines is as follows: California, 58; Colorado, 32; Montana, 30; Nevada, 27; Arizona, 18; Alaska, 12; Idaho, 12; Utah, 8; South Dakota, 6; with the remainder distributed among five other states.

Detailed data on placer operations affected by the order are not presently available, but the Bureau of Mines reported that in 1940 a total of 3,107 placer mines produced gold and silver in the United States, and 1,069 in Alaska. Undoubtedly, sizable numbers of these produced such small quantities that they would be exempted by the order.

[fol. 2518] The Bureau of Mines reported that in 1940 there were 49 connected-bucket floating gold dredges operating in Alaska, 46 in California, 12 in Idaho, 7 in Montana, 6 in Oregon, 1 in Colorado, and 1 in Nevada. In addition there were large numbers of mechanized placer operations using drag line and power-shovel excavators, but no separate figures on these operations are available.

(2) Labor involved

Based on 1941 data, latest available from the Bureau of Mines, approximately 12,400 employees in lode gold mines will be thrown out of work by the order. Incomplete data indicate that about 70 percent of this labor is employed underground. Geographic distribution of this total labor was as follows: California, 3394; South Dakota, 2123; Colorado, 1689; Alaska, 1251; Arizona, 911; Montana, 602; Nevada, 601; Idaho, 590; Utah, 484; with the remainder distributed in a number of Western and Eastern states.

No detailed data are available showing number of employees in placer operations, except that the number would probably amount to at least several thousand in the United States and perhaps two thousand in Alaska.

(3) Estimated recapture of employees affected

Assurances were given by General McSherry at a meeting of the Interdepartmental Committee on Non-Ferrous Metals, September 8, that the U.S. Employment Service had adequate staff available to go immediately into the several hundred mining camps which might be affected by the gold curtailment order and to recruit labor for transfer to copper mines and other non-ferrous metal mines in dire need of such labor. At a previous meeting of this Committee, an estimate was made that about 25 percent of the mine labor might be recaptured for work in other mines.

(4) Other metals lost

Production of other metals in 1940 by mines affected is as follows: copper, 2,751,000 pounds; zinc, 92,000 pounds; lead, 12,047,000 pounds; silver, 4,947,000 ounces. Other metals such as antimony, arsenic, tungsten, molybdenum, and manganese are also produced in minor amounts by some of these mines.

(5) Fluxing ore problem

Some gold mines affected by the order produce large tonnages of siliceous ore required by smelters working primarily on other non-ferrous metals, such as copper, lead and zinc. This flux is necessary to their operation, and [fol. 2519] gold values in the flux naturally make operations more economical than by adding barren siliceous material which may, or may not, be available at the smelter.

(6) Critical materials saved

Sizable amounts of critical materials will be saved in closing these gold mines. Estimates as to total current consumption of such materials are not available but the general order of magnitude of such consumption is indicated by the fact that in 1939 gold mines in the United States (excluding Alaska) spent about $17,000,000 on supplies and materials, $2,000,000 for fuel and about $5,000,000 for purchased electric energy.

(7) Effect on economy of states and communities

Shutting down the operations at mines affected by the order will result in loss of sizable tax revenues, in respect to state tax revenues alone, in some of the states involved. There has been insufficient time to obtain complete data on this point, but two examples are cited as follows: (a) In South Dakota, total state taxes collected in fiscal year 1941, exclusive of motor fuel taxes, amounted to $11,700,000; taxes paid to the state by mines in South Dakota affected by this order amounted to $1,000,000, or about 9 percent of the total; (b) in Nevada total taxes collected in fiscal year 1941, excluding motor fuel taxes, amounted to $3,300,000, of which about $65,000, or 2 percent, was collected from mines affected by this order.

Losses in county and municipal taxes will be felt much more severely by the communities in the vicinity of the mines. In this respect, shutting down mining operations is not comparable with shutting down other industrial operations in communities where enterprise is diversified; in the West it is generally true that the mine is the sole major source of income for local communities. For example, it has been reported that the Homestake Mining Company pays 65 percent of the local community taxes and 50 percent of the county taxes; that the wage earners and those servicing them pay the balance largely from the $4,500,000 in annual wages paid by the company. At least 19,000 people, the population of the county, are directly or indirectly dependent upon its operation.

For reasons stated in the last paragraph, hardships faced by old established mine employees will be severe. There is virtually no possibility of converting the facilities at the mines to war work.

[fol. 2520] (8) Probable loss of deep mining operations and dredging equipment

Although the order permits gold mining companies to maintain buildings, machinery and equipment in repair, and to keep access and development workings in a safe and accessable condition, it is probable that most of the deep mines situated in heavy, caving ground will be unable to take full advantage of these provisions in the order. As a result it is probable that many of these old, deep mines may never be reopened.

Costly dredging equipment forced to lie idle will be subject to more rapid depreciation than if it were maintained in operation.

The suggestion was made at a meeting this morning that the order should be tightened further by lowering the exemption from the 4,000 ton figure to 1,500 tons annually, or a monthly rate of 100 tons. Such a change would result in a large increase in the number of mines affected by the order, in the total labor involved, and in items 3 to 6, inclusive, discussed above. Tabulations covering these smaller operations are just now being made, so details in respect to these items cannot be presented herewith. The order will be modified to the lower exemption figure before

clearance, if these studies indicate a considerable amount of labor involved.

A factor which would tend to lower the number of mines affected, labor involved and other items discussed above, is the fact that many of the gold mines affected by the order have already been forced to curtail or close operations through difficulties encountered in obtaining material and equipment, or through loss of labor to other industries. In one known instance, a recent fire destroyed the mill of a sizable mine so this operation is completely shut down and no labor available for recruitment.

There is, of course, an appeal provision in the order, through which, again, the number of mines, number of employees, other critical materials and fluxing ores affected will be lowered from the estimates cited in items 1 to 5 above.

Concluding Statement

Administration of an order such as the above, entirely divorced from provisions of Order P-56, necessarily involves duplication of work, both here in Washington and in the companies affected by the order. Those gold mines producing needed metals and fluxing ores will have to submit an appeal under the provisions of the order before they can be exempt. There is no practicable way of defining, in an order, such mines that should be exempted. This appeal procedure duplicates, in large measure, the appeals that were already made under the administration of P-56, and it is likely that the repercussions throughout the mining industry of such duplication of effort will be unwholesome. [fol. 2521] Without using the mine serial numbers already established as a means for determining essential mining operations, there appears to be no alternative other than to use a percentage value basis in defining gold mines, and to provide for continued operation of essential ones through an appeal procedure.

Other pertinent considerations are presented in the attached memorandum to you from Dr. Wilbur Nelson, and I suggest that they be given careful attention.

The adverse repercussions mentioned above might be overcome in some measure by including an additional provision in the accompanying order which would automatically

exempt those gold mines now having serial numbers until they are notified by the Director General for Operations that they are to cease operation. Each of these cases, in the meantime, should be carefully reviewed and judged in the light of the more acute situation now prevailing.

I shall await your written instructions before proceeding further.

R. J. Lund, Chief Miscellaneous Minerals Branch.

RJLund/ljp
Enclosures

[fol. 2522] DEFENDANT'S EXHIBIT 46

War Production Board

Washington, D. C.

September 11, 1942

Attention: Miss Thornton

Memorandum

To: Mr. Donald M. Nelson.
From: J. M. Scribner, Operating Assistant to Mr. A. I. Henderson.
Subject: Gold Order.

In accordance with instructions issued by Mr. A. I. Henderson, you will find attached a copy of the proposed curtailment order on gold. This order is in process of circulation in accordance with the procedure for order clearance and should be presented to the Clearance Committee for action about September 21.

Mr. Henderson requested that the order be prepared in a manner completely divorced from Order P-56. However, in his absence, after a consultation with Mr. H. W. Dodge and Dr. Wilbur A. Nelson, and a meeting with Messrs. Fred M. Eaton, Richard Lester, and myself, it was determined to be most practical that the order not be divorced from P-56.

The effect of this order will be to close down all gold mines not having a mine serial number, within 30 days from issuance. It is the intention of the Mining Branch to

review all mine serial numbers assigned to mines producing 50% or more gold in dollar value and to withdraw such serial numbers unless the balance of the production represents critical materials urgently needed for the war effort in amounts sufficient to justify continuance of the operation.

J. M. Scribner

Attachment

[fol. 2523] Draft of SEC-4

The Order requires that all mines producing gold, except those having a serial number under P-56, cease operation and development within 30 days after the date of issuance of the Order. The Order makes provision for the minimum maintenance and repair necessary to maintain the mines plant in condition and for the granting of preference ratings to accomplish this after application made to the Director General for Operations.

All gold mines which produce needed quantities of copper, lead, zinc, and other minerals, or of silicious fluxes, already hold serial numbers under Order P-56. Therefore, the mines closed down by this proposed order would be only those which have, after examination by the Mining Branch, already been determined to be nonessential to the war effort.

The result of closing these nonessential mines will be to conserve all the material which they have been using for operational and development purposes. Heretofore they have merely been denied the right to use the high preference ratings granted by Order P-56, but have been able not only to obtain certain material under P-100, but also to use their own inventories.

[fol. 2524] Title 32—National Defense

Chapter IX—War Production Board

Subchapter B—Director General for Operations

Part —Gold Mining

Limitation Order L—

The fulfillment of requirements for the defense of the United States has created a shortage in the supply of criti-

cal materials for defense, for private account, and for export which are used in the maintenance and operation of gold mines, and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.

Section —, Limitation Order L—

(a) *Definitions.* For the purposes of this order, "nonessential mine" means any mining enterprise in which gold is produced, unless the operator of such mining enterprise is the holder of a serial number for such enterprise issued under Preference Rating Order P-56, as amended.

(b) *Restrictions Upon Acquisition, Consumption, and Use of Material by Nonessential Mines.*

(1) *Operation and Development.* On and after 30 days after the issuance date of this order, no person, except as permitted under the provisions of subparagraph (b)(2), shall acquire, consume, or use any material for the operation or development of a nonessential mine.

(2) *Maintenance and Repair.* On and after 30 days after the issuance date of this order, no person shall acquire, consume, or use any material for the maintenance or repair of a nonessential mine except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair, and its access and development workings safe and accessible.

(c) *Restrictions on Application of Preference Ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material for consumption or use in the maintenance or repair of a nonessential mine, except with the express permission of the Director General for Operations issued after application made to the Mining Branch, War Production Board.

[fol. 2525] (d) *Assignment of Preference Ratings.* The Director General for Operations will, upon receiving an application in accordance with paragraph (c) above, assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in subparagraph (b)(2) above.

(e) *Exception.* The provisions of this order shall not apply to any mine which produced 1200 tons or less of com-

mercial ore in the year 1941, and which is producing commercial ore at the rate of 100 tons or less per month from and after the issuance date of this order.

(f) *Records.* All persons affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore.

(g) *Reports.* All persons affected by this order shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

(h) *Audit and Inspection.* All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(i) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to the War Production Board, Mining Branch, Washington, D. C., Ref.: L—.

(j) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of or from processing or using material under priority control and may be deprived of priorities assistance.

(k) *Appeal.* Any person affected by this order who considers that compliance therewith would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting forth the pertinent facts and the reason he considers he is entitled to relief. The Director General for Operations may thereupon take such action as he deems appropriate.

(l) *Applicability of Priorities Regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the Priorities Regulations of the War Production Board, as amended from time to time.

Issued this — day of —, 1942.

——— ———, Director General for Operations.

[fol. 2526] DEFENDANT'S EXHIBIT 48

September 1942.

Summary of Proposed Gold Curtailment Order

A draft of a limitation order on materials and supplies for gold mining is being circulated within the War Production Board. The order provides for complete shutdown of non-essential mines in the United States with the following exceptions:

1) Mines producing less than 1,200 tons of ore per year will be permitted to continue operations at their rate of operation in 1941 or early 1942. Such mines are usually individual or partnership enterprises worked by men who are not likely to be employed by others.

2) A limited amount of supplies and equipment will be made available for the purpose of keeping the mines accessible and safe. This is intended to avoid flooding or otherwise damaging mines which would be in a position to produce after the emergency has passed.

A non-essential mine is defined as a mining enterprise in which gold is produced, unless the operator holds a serial number for such enterprise issued under Preference Rating Order P-56, as Amended. Since producers of siliceous fluxing ores and of complex ores containing substantial amounts of critical metals as well as gold have already been granted serial numbers, the order will not affect the production of essential metals.

The basic purpose of this curtailment of gold mining is, of course, to free manpower for the mining of essential minerals, particularly non-ferrous metals such as copper, zinc and lead. Because many of the gold mines are located much close to other mines producing such strategic metals as mercury, molybdenum, tungsten, vanadium, chromium, manganese, etc., it is expected that workers will also be made available to these industries.

The War Manpower Commission through the Employment Service is now taking steps to insure orderly recruiting of these gold miners and to provide for a minimum of delay in reemployment as well as to provide transportation expenses. It is expected that this procedure will make possible the maximum diversion of labor to essential mining industries where their skills can be used to best advantage.

Beside diverting manpower to essential industries, this order, when in effect, will also conserve some materials and supplies used in gold mining, such as mercury, drill steel, etc.

[fol. 2527] DEFENDANT'S EXHIBIT 49

April 24, 1943

Memorandum

To: Mr. Edward T. Dickinson, Jr., Executive Director, Planning Committtee, War Production Board, 2744 Social Security Building.

From: Mr. Edward H. Rott, Deputy Administrator, Order L-208, Mining Equipment Division, War Production Board, 1025 Temporary Building R.

Subject: Supplement to Report of April 8 on the Effect and Accomplishments of Limitation Order L-208.

In accordance with your request for additional information relative to:

1. Breakdown to show amount of critical and non-critical materials involved in the $15,131,977 reported as estimated potential consumption of the two hundred seventy lode gold mining operations included in the analysis, and,

2. Total investment in mining equipment and milling facilities made idle through the issuance of Order L-208, this supplement has been prepared.

Ninety-four mines employing twenty five men or more and producing approximately 90% of the total production of the two hundred seventy operations covered by the above analysis were considered. This group was selected since their equipment would be more or less standardized and the investment would cover about 95% of the total investment. The smaller operations are generally less costly and frequently do not include milling facilities.

It must be understood that any figures given in connection with the above items must be a very rough estimate. However, we believe that the figures are sufficiently close to give a fair idea of what may be expected in the way of saving critical materials and gain through the transfer of idle equipment.

1. Breakdown to Critical and Non-Critical Materials

Critical Materials—Critical materials have been classed as such because of a shortage of the raw materials going into them or inadequacy of production facilities.

[fol. 2528]

Repair parts, drill steel, new equipment for replacement, grinding balls, ball mill and crusher liners, steel plates for shop work, etc., cable, zinc dust, etc.

	50% of Total	$ 7,500,000.00
Lumber	10% of Total	1,500,000.00
Powder, caps and fuse	20% of Total	3,000,000.00
Sub Total		$12,000,000.00

Non-Critical Materials—Classed as such because supply raw material is adequate for their production and there are sufficient production facilities. Lime, cyanide, other chemicals and misc.

	20% of Total	3,000,000.00
Total		$15,000,000.00

2. Estimated investment in mining equipment and mill facilities by ninety-four mines employing twenty-five men or more

The total output of niney-four operations considered was approximately 38,000 tons of ore daily. To mine and treat that tonnage, conservatively speaking, required in normal times, the following investment:

For Mining Equipment	$19,000,000
For Milling Facilities	$38,000,000

It is estimated that 75% of the mining equipment and not more than 30 to 35% of the milling facilities are transferable for use in strategic metal mining or other industries. However, it is our opinion that not more than 10% of this will be moved. Reasons for this are that much of the equipment is too old or worn to be desired for use by other operators and in a large number of cases, the available equipment will not meet the specifications necessary for the job for which it is required. In some cases, equipment will not be reported and in others, owners may strongly oppose releasing their property.

[fol. 2529] The above estimate does not include gold dredges or equipment used in other types of placer mining for which we have no satisfactory information as to investment. In gold dredging, the investment in dredges, draglines, washing plants, tractors, bulldozers, etc., is very large. Some of our largest individual transfers of used equipment are from such operations, namely: draglines for coal mining, construction or use about ship yards, and

tractors with bulldozers for construction and other mining operations.

Edward H. Rott.

[fol. 2530] DEFENDANT'S EXHIBIT 50

War Production Board

Document 228

Gold Mining Order L-208

Executive Secretary's Note

June 15, 1943.

I. The Present Issue

The question has been raised whether the present closing order on nonessential gold mines, Limitation Order L-208, shall be amended. Thirty United States Senators have requested in writing the recision of the Order but have indicated that a substantial relaxation of the terms of the Order would meet with their approval. Moreover, a number of grants of appeal for relief from the Order expire this month and a policy must be established with regard to continuing the grants or allowing them to expire with an effective tightening of the restrictions on nonessential gold mining.

The order closing nonessential gold mines was directed primarily toward releasing miners to essential activities, particularly non-ferrous mining. The efforts made to transfer the released gold miners to copper mines was partially successful. Not all the gold miners released are able to mine copper, many of them refused to travel away from their home surroundings, and others preferred to work in other activities such as farming and stock raising. While the degree of relief afforded to the copper mines by the closing of the nonessential gold mines is debated, there is no doubt that the copper situation was relieved to some extent.

The copper situation is critical. Requirements for the third quarter were 40,000 tons in excess of indicated supply and our stockpile has been seriously depleted. Production declined from an average of 94,700 tons in the last

quarter of 1942 to an average of 91,200 tons in the first quarter of this year. The United States Copper Association estimates a total labor shortage at copper mines, mills, smelters and refineries of about 4,700 workers. This shortage must be corrected and an additional 3-4,000 workers supplied to the copper mining industry if the present capacity and projected increased facilities are to be fully utilized during the balance of this year and in 1944. Other nonferrous mining industries are facing similar shortages.

Recognizing the critical situation, the War Production Board has discussed with Army officials the furloughing of 7,000 additional soldiers for work in the copper mining industry. The War Department is reluctant to do this until assured that all other practical solutions have been exhausted, such as diverting all possible miners from gold mines. A decision must be reached now as to whether limitation Order L-208 should be continued, relaxed, or tightened.

[fol. 2531] II. History of Limitation Order L-208

A. In August 1942 the labor situation in the copper mines had become critical. This situation was discussed at the War Production Board on September 1 and the Board agreed that every effort should be made to improve the situation in non-ferrous metal industries. Accordingly the Army furloughed, for work in copper mines, 4,000 soldiers who were formerly hard-rock miners.

B. On October 6, 1942 the War Production Board decided that an order stopping all ~~non~~essential domestic gold mining should be issued at once.

On October 8, 1942 Limitation Order L-208 was issued, ordering the closing down of nonessential gold mines except very small producers, but allowing for appeals.

III. Results of L-208

A. Manpower Saved:

Total employed in gold mining prior to L-208	12,300	
In essential gold mines or in small operations exempted from the Order	5,800	
Affected by the Order	6,500	
Reported by operators as displaced by the Order		3,200

Note:—The difference of 3,300 includes maintenance employees in closed mines and 1,700 in mines continuing production through grants of relief under appeals from the Order.

Placed in non-ferrous mines	1,200
Placed in other industries	500
Referred to other jobs—not placed	800
Refused reference to other jobs	300
Not accounted for	400

B. Equipment Saved: The amount of used equipment which became available for other essential activities is esti- [fol. 2532] mated at $75,000,000. Equipment has been moving into transfer channels leading to essential work at the rate of about $100,000 per week. By the middle of May 1943, $2,200,000 used gold mining equipment had been transferred to essential activities.

C. Materials Saved: The normal amount of critical materials consumed by affected gold mines is not available, but overall industry data for 1942 shows consumption of $26,000,000 of materials for maintenance and operation and $9,000,000 for capital investment. Since the Order affected about one-half of the total number of gold miners employed, the materials saved may run to $10-$20,000,000 annually, part of which is offset by the consumption of critical materials in permitted maintenance and stand-by operations.

D. Critical Materials Added to Available Supply: The Labor Production Division estimates that the gold miners who were transferred to nonferrous metal production have added to the annual production of critical materials in the following amounts:

Copper	11,000 tons
Zinc	4,000 tons
Molybdenum	3,000 tons
Lead	2,400 tons
Tungsten	130 tons

The Minerals Resources Coordinating Division estimates that by the closing of the gold mines annual production of about 6,370 tons of non-ferrous metals was lost, most of it in lead which is the least critical of the group. Assuming that only 500 of the transferred gold miners have continued at their new jobs in non-ferrous mines, they will contribute this year an additional 12,000 tons of copper, lead and zinc. The net gain is roughly 6,000 tons.

IV. Appeals from L-208

Since issuance of Order L-208 many mines have appealed for permission to continue operations. In some cases a few aged employees were involved who could not find employment in war industries. In others, permission was granted to process stockpiles and tailings above ground. In still others, collateral extraction or development of non-ferrous metals was involved.

[fol. 2533]

Number of appeals processed		187
Appeals granted and in effect		137
Involving 1 to 5 employees	84	
Involving 6 to 24 employees	46	
Involving 25 or more employees	7	
Total employees involved in grants		1,487
U. S.	1,019	
Alaska	468	

The appeals were granted for a limited term. As many expire this month, the question arises whether relief should be extended or the mines closed down.

V. Alternative Proposals

A. Rescind Limitation Order L-208 as requested by thirty United States Senators.

B. Continue Order L-208 with no change of policy on appeals.

C. Amend Order L-208 to provide that nonessential gold mines can be operated at a rate which will permit break-even operations, to pay for maintenance. Proponents of this policy contend that mines cannot be maintained without income from mining operations. If not maintained, mines flood and deteriorate rapidly. Contra-arguments point out that a resumption of mining will consume critical materials, halt the flow of machinery and equipment from mines to essential war activities, and draw labor back to

the mines from more essential operations to which they have transferred, in spite of the proposed restriction that only miners more than 46 years old can be employed, and if not available in the locality must be certified for such work by the War Manpower Commission. Additionally, the War Production Board's policies have been built on furtherance of the war effort and not commercial or competitive considerations.

D. The closing of at least all the nonessential gold mines regardless of any consideration.

E. Continue Order L-208 with exemptions allowed on appeal only if:

(a) the critical material output of the individual mine makes an equal or larger contribution to the war effort than the materials and labor absorbed in operations, and,

(b) the necessary labor can be obtained without drawing upon any essential war activities, and certification to this effect can be obtained from the War Manpower Commission.

[fol. 2533a] DEFENDANT'S EXHIBIT 51

Minutes of War Production Board

June 15, 1943

[fol. 2534] 3. Gold Mining

The Chairman referred to the Executive Secretary's Note on the question whether the present closing order on nonessential gold mines, Limitation Order L-208, shall be amended (Doc. 228). He reported that he had been requested in a letter signed by thirty United States Senators to rescind the Order, although they indicated that a substantial relaxation of the terms of the Order would meet with their approval. Moreover, a number of limited exemptions to the Orders granted by the Appeals Board expire this month and a decision must be reached regarding the continuing policy on appeals.

The Chairman recalled that the primary purpose in closing nonessential gold mines was to divert men and materials into essential non-ferrous mines, particularly copper mines, to relieve a situation which became particularly

acute in the last half of 1942. Manpower shortages and a consequent decline in copper output were called to the attention of the War Production Board (See WPB Minutes, September 1, 1942, Item 1), and the Board agreed that every effort should be made to improve the situation in the non-ferrous metal industries. The Army later furloughed for work in copper mines 4,000 soldiers who were formerly hardrock miners. Shortly thereafter the War Production Board agreed that an order stopping all nonessential gold mining should be issued at once (See WPB Minutes, October 6, 1942, Item 1). Limitation Order L-208 was then issued ordering the closing of nonessential gold mines except very small producers, but allowing for appeals.

These actions did relieve the situation to some extent. Although not all the gold miners displaced were transferred to other mining operations, the net gain in 1943 output of copper, lead, and zinc is estimated at about 6,000 tons. Additionally, many of the miners were placed in other war industries. By closing the nonessential gold mines a great deal of equipment was made idle and became available for essential activities. It is estimated that by the middle of May 1943, 2,200,000 dollars of used gold mining equipment had been transferred to essential activities and transfers are continuing at the rate of about 100,000 dollars per week. It is also pointed out that nonessential gold mines normally consume a large quantity of critical materials and their closing may have made as much as 10-20,000,000 dollars of materials available for essential consumption, less a small amount which they continue to absorb for maintenance and standby operations. Rescission would undo these benefits. The Chairman stated that he is unwilling to approve the production of gold at the expense of copper, a most critical material. Mr. Ickes concurred.

The Chairman emphasized that the copper situation is still critical. Requirements for the third quarter of this year were 40,000 tons in excess of indicated supply and our stockpile has been seriously depleted. (See WPB Minutes, April 27, 1943, Item 2). Production has again turned downward. The present labor shortage in the copper mines, mills, smelters, and refineries is estimated at 4,7000 workers. This shortage must be corrected and additional 3-4,000 workers supplied to the copper mining industry if the present capacity and projected increased facilities are to

be fully utilized during the balance of this year and in 1944. Other non-ferrous mining industries are facing similar shortages. The War Production Board has discussed with Army officials the furloughing of 7,000 additional soldiers for work in the copper mining industry. The War Department is reluctant to do this until assured that all other practical solutions have been exhausted, such as diverting all possible miners from gold mines.

The Chairman stated that the principal argument made by the proponents of gold mining is the economic dependence of the various mining communities on continued operation of gold mines. Another argument is that gold mining machinery is being exported to Latin American and South Africa. The Vice President stated that South African economy is vitally dependent on gold mining and its cessation there would have vastly more serious results than in the United States. It may well be true that in order to preserve the economic and political stability of other countries, a smaller quantity of critical materials would have to be exported in the form of gold mining machinery than in other forms if gold mining were discontinued there. Our exports of gold mining machinery have been far less than requested. The Chairman observed that even if materials were saved by prohibiting the export of gold mining machinery, our domestic economy would not benefit from the labor released by closing foreign gold mines. He stated that he would have a study made of the volume of gold mining machinery exported.

Upon motion by Mr. Lubin and seconded by Mr. Ickes, it was unanimously agreed that:

Limitation Order L-208 shall be continued with exceptions allowed on appeal only if

(a) The critical material output of the individual mine [fol. 2534a] makes an equal or larger contribution to the war effort than the materials, equipment, and labor used in operating the mine, considering the relative urgencies of the critical materials involved, or

(b) the necessary labor can be obtained without drawing upon any essential war activities, and certification to this effect can be obtained from the War Manpower Commission.

G. Lyle Belsley, Executive Secretary.

Approved: D. M. Nelson, Chairman.

[fol. 2535] DEFENDANT'S EXHIBIT 52

Washington Gas Light Company Building

War Production Board

Memorandum

September 15, 1942.

To: Dr. Marcellus H. Stow, Chief, Mining Branch, Room 1035, Temporary "R" Bldg.

From: Harvey A. Anderson, Chief, Conservation and Substitution Branch.

Subject: Preliminary draft of proposed Limitation Order L-208 covering Gold Mining.

The Conservation Division believes that in (a) the definition of a "nonessential mine" should be more specific as regards the metals associated with the gold production. The interpretation of this definition seems to rest on Preference Rating Order P-56 as administered by the Mining Branch. In such interpretation we should like to have adequate consideration given to the following points:

(1) The most critical metals are now represented by copper, zinc, vanadium, tungsten, molybdenum, iridium and rhodium, some or all of which might conceivably be associated with gold.

(2) The metals to be specifically excluded are silver, lead, antimony and mercury.

Our recommendation is based upon the latest estimates of supply and demand made by the Statistical Branch.

(Signed) Harvey A. Anderson.

WPSykes/ahb

CC to Mr. M. G. Symonds, Mr. G. H. McGowen.

[fol. 2536]

DEFENDANT'S EXHIBIT 53

Table 1

Comparative Statistics For Metal Mining in the United States,
By Type of Metal Ore, 1939 [1]

	Number of Mines [1]	Value of Products ($000)	Supplies and Materials ($000)	Fuel ($000)	Purchased Electric Energy ($000)	Cost of Machinery ($000)		Buildings ($000)
						New	Used	
Metallic ores, total	1,992	$515,009	67,898	10,212	18,527	14,338	3,229	5,284
Iron Ore	177	150,872	10,621	2,267	4,083	3,410	193	770
Major nonferrous metallic ores, total	1,640	338,092	53,969	7,290	13,798	10,055	2,863	4,136
Gold (total)	1,180	114,090	17,369	2,101	4,796	6,391	978	1,775
Lode gold	841 [2]	86,063	13,588	1,402	3,323	3,043	535	1,640
Placer gold	339 [3]	28,027	3,780	699	1,473	3,348	442	135
Silver ore	163	19,716	2,502	178	573	343	48	161
Copper ore	51	141,635	23,562	4,168	4,899	2,577	1,507	1,822
Lead ore	76	31,467	4,897	267	1,851	325	146	144
Zinc ore	170	31,184	5,639	577	1,679	420	184	234
Other nonferrous metallic ores, total	175	26,045	3,308	655	645	874	174	378

Notes:

[1] Figures cover mines engaged principally in producing ores, concentrates, bullion, or other materials valued chiefly for their gold, silver, copper, lead, zinc or other content; and for which the value of products; reported principal expenses; or cost of buildings, machinery, or equipment erected or installed during the year amounted to $2,500 or more.

[2] Excludes 637 preparation plants operated in conjunction with the metallic ore industry, of which 329 are in gold mining. The 1,180 gold mines and 329 mills were operated by 820 companies.

[3] Including washing plants.

Source: United States Department of Commerce, Bureau of the Census, Sixteenth Census of the United States: 1940, Mineral Industries 1939, Vol. 1, General Summary and Industry Statistics. The data are taken from Table 1, pp. 18–19.

[fol. 2537] DEFENDANT'S EXHIBIT 54

Table 2

Value of Mining Machinery and Equipment Produced in 1939

Item	Value
Total	$33,558,909
Mining machinery, equipment, parts and attachments, made in the industry	29,399,717
Miscellaneous products not specified	222,806
Other products (not classified in this industry)[1]	2,790,430
Receipts for contract and repair	1,145,956

Note: [1] Chiefly mining locomotives, castings, power transmission machinery and equipment, and miscellaneous machinery.

Source: Census of Manufactures, 1939, Table 3, page 429.

[fol. 2538] DEFENDANT'S EXHIBIT 55

Table 3

Fuels Consumed and Electric Energy Consumed
By Major Nonferrous Metal-Ore Industries in the United States, 1939

	Total	Gold		
		Total	Lode	Placer
Anthracite (short tons)	42,050	1,045	896	149
Bituminous coal (short tons)	521,574	110,084	297	109,787
Fuel oils (bbls. of 42 gals.)	978,430	311,343	144,048	167,295
Gasoline and kerosene (gals.)	6,726,473	4,030,765	1,584,312	2,446,453
Natural gas (000 cu. ft.)	7,993,014	206,290	22,875	183,415
Electric energy consumed (000 kw. hrs.)				
Purchased	1,876,255	532,405	190,397	342,008
Generated by reporting companies	587,490	48,172	18,490	89,682

Coverage: Mines for which value of products; reported principal expenses; or cost of buildings, machinery and equipment erected or installed during year amounted to at least $2,500.

Source: United States Department of Commerce, Bureau of the Census, Sixteenth Census of the United States: 1940, Mineral Industries 1939, Vol. 1, General Summary and Industry Statistics. The data are taken from Table 2, pp. 340–1.

[fol. 2539] DEFENDANT'S EXHIBIT 56

Table 4

Number of Gold Mines in the United States and Alaska, By Class of Ore, 1941–1943

	United States		Alaska	
	Number	% of value from gold	Number	% of value from gold
Mines producing gold ore:				
1941	2,791	96.0 (a) 99.0 (b)	54	97.6
1942	1,363	96.0 (a) 98.7 (b)	38	97.8
1943	398	86.0	7	97.0
Mines producing gold-silver ore:				
1941	435	48.1	N.A.	N.A.
1942	215	48.6	N.A.	N.A.
1943	96	38.5	N.A.	N.A.
Gold placer mines:				
1941	2,550	....	799	....
1942	1,305	....	453	....
1943	248	....	114	....

Note: a. Percentages apply to mines in Western States.
b. Percentages apply to mines in Eastern States.
N.A. Not available.
Source: U. S. Bureau of Mines, Minerals Yearbooks, 1942, 1943, and 1944.

[fol. 2540] DEFENDANT'S EXHIBIT 57

Table 6

Gold Production, United States and Alaska, 1939–1943

	Quantity (in fine oz.)	Value ($ million)
1939	4,673,042	163.6
1940	4,869,949	170.4
1941	4,750,865	166.3
1942	3,457,110	121.0
1943	1,363,815	47.7

Source: U. S. Bureau of Mines.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

THE UNITED STATES, PETITIONER

v.

CENTRAL EUREKA MINING COMPANY (a Corporation), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
Attorney, Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

THE UNITED STATES, PETITIONER

v.

CENTRAL EUREKA MINING COMPANY (a Corporation), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above cases on February 20, 1956.

OPINIONS BELOW

The original opinion of the Court of Claims and its opinion on rehearing are set out in the Appendix, *infra*, pp. 1-130.[1]

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[1] The Court of Claims' earlier opinions overruling the Government's demurrer are reported as *Idaho Maryland Mines Corp.* v. *United States*, 122 C. Cls. 670; *Homestake Mining Co.* v. *United States*, 122 C. Cls. 690 and *Central Eureka Mining Co.* v. *United States*, 122 C. Cls. 691.

JURISDICTION

The judgment of the Court of Claims was entered on February 20, 1956 (App., *infra*, p. 122). A motion by the United States for a new trial, seasonably filed, was denied July 12, 1956 (App., *infra*, pp. 123-130). By order of the Chief Justice signed on October 9, 1956, the time for filing a petition for a writ of certiorari was extended to and including October 24, 1956 (App., *infra*, p. 131). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

In order to conserve scarce war materials and to bring about the voluntary relocation of skilled manpower to more vital mining activities, the War Production Board, on October 8, 1942, issued Limitation Order L-208, requiring those gold mines deemed nonessential to this country's war effort to be closed in the shortest possible time and prohibiting their acquisition or use of any material, facility, or equipment for mining except the minimum necessary for adequate maintenance. The Order contained no provision for routing the scarce war materials held by the mine owners to the more urgent users of such materials. During the period that the order was in effect, the Government did not otherwise interfere with the owners' exclusive possession and control of the mines. The questions presented are:

1. Whether Limitation Order L-208 resulted, under the Fifth Amendment, in a temporary taking of the owners' right to mine gold.

2. Whether, if there were a temporary taking, such action by the War Production Board was authorized, so as to impose liability therefor upon the United States.

STATEMENT

This is an action for just compensation under the Fifth Amendment for the alleged temporary taking of some nine gold mines pursuant to War Production Board Limitation Order L-208 during World War II. The Court of Claims, two judges dissenting, concluded that the Government had taken the owners' right to mine gold for which they were entitled to compensation under the Fifth Amendment, and reserved determination of the exact amounts of recovery for further proceedings.[2] The pertinent facts as found by the Court of Claims may be summarized as follows:

1. *Period prior to issuance of Limitation Order L-208.* By October 8, 1942, when Order L-208 was issued, the War Production Board had been delegated broad powers to regulate the production and supply of materials essential to the prosecution of the war effort (App., *infra*, p. 51).[3] By a system of priorities, man-

[2] Under Rule 38(c) of the Rules of the United States Court of Claims, trials in the first instance may be limited to the issues of law and fact relating to the right of recovery, with the amount of recovery reserved for further proceedings. In *United States* v. *Caltex (Philippines) Inc.*, 344 U.S. 149, also coming to this Court from the Court of Claims, the issue of liability was reviewed on certiorari before the amount of recovery was determined. See Petition in No. 16, Oct. T., 1952, p. 2, fn. 2; 343 U.S. 955. In the analogous situation in patent cases where the issues of infringement and damages are separately tried, the judgment on infringement has also been reviewed on certiorari before trial of the issue of damages. *United States* v. *Esnault-Pelterie*, 299 U.S. 201; *Marconi Wireless Co.* v. *United States*, 320 U.S. 1, 47. See also *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 341 U.S. 48.

[3] The power to allocate materials and facilities, wherever deemed necessary and appropriate in the public interest and to promote the national defense, was granted by Congress to the President in the Second War Powers Act. See 2(a)(2) of 54 Stat. 676, as amended by 55 Stat. 236 and 56 Stat. 177. This power was delegated to the War Production Board by a series of Executive Orders:

datory orders, and orders which prohibited or curtailed the manufacture of end products,[4] the War Production Board attempted to increase production and conserve essential materials, supplies, and equipment (App., *infra*, pp. 51-52). To serve these ends, the Board often had to consider means of attaining the maximum utilization of manpower—a problem inherent in any attempt to increase production (App., *infra*, p. 53).

As the shortage of critical war materials became increasingly acute during 1941 and the early months of 1942, the mining industry generally was subjected to progressively more stringent limitations (App., *infra*, pp. 53-62). Finally, on March 2, 1942, Preference Rating Order P-56 was amended so as deprive gold and silver mines of all priority ratings formerly available. This was accomplished by revoking the "serial numbers" of all mines (including those of respondents here) where the production of gold or silver, or both, relative to other minerals, constituted thirty percent or more of the total value of the extracted ore (App., *infra*, p. 61). Although an earlier unrevoked priority order permitted the gold mine operators to obtain maintenance, repair, and operating supplies with a priority position equal to that of the least essential industries in the United States, the demand for the equipment was so far above available supply that the possibility that the gold mines would obtain any was remote (App., *infra*, p. 62). Thus, by granting the lowest possible priority rating in a market where supplies

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see Executive Order 9024 (7 Fed. Reg. 329); Executive Order 9040 (7 Fed. Reg. 527); Executive Order 9125 (7 Fed. Reg. 2719).

[4] For instance, during the war, production of office machinery, furniture, bicycles, stoves, refrigerators, and laundry equipment was suspended or limited (App., *infra*, p. 52).

were exceedingly scarce, the War Production Board had effectively eliminated the possibility of acquisition by the gold mines of critical materials or supplies (App., *infra*, p. 62).

2. *Issuance of Limitation Order L-208.* In the summer of 1942, the Labor Division of the War Production Board became concerned with the problem of an acute shortage of hardrock or underground miners in the vital non-ferrous copper mines (App., *infra*, p. 62). The primary reasons for this shortage were the draft, and the migration of workers out of the mine fields because of higher wages and better working conditions in other war industries (App., *infra*, p. 63). Accordingly, it was suggested to the War Production Board that, if the gold mines were closed, the unemployed miners would probably be diverted to copper mining, thereby alleviating a shortage which severely threatened the national war effort (App., *infra*, p. 65). In this connection, it was recognized that there was no authority to require the miners to transfer to industries in which their services were more urgently required (App., *infra*, p. 66); and further that the workers thus made available by the closing of the gold mines might very well go to work in the West Coast war plants instead of in the non-ferrous copper mines (App., *infra*, p. 66).

Despite these doubts as to the outcome of the proposed order, the War Production Board, on October 8, 1942, issued Limitation Order L-208 (App., *infra*, p. 85). Specifically, the Order directed that each gold mine without a priority "serial number" (1) should close down in the shortest possible time; (2) that, after seven days, no material or equipment should be ac-

quired, consumed, or used to break new ore or proceed with any new operations; and (3) that, after sixty days, no material or equipment should be acquired, consumed, or used to remove any ore or conduct any operation except to the minimal amount necessary to maintain the properties safe, accessible, and in good repair (App., *infra*, p. 86). In the Order closing the gold mines, no attempt was made by the Board to impose mandatory orders for delivery of the materials and facilities then possessed by the various mine operators to critical industries (App., *infra*, p. 90).

Notwithstanding the Order, only an insignificant number of hardrock miners actually transferred to the copper mines (App., *infra*, p. 89). Eventually, the acute labor shortage in the copper mines was alleviated by the Army's granting of furloughs to four thousand men for work in the copper mines—an action the Army had not been willing to institute so long as the gold mines continued in operation (App., *infra*, p. 84).

Finding that (1) Order L-208 explicitly ordered respondent gold mines to suspend operations, (2) the Order did not allocate the supplies and equipment remaining in the mines at the time of the shutdown to specific users in more essential industries, and (3) a major consideration in the decision to close the mines was consequential relocation of manpower in mines which extracted minerals more essential to the war effort than gold ore, the Court of Claims held that, while the War Production Board was authorized to impose such regulatory controls, Order L-208 nevertheless exceeded the permissible bounds of regulation

and, consequently, that the action of the Board constituted a "taking" entitling the gold mine operators to just compensation under the Fifth Amendment (App., *infra*, pp. 1-33).[5] Chief Judge Jones and Judge Laramore dissented (App., *infra*, pp. 47-50).

REASONS FOR GRANTING THE WRIT

The Court of Claims, in holding that Limitation Order L-208 went beyond the bounds of permissible regulation and resulted in a Fifth Amendment taking, although the Government at no time interfered with the owners' exclusive possession of the mines, has erroneously decided an issue of unusual constitutional importance in the twilight zone between non-compensable regulation and compensable takings. Not only is the decision directly contrary to the Court of Claims' prior rulings in *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, certiorari denied, 341 U.S. 948, and *St. Regis Paper Co.* v. *United States*, 110 C. Cls. 271, certiorari denied, 335 U.S. 815 (see also *Alaska-Pacific Consolidated Mining Company* v. *United States*, 120 C. Cls. 307), but it is at odds with the prior decisions of this Court. And in addition to the fact that a large number of cases arising under the same Limitation Order are now pending in the Court of Claims—as to which the Government's liability under the decision below may well aggregate

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[5] While holding that in general there had been a compensable taking, the court dismissed three of the nine complaints. Oro Fino's claim was dismissed because plaintiff was either not the real party in interest or it claimed under an invalid assignment (App., *infra*, p. 39); Alabama-California Gold Mine Co. ceased operations two months prior to the issuance of Order L-208 (App., *infra*, p. 43); and Consolidated Chollar Gould & Savage Mining Co. was granted permission to continue mining operations after Order L-208 was issued and its eventual suspension of mining operations was pursuant to a voluntary decision (App., *infra*, p. 43).

tens of millions of dollars—a more definitive delineation between "regulation" and "taking" is needed as a guide for use in the current and continuing preparation for possible future national or war emergencies.

1. *(a)*. In the *Oro Fino* case, *supra,* the plaintiff, as do respondents here, sought just compensation for the alleged taking of a gold mine under Order L-208.[6] Stating that "[t]he issue is whether L-208 was a regulation or a requisition" (118 C. Cls. at 24), the Court of Claims—after extensively reviewing this Court's numerous decisions affirming that under the war power the Government may properly impose value-impairing restrictions on the use and disposition of property without becoming liable for just compensation under the Fifth Amendment (see *infra,* pp. 12-15) —concluded (we believe properly) (118 C. Cls. at 28, 29-30):

> We think that the principle that the use and enjoyment of property may under proper circumstances be regulated or restricted or even temporarily suspended in order to protect the whole public, is applicable to the case at bar. The war provided the proper circumstances. The United States did not take plaintiff's property or impose a servitude on it, as Pennsylvania was held to have done in the *Pennsylvania Coal* case [*Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393]. What the Government did here was to impose a permissible restriction upon the use by plaintiff of

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[6] In that *Oro Fino* case, the Court of Claims dismissed the complaint on the Government's demurrer. While the decision here was made after trial, the evidence merely elaborated upon the conclusory allegations of the first *Oro Fino* complaint.

its property in the interests of the general safety. * * *

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* * * It is clear that a taking was not intended. The defendant did not deprive plaintiff of property by bestowing a right on another, as the statute in the *Pennsylvania Coal* case in effect did. The Government did not take over or use plaintiff's land; it did not take any gold; there was as much gold in the Oro Fino mine on June 30, 1945, when Order L-208 was revoked, as there was on January 18, 1943, when the mine was closed. Title and possession remained in plaintiff. The Government merely forbade, for the time being, the mining of gold on this land. If this had the effect of depriving plaintiff temporarily of the only interest it had in the land, and if, because plaintiff's interest was not in fee but was for a definite duration, it made that interest less valuable, these adverse effects were incidents, not so much of Order L-208, as of the kind of ownership that plaintiff had. The Government is not liable for such effects.

In so holding, the court expressly adhered to principles it had followed in the *St. Regis* case, *supra* (see 118 C. Cls. at 20). In *St. Regis,* the War Production Board, in order to alleviate a serious pulpwood shortage, prohibited all plants in a defined area of the United States from consuming, processing, or delivering any pulpwood without specific authority, and ordered the company to sell its entire supply of pulpwood to specified critical users at OPA ceiling prices. Although the company was thereby forced to suspend

operations for the period of the limitation order, the Court of Claims ruled (110 C. Cls. at 278, 279):

> It amply appears from the petition that defendant did not actually "acquire by condemnation * * * any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for * * * war purposes" as it might have done under authority of the Second War Powers Act (56 Stat. 176, 177; 50 U.S.C.A. App. sec. 632). It did not, as plaintiff argues, take over the complete dominion and control of plaintiff's property, nor appropriate to itself any right to the use and enjoyment of plaintiff's plant or any part thereof. On the other hand it is equally apparent from the allegations of the petition that the determinations and directions of the War Production Board respecting plaintiff's Tacoma plant did have the effect of depriving plaintiff of the use of said plant in the consumption and processing of pulpwood, in order that manufacturers in more strategic areas might employ, in the manufacture of war materials, the pulpwood which plaintiff would otherwise have consumed, and that it was intended to accomplish this end notwithstanding it should mean the forced closing down of plaintiff's mill. * * *

(b). In its lengthy opinion in this case the Court of Claims does not discuss its prior *Oro Fino* decision[7]

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[7] In overruling the Government's demurrers in these cases (see *supra*, p. 1, fn. 1), the Court of Claims distinguished *Oro Fino* on the basis of the more extensive and detailed allegations, contained in the amended petitions, of arbitrary action by the War Production Board in issuing Order L-208. See *infra*, p. 14, fn. 11.

and attempts to distinguish *St. Regis* on two grounds: (1) that Order L-208 expressly required that the gold mines be closed in the shortest possible time, and (2) that Order L-208 did not undertake to allocate the critical supplies and equipment of the gold mines to war plants (App., *infra*, pp. 21-23, 32). These factual differences do not justify a difference in legal result. In *St. Regis*, the court expressly recognized that the restriction placed upon the company by the Government left the company no choice but to shut down. 110 C. Cls. at 279, *supra*, p. 10. On the other hand, even if the shutdown requirement had been omitted from Order L-208, the same cessation of operations would have been effected by the Order's other provisions forbidding the operator of a non-essential mine from acquiring, consuming, or using any material, facility or equipment. Indeed, in *Oro Fino* the court rejected this very distinction (118 C. Cls. at 29):

> * * * We see no relevance in the distinction between the cases, urged by plaintiff, that Order L-208 was a direct order to plaintiff to close down while the order in the *St. Regis* case merely forbade the paper company to use the materials it needed to continue to operate. We decline to hold that the Government may not do directly what we have already held it may do indirectly.

Similarly without substance is the court's further distinction *i.e.*, that in Order L-208 the War Production Board did not allocate to more essential users the critical supplies and equipment on hand in the gold mines when the Order was issued. The disposition of these supplies was admittedly not the prime purpose of the allocation order (*supra*, p. 5), nor did the

Board undertake completely to distribute every item of supply or equipment that might be of service to the war effort. As Chief Judge Jones, dissenting here, points out (App., *infra*, p. 48),

> * * * even those who were engaged in essential wartime industry were often merely given priority orders which were little more than hunting licenses and these industries had the task of locating and securing the critical materials.

The fact that the Board did not undertake to control the disposition of the supplies and equipment held by the mine owners indicates, not an excessive use of the allocation power as the Court of Claims held, but a use of that power which was far more limited than that in *St. Regis*.

2. (*a*). Even apart from the Court of Claims' prior decisions, established principles suggest that Order L-208 did not result in a "taking" of the gold mines. It is clear that there was no affirmative use or invasion of the mines by the Government, nor was ownership or possession transferred to the Government; instead, the owners retained complete title to, and possession of, their mines. The sole impact of Order L-208 was negative, *i.e.*, to forbid the owners from using their mines to extract gold during the war period, and since there was as much gold in the mine when Order L-208 was revoked as when it was issued, the effect of the Order was simply to suspend until after the war the extraction of the gold.

Such an imposition by the Government falls short of a taking for public use, which almost always requires that there be some positive invasion of the property, some use *by* the United States. See, *e.g.*, *United*

States v. *Pewee Coal Co., Inc.*, 341 U.S. 114; *United States* v. *Causby*, 328 U.S. 256; *United States* v. *General Motors*, 323 U.S. 373; *Portsmouth Co.* v. *United States*, 260 U.S. 327; *Richards* v. *Washington Terminal Co.*, 233 U.S. 546; *United States* v. *Welch*, 217 U.S. 333; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.[8] The requirement of public *use* consequent upon a taking is set out in the Fifth Amendment itself and has recently been emphasized by this Court in *United States* v. *Caltex (Philippines), Inc.*, 344 U.S. 149, 155. Significantly, in the instant case, it was the lack of any usefulness of the gold mines for the war effort which led to the issuance of Order L-208.

(b). Nor, in our view, does this case fall within the very limited category of takings resulting when a regulatory order interferes too severely or extensively with the use or control of property. See, *e.g.*, *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393. Until now, this narrow exception has been restricted to peacetime situations,[9] and while war does not suspend the Fifth

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[8] The so-called destruction cases (of which the flooding decisions are representative) clearly involve an affirmative invasion of property. See, *United States* v. *Welch*, 217 U.S. 333 (cited by the court below at App., *infra*, p. 19). This is also true in regard to other cases cited below. See *United States* v. *General Motors*, 323 U.S. 373; *Richards* v. *Washington Terminal Co.*, 233 U.S. 546; *Kimball Laundry Co.* v. *United States*, 338 U.S. 1. See App. *infra*, pp. 19, 32.

In *United States* v. *Pewee Coal Co., Inc.*, 341 U.S. 114, the Court found that the Government had taken *actual* possession of the coal mine, and that that possession and control amounted to a taking. See 341 U.S. at 114-117; cf. *United States* v. *Wheelock Bros., Inc.*, 341 U.S. 319.

[9] The *Pennsylvania Coal* case is distinguishable on at least two additional grounds: first, the restriction in that case was for the particular benefit of a single private house, while here the restriction was clearly for the nation as a whole; and second, the restriction in *Pennsylvania Coal* was permanent while here it was only for the temporary period of actual hostilities. See also *supra*, pp. 8-9.

Amendment it is clear that war or emergency are circumstances justifying governmental action without compensation which might be questionable in periods of less stress. Thus, in time of war or emergency, rent control can be imposed. *Woods* v. *Miller*, 333 U.S. 338; *Bowles* v. *Willingham*, 321 U.S. 503; *Block* v. *Hirsh*, 256 U.S. 135.[10] Commodity prices can be limited (*Yakus* v. *United States*, 321 U.S. 414; *Morrisdale Coal Co.* v. *United States*, 259 U.S. 188) and profits can be renegotiated. *Lichter* v. *United States*, 334 U.S. 742. Materials may be allocated among producers and distributors (*L. P. Steuart & Bros., Inc.* v. *Bowles*, 322 U.S. 398); prohibition of liquor may be ordered (*Ruppert* v. *Caffey*, 251 U.S. 264; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146); and rights under a contract may be frustrated. *Omnia Commerical Co.* v. *United States*, 261 U.S. 502. Here, the Court of Claims agreed that the restriction on acquisition, use, and consumption by the mines of materials and supplies was a reasonable exercise of the wartime allocation power (App., *infra*, p. 32), and also that the War Production Board's objective of better manpower utilization was unobjectionable (App., *infra*, p. 30).[11]

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[10] Justice Holmes' statement in *Block* v. *Hirsh*, *supra*, that "[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change" (256 U.S. at 157) indicates that emergency restrictions are least likely to result in a taking where they are imposed for a temporary period.

[11] Despite its holding that the War Production Board was authorized to issue an order to achieve these objectives (App., *infra*, p. 30), the Court of Claims also stated that the issuance of Order L-208 was arbitrary. This appears to be based on the premise that it was unreasonable to believe that gold miners would voluntarily transfer to the copper mines where workers were vitally needed. But the facts were that, when Order L-208 was issued, manpower was emphatically needed and, while there was a difference of opinion

The fact that the owners of the gold mines suffered some damage and incurred expense—though retaining the gold and the mines intact—does not, of course, serve in itself to convert Order L-208 from valid regulation to a Fifth Amendment taking. It is settled that even substantial damages or injury flowing from a valid exercise of the war powers need not be compensated. *Morrisdale Coal Co.* v. *United States*, 55 C. Cls. 310, 316, affirmed, 259 U.S. 188; *Royal Holland Lloyd* v. *United States*, 73 C. Cls. 722; see *Block* v. *Hirsh*, 256 U.S. 135; *Bowles* v. *Willingham*, 321 U.S. 503; *Woods* v. *Miller Co.*, 333 U.S. 138; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146, 155-158; *Omnia Commercial Co.* v. *United States*, 261 U.S. 502; *United States* v. *Carver*, 278 U.S. 294; *Transportation Co.* v. *Chicago*, 99 U.S. 635; *United States* v. *Caltex (Philippines), Inc.*, 344 U.S. 149; cf. *Miller* v. *Schoene*, 276 U.S. 272, 279-280. As stated by the Court in *Lichter* v. *United States*, 334 U.S. 742, 754:

> In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself.

3. In addition, the Court of Claims has ignored the significant factors that (1) the War Production Board did not have the authority to requisition property in

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as to whether the Order would be effective, the prospects of success as they appeared at that time, rather than by hindsight, justified the War Production Board's action. In any case, if the Order were arbitrary and so invalid, the judicial relief available was a suit to enjoin enforcement, not for compensation for damages. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, *infra*, p. 16.

circumstances such as are here involved [12] and (2) the Board did not intend, nor did it purport, to exercise any requisitioning authority that it had.

While its original opinion in these cases appears to take a contrary view (App., *infra*, pp. 23-31), the Court of Claims recognized these factors in its opinion on rehearing (App. *infra*, p. 125); and it also acknowledged the rule that the Government may not be held liable for an unauthorized taking (see, *e.g.*, *United States* v. *Goltra*, 312 U.S. 203; *United States* v. *North American Co.*, 253 U.S. 330; *Hooe* v. *United States*, 218 U.S. 332 [13] (App., *infra*, p. 126)). Nevertheless, the court reaffirmed its earlier conclusion that the taking was authorized, reasoning that the Government in

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[12] None of the statutes referred to by the court in its original opinion (App. *infra*, p. 3, fn. 1) authorized the taking which the court held occurred here. The Selective Service and Training Act of September 16, 1940, 54 Stat. 885, authorized, in Section 9, only the placing of "mandatory orders" with firms "for such product or material as may be required and which is of the nature and kind usually produced or capable of being produced by such" firm. The Act of October 10, 1940 (54 Stat. 1090) authorized the requisition of "military or naval equipment or munitions, or component parts thereof, or machinery, tools, or materials, or supplies necessary for the manufacture, servicing or operation thereof" * * * held for export. And the Act of October 16, 1941 (55 Stat. 742) provided:

> * * * whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions, is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property * * *.

[13] This principle seems to have been confirmed and applied in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585.

issuing Order L-208 merely used "an *unauthorized* means of accomplishing an *authorized* taking" (emphasis in original) (App., *infra*, p. 129); to buttress this result, the court quoted from this Court's recent opinion in *Hatahley* v. *United States*, 351 U.S. 173 (App., *infra*, pp. 128-129).

But the Court of Claims' rationale is erroneous, even if it be assumed that that court has jurisdiction wherever a taking by the particular agency is authorized and that the agency's failure to follow the prescribed statutory procedure does not oust the court of authority. As we have already indicated, *supra*, pp. 15-16, the War Production Board—the agency which issued Order L-208—had not been given any power to take this kind of property. Unless the principle that the Government may not be held responsible in damages for an unauthorized taking is to be jettisoned (and the Court of Claims did not purport to abandon it), there must be, at the least, some authority in the agency to seize or requisition the particular property.

Hatahley has no bearing on this problem. That case arose under the Federal Tort Claims Act, which imposes liability upon the Government for the torts of its employees "while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act * * * occurred." 28 U.S.C. 1346(b). The Court held the Government liable since "[u]nder the law of Utah, an employer is liable to third persons for the willful torts of his employees if the acts are committed in furtherance of the employer's interests or if the use of force could have been contemplated in the employment." 351 U.S. at 180. In contrast to this principle, which is generally applied in tort law and is

necessary if the doctrine of *respondeat superior* is to be effective, no such rule has been followed in the field of eminent domain. On the contrary, because the authority to requisition property has been granted only with great care and its use has been carefully controlled to prevent abuse, the Government has been held liable only for those takings for which the requisite general authority has been granted. See the cases cited, *supra*, pp. 12-13, 16.

4. Some 160 cases under the same Limitation Order (L-208) are now pending in the Court of Claims.[14] If the rulings in the instant cases are left standing, the Government's total liability will probably be measured in terms of thirty to sixty million dollars. Moreover, the general constitutional problem of when "regulation" turns into "taking" is of ever-present concern during a span of war or emergency,[15] and, in view of the prevailing opinions below, it would be well to have, at this time, more authoritative guidance which will be useful in current planning for future periods of stress, as well as in the actual operation of controls in times of emergency. It will also be most helpful to have a definitive ruling on the extent of the jurisdiction of the Court of Claims where an administrative seizure is unauthorized.

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[14] Subsequent to the denial of certiorari in *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C.Cls. 18, certiorari denied, 341 U.S. 948, *supra*, Congress, by the Act of July 14, 1952, 66 Stat. 605, authorized the Court of Claims to hear and render judgment on the claims of the gold mine operators, without regard to the statute of limitations.

[15] See, *e.g.*, *Block* v. *Hirsh*, 256 U.S. 135; *Marion & Rye Valley Railway* v. *United States*, 60 C. Cls. 230, affirmed, 270 U.S. 280; *Dayton-Goose Creek R. Co.* v. *United States*, 263 U.S. 456; *Hamilton* v. *Kentucky Distilleries and Wine Co.*, 251 U.S. 146; *Yakus* v.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
Attorney.

OCTOBER, 1956.

United States, 321 U.S. 414; *Bowles* v. *Willingham*, 321 U.S. 503; *Lichter* v. *United States*, 334 U.S. 742; *United States* v. *Peuree Coal Co.*, 341 U.S. 114; *United States* v. *Caltex (Philippines), Inc.*, 344 U.S. 149.

In the United States Court of Claims

(Decided February 20, 1956)

No. 49468

CENTRAL EUREKA MINING COMPANY (A CORPORATION) v. THE UNITED STATES

No. 49486

ORO FINO CONSOLIDATED MINES, INC. v. THE UNITED STATES

No. 49693

ALASKA-PACIFIC CONSOLIDATED MINING COMPANY v. THE UNITED STATES

No. 50182

IDAHO MARYLAND MINES CORPORATION v. THE UNITED STATES

No. 50195

HOMESTAKE MINING COMPANY v. THE UNITED STATES

No. 50214

(1) BALD MOUNTAIN MINING COMPANY, (3) ALABAMA-CALIFORNIA GOLD MINES COMPANY, (5) CONSOLIDATED CHOLLAR GOULD & SAVAGE MINING COMPANY, (7) ERMONT MINES, INC. v. THE UNITED STATES

Mr. Phillip Barnett for Plaintiff Central Eureka Mining Company. *Messrs. Ralph D. Pittman* and *Rodney H. Robertson* were on the brief.

Mr. John Ward Cutler for Plaintiffs Oro Fino Consolidated Mines, Inc., Bald Mountain Mining Company, Consolidated Chollar Gould & Savage Mining Company and Ermont Mines, Inc.

Mr. O. R. McGuire, Jr., for Plaintiff Alaska-Pacific Consolidated Mining Company. *Messrs. Hogan & Hartson* and *V. A. Montgomery* were on the brief.

Mr. George Herrington for Plaintiff Idaho Maryland Mines Corporation. *Messrs. Orrick, Dahlquist, Herrington & Sutcliffe* were on the briefs.

Mr. Edward W. Bourne for Plaintiff Homestake Mining Company. *Messrs. James D. Ewing, Eugene Z. Du Bose, Edward E. Rigney, J. Kenneth Campbell* and *James W. Misslbeck* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant. *Mr. Thomas H. McGrail* was on the brief.

LITTLETON, *Judge*, delivered the opinion of the court:

The plaintiffs were, at the times herein mentioned, the owners and operators of gold mines. On October 8, 1942, the War Production Board issued Limitation Order L–208 requiring certain so-called non-essential mines to close down and cease all mining operations, or any other operations in and about the mines, except to the minimum amount necessary to maintain the mines safe and accessible. Violations of the order were punishable by fine and imprisonment. By its terms, the order suspended for the life of the order the right of plaintiffs to mine and sell gold.

It is plaintiffs' contention that this action by the Government amounted in law to a taking, for a public purpose, of their right to make profitable use of their mining properties for which just compensation is due them under the Fifth Amendment to the Constitution. In the alternative, the plaintiffs contend that by virtue of the jurisdiction conferred on this court by the special jurisdictional act of July 14, 1952, 66 Stat. 605, they are entitled to recover for the closing of their mines the amount of losses incurred as a

result of Order L–208. It is plaintiffs' position that in the absence of the special jurisdictional act, this court would not have jurisdiction to render a judgment in favor of a gold mine owner for losses incurred unless they could establish a compensable taking, but that the act conferred on this court jurisdiction to render judgment for such losses where they resulted from the issuance of L–208.

Following denial by this court of the Government's motion to dismiss the petition in the case of the *Idaho Maryland Mines Corp.* v. *United States* [1952], 122 C. Cls. 670, the instant cases were consolidated for trial before a commissioner of the court on the question of the Government's liability, the question of just compensation or the amount of damages being reserved for further proceedings.

By the time L–208 was issued by the War Production Board, on October 8, 1942, the President had delegated to that Board all allocation, priorities and requisitioning powers granted to him by Congress,[1] except the power to requisition real property. In general, the purposes to be

[1] The Act of June 28, 1940, 54 Stat. 676, as amended by the Act of May 31, 1941, 55 Stat. 236, as further amended by Title III of the Second War Powers Act of March 27, 1942, 56 Stat. 177, gave to the President priorities and allocation powers and the authority to delegate such powers. Section 9 of the Selective Training and Service Act of September 16, 1940, 54 Stat. 885, 892, gave the President the power to place mandatory orders for products or materials required for the national defense, and provided for the payment of just compensation for such products, or as rental for any facilities or plants used by the United States. The Act of October 10, 1940, 54 Stat. 1090 authorized the President to take over for use or operation any military or naval equipment, etc., held for export purposes but whose exportation had been denied by law, and provided for payment of just compensation. The Act of October 16, 1941, 55 Stat. 742, authorized the President to requisition all other military or naval equipment not held for export. This act was amended in Title VI of the Act of March 27, 1942, *supra*, to eliminate the requirement that only equipment and machinery not in actual use by the owner could be requisitioned. Section 120 of the National Defense Act of 1916, 39 Stat. 213, authorized the President to place mandatory orders for the production of materials required for defense and for the seizure of plants refusing to cooperate. All of these acts provided for the payment of just compensation for any interest taken. The President delegated all the above authorities to the War Production Board or its predecessors in a series of Executive Orders as follows: Executive Order 8572, October 21, 1940, as amended by Executive Order 8612, December 15, 1940 (the Priorities Board); Executive Order 8629, January 7, 1941 (Office of Production Management); Executive Order 8875, August 28, 1941 (OPM and SPAB); Executive Order 8891, September 4, 1941; Executive Order 8942, November 19, 1941; Executive Order 9024, January 16, 1942 (WPB); Executive Order 9040, January 24, 1942; Executive Order 9125, April 7, 1942; Executive Order 9138, April 17, 1942; by Executive Order 9139, April 18, 1942, the President established the War Manpower Commission and transferred to it the labor supply functions of WPB's Labor Division.

accomplished through the exercise of those powers were to increase production of raw materials and finished products needed for the national defense through the mobilization of the material resources and the industrial facilities of the nation. The Board's power to regulate the production and supply of materials, equipment and facilities necessary for the national defense was broad and was, in general, accomplished by the use of various orders, the most common of which were the "P" or priorities orders, the "M" or materials orders, and the "L" or limitation orders. "P" orders were usually addressed to buyers of materials, etc., and authorized them to attach to their purchase orders a symbol entitling them over other users to a certain preference in delivery. "M" or materials orders were allocation orders addressed to the manufacturers or distributors of materials. These orders were used to limit and define the use or the distribution of the particular material which was the subject of the order. "M" orders might also prohibit producers or distributors of certain materials or products from selling them to any buyer unless that buyer had a certain preference rating. "L" or limitation orders, were also related to the Board's allocation functions and were issued to curtail or prohibit the manufacture of end products which required the use of specified critical materials.

The mining industry, along with other industries, was subject to regulation of its acquisition and use of materials, supplies and equipment needed in the defense effort. A general repair order known as P–22 was issued on September 9, 1941, which authorized a variety of industries, including the mining industry, to use only the lowest preference rating, i. e., A–10, to acquire the materials needed for the repair of their mining property and equipment. On September 17, 1941, Preference Rating Order P–56 granted an A–8 preference rating to so-called recognized mining enterprises to acquire materials needed by them for operating supplies and for the maintenance of the mines' property and equipment. This order represented the first special treatment accorded to gold mines as distinguished from other types of mines, in that placer gold mines were expressly excluded from any benefits under the order. Lode gold mines were permitted the use of the A–8 rating because it was recognized

that denying to them repair and maintenance supplies would cause depreciation of their installed equipment and structures, and because many lode mines produced metals other than gold which were useful to the defense effort.

As the critical materials supply situation became more acute, the Office of Production Management [2] found it necessary to take action that would insure a sufficient amount of new and repair parts for the mines producing critical raw materials, and in order to do this it eventually became necessary to deny to mines whose production was predominantly gold the right to purchase any new machinery for use in that production, and to limit such gold mines to the lowest preference rating for the acquisition of maintenance, repair and operating supplies. Accordingly, on December 18, 1941, Preference Rating Order P–100 was issued granting the mines an A–10 or the lowest possible preference rating. On March 2, 1942, Preference Rating Order P–56 was amended to revoke the serial numbers of all gold mines whose total dollar production was more than 30 percent gold. Without a serial number, a gold mine could not acquire any materials needed for operating supplies, or supplies for the maintenance of their property and equipment. Over two hundred gold mines, including those of most of the plaintiffs herein, never again received serial numbers under Order P–56 and thus, by March 1942, a series of progressively more stringent regulations had virtually eliminated any opportunity for the gold mines to acquire critical materials and supplies needed for the national defense.

No agency of the Government was ever granted any real power to control civilian manpower during the war. However, the War Production Board found it necessary to take into consideration manpower problems obviously inherent in the overall problem of increasing the production of vital raw materials and finished products necessary for defense. Shortly after the establishment of WPB's predecessor agency, the Office of Production Management, an operating division known as the Labor Division was established in OPM to study and keep abreast of the labor requirements for national defense and to advise and collaborate with the

[2] At this time the Office of Production Management was still in existence. It was not succeeded by WPB until January 1942.

other divisions of OPM on all matters affecting labor.[3] In the summer of 1942, the Labor Division of what was now WPB, became concerned with the seriously increasing shortage of hardrock or underground miners in the vital nonferrous metal mines, particularly in the copper mines. This concern was shared by the recently established War Manpower Commission and by the War Department which had become alarmed by the growing shortage in the output of copper. Upon investigation, these groups found that the exodus from the strategic metal mines was the result of the higher wages and better working conditions available to the miners in the aircraft and shipbuilding industries and on the armed services building construction projects frequently being carried on in the vicinity of the copper mines. It was also determined that a large number of experienced miners were being drafted into the armed services and Selective Service was adverse to granting deferments to such workers. Despite the urgings of mine employers and the government agencies involved to miners to stay on the job, the strategic metal miners continued to leave the mines for the more attractive job opportunities offered by other defense industries. Production was also hampered by the generally low morale of the miners, the short workweek in the mines, and the lack of any effective means of recruiting workers for work in the strategic metal mines.

During this same period the gold mines were losing experienced miners by virtue of the same circumstances, except that working conditions in many of the gold mines were good, many of the miners owned their own homes, and gold mining was often a family tradition from which they would not readily depart.

Based on 1940 and 1941 statistics furnished by the Bureau of Mines, the War Department, the War Manpower Commission and the War Production Board's Labor Division determined that if the gold mines could in some way be closed down, several thousand hardrock miners would immediately become available for work in the nonferrous metal mines, although no one was quite sure how they could be induced to go to work in such mines since no one had author-

[3] OPM Regulation 5, March 18, 1941, 6 F. R. 1598, 32 CFR 2875—1941 Supp.

ity to require them to do so. A survey by WPB's Mining Division revealed that the labor figures arrived at by the Labor Division were unduly optimistic and that the probable number of hardrock miners employed in gold mines was much smaller than the estimate based on the 1940 and 1941 figures; that, after taking into consideration the number of hardrock miners who would be necessary to maintain the closed mines in safe condition, and the number who were elderly men and home owners and thus unlikely to leave their homes unless forced to do so, a relatively small number of experienced miners would be thrown on the labor market for any purpose. The conclusions of the Mining Division were reinforced by data supplied by representatives of the larger gold mines who came to Washington to confer with officials of WPB and the Army, and also by Congressional Representatives of the mining States. Everyone involved in the ensuing controversy was aware that there was no power in any arm of the Government to force gold miners to work in the nonferrous metal mines, and no way to deny to gold miners opportunities to work in the same war industries or on the same armed services' construction projects that had been luring the nonferrous metal miners away from their jobs in the mines. Selective Service could not bring itself to grant deferments to miners. The Army indicated that it might furlough some four thousand soldiers who had mining experience, and condition their furloughs on their staying on the jobs in the nonferrous metal mines. But the Army was reluctant to grant those furloughs while the gold mines were still operating. Army officials were furnished with facts and figures showing that few hardrock miners would be released by the closing of the gold mines and that there was no way of compelling those miners to work in the copper mines and little likelihood that they would do so. Despite this, officials of the Army continued to bring great pressure to bear on the War Production Board to close down the gold mines, indicating that otherwise WPB would not be doing its part to increase production in the nonferrous metal mines. The Army's objection to the continued operation of gold mines appears to have been largely political rather than practical. Its reluctance to furlough trained soldiers was understandable, but the fact remains that it

was the only governmental agency which had sufficient control over manpower to compel persons under its jurisdiction to work in the nonferrous metal mines and continue to do so.

Over the vigorous objection of informed persons in and out of the War Production Board, the Board on October 8, 1942, issued L–208 which ordered the complete shutdown within 60 days of all the country's gold mines which did not produce sufficient strategic metals to warrant their holding serial numbers.

Within a relatively short time it became apparent that the closing of the gold mines was doing little to relieve the shortage of hardrock miners in the strategic metal mines. In fact, the record indicates that no more than 100 gold miners went into other mines and remained there for a year or more. Despite numerous appeals and a desire on the part of WPB officials to modify the order to permit the gold mines to operate at least on a break-even basis, the order was continued in effect and unchanged until the summer of 1945.

The record establishes that no one having anything to do with the issuance of L–208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines. Although WPB had full power to requisition any large inventories of supplies, materials, and equipment owned by the gold mines, or to authorize more essential users of such materials to place mandatory orders with the gold mines, no such power was ever exercised. In L–208 WPB did not even attempt to assure that those critical materials, equipment and facilities would be held for possible future requisition or order, but left the owners free to sell them to anyone they pleased, whether the prospective purchaser was engaged in essential defense work or not.

The record establishes that the purpose and intent of WPB in issuing L–208 was to deprive the gold mine owners and operators of the right to use their properties in the only way they could be beneficially used, i. e., to mine and sell gold for a profit, and that this was done in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines. The record fails to establish that

the prohibition of gold mining was reasonably calculated to or in fact did increase the country's war efficiency.

The following contentions were made in the Homestake brief and were adopted in general by all the other plaintiffs. After discussing those contentions and disposing of them, we shall take up separately the applicability of the conclusions reached to each of the plaintiffs.

Plaintiffs contend that L–208, while in form a regulation restricting their acquisition and use of critical materials needed for defense, was in substance a requisition or taking, for the life of the order, of plaintiffs' right to make profitable use of their gold mining properties for which taking the Government is liable to pay just compensation under the Fifth Amendment to the Constitution. Plaintiffs also contend that if the court should decide that L–208 was actually a regulation in substance as well as in form, it was arbitrary in that it went far beyond what was required by the exigencies of the war situation existing at the time of its issuance, bore no reasonable relation to its ostensible purpose of conserving critical materials needed in the defense effort, and in fact and law amounted to a taking of valuable property rights of plaintiffs for which just compensation should be paid.

The Government contends that regardless of how much damage plaintiffs may have suffered by virtue of their compliance with the provisions of L–208, the order was a proper exercise of the statutory regulatory powers over critical materials by the War Production Board; that it was issued to prohibit plaintiffs' use of those materials in a manner detrimental to the public safety in wartime; that the Government made no use of plaintiffs' property nor did the order represent any positive invasion of any of plaintiffs' property rights, and that no direct benefits accrued to the Government from the imposition of the order except the negative benefit arising from the prohibitions placed on plaintiffs' use of their property. Defendant urges that under these circumstances, plaintiffs' losses are no more compensable than were the losses suffered by the St. Regis Paper Company from the imposition on it of War Production Board General Preference Order M–251 (*St. Regis Paper Co.* v. *United States*, 110 C. Cls. 271; cert. den. 335 U. S. 815), or the losses

suffered by landlords who complied with wartime rent control regulations (*Bowles* v. *Willingham*, 321 U. S. 503, *Block* v. *Hirsh*, 256 U. S. 135, *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170). Defendant also contends that if WPB acted arbitrarily and without good cause in issuing L–208, then the order was unauthorized and illegal and the Government is not liable to pay just compensation for losses occasioned by the unauthorized act of its agents, citing *Hooe* v. *United States*, 218 U. S. 322 and *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330. Defendant suggests that in this latter circumstance, plaintiffs should have refused to obey the order (*Morrisdale Coal Co.* v. *United States*, 259 U. S. 188); or they should have brought injunction proceedings against the officials of WPB to prevent enforcement of the order.

Our first problem is to determine the precise nature of the action taken by the War Production Board in its issuance of L–208, i. e., whether that action amounted to a regulation or a taking of plaintiffs' property rights. Next it must be determined whether WPB had the power to do what it in fact did, and finally whether the Government is liable for the injuries caused plaintiffs by the exercise of that power, even though the power was exercised arbitrarily.

The property which plaintiffs contend has been taken from them, and which defendant urges was merely limited in its usefulness to plaintiffs as a consequence of a valid regulation of scarce materials, was plaintiffs' right to make profitable use of their gold mining properties. As pointed out by Mr. Justice Roberts in *United States* v. *General Motors Corporation*, 323 U. S. 373, while "property" as that term is used in the Fifth Amendment certainly means the physical thing with respect to which the citizen exercises rights recognized by law, it also means the group of rights inhering in the citizen's relation to the physical thing, as the rights to exclusively possess, use and dispose of the physical thing. In this sense, the right of a gold mine owner to extract gold from his mine and to sell it for a profit, is a property right protected by the Constitution. *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393.

In order to determine whether that property right was "regulated" or "taken," or was merely injured as a conse-

quence of a regulation or of a taking of some other property or property right of plaintiffs, we turn to the limitation order itself and to the facts and circumstances of record surrounding its issuance.

The order was issued on October 8, 1942, by the War Production Board which had succeeded to all the powers and functions of the old Office of Production Management and the Supply Priorities and Allocations Board. The preamble to L–208 reads as follows:

> The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.

The statutory authority cited at the conclusion of the order was section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended,[4] which granted to the President the power to establish priorities and to allocate materials. The President's allocation powers were expressed in the following language (56 Stat. 178), which it will be noted, closely resembles the above quoted language in the preamble of L–208:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

As further authority for its issuance, the order cited Executive Order 9024 (January 16, 1942) abolishing SPAB and establishing the War Production Board, Executive Order 9040 (January 24, 1942), abolishing the Office of Production Management and transferring to WPB all of its duties and powers along with those of the old SPAB, and providing that WPB should perform the functions and exercise the authority vested in the President by section 120 of the

[4] Act of May 31, 1941 (Pub. Law 89), 55 Stat. 236; Act of March 27, 1942 (Pub. Law 507), 56 Stat. 177.

National Defense Act of 1916 (39 Stat. 312). Section 120 of the last mentioned act provided that the President in time of war might, through the head of any Government department or agency, place mandatory orders with individuals, firms, associations, etc., for products produced by them; that if there was a refusal to make or sell at a reasonable cost any product required in response to such mandatory orders, the President, through the head of any department, might take immediate possession of the plant. The section provided for the payment of compensation for any product or material acquired by mandatory orders, or as rental for the use of the manufacturing plant. Executive Order 9125, April 7, 1942, also cited in L–208, contained the President's delegation of his allocation and priority authority to WPB pursuant to Title III of the Second War Powers Act of 1942, 56 Stat. 176.

Order L–208 provided that for the purposes of the order all gold placer or lode mines located in the United States or its territories or possessions which did not hold serial numbers under Preference Rating Order P–56 were deemed "nonessential mines".[5] The order then required such nonessential gold mines to do the following: (1) to close down as soon as possible after the issuance of the order; (2) to cease acquiring, consuming or using any material, facility or equipment for the purpose of breaking any *new* ore or for the purpose of carrying on any development work; (3) on or after 60 days from the issuance of the order, to cease acquiring, consuming or using any material, facility or equipment to remove *any* ore or waste from the mine, above or below ground, or to conduct any other operation in or about the mine except to the minimum amount necessary to maintain the buildings, machinery and equipment in repair, and the mine's access and development workings safe and accessible; (4) to refrain from using any preference rating to acquire any material or equipment for consumption or use in the operation, maintenance or repair of the mines covered by the order, except with the permission of the Director General for Operations. The order provided that the Direc-

[5] This provision had the effect of including in the operation of the order all mines whose gold production in dollar value exceeded 30 percent of its total production.

tor General for Operations, WPB, might assign preference ratings only for obtaining the minimum amount of material needed to maintain the nonessential gold mines in safe condition during the closedown. Violations of the provisions of the order were made a crime punishable by fine or imprisonment. The order provided that persons affected by the order might appeal to the Board by letter and that the Director General for Operations might thereupon take such action as he might deem appropriate.

The preamble to the order, the authority cited at the end thereof, and the prohibition placed upon the acquisition of critical materials, indicate that the order was merely intended to allocate *away from* the so-called nonessential gold mines materials, equipment and facilities which were in short supply and needed for defense. A study of the balance of the order, particularly in the light of certain facts of record, persuades us that the order was not intended to be an allocation order. Insofar as the order prohibited the acquisition of materials, equipment and facilities, certain existing orders, P–56 and P–100, already prevented the acquisition by the gold mines of any such materials except, in the case of P-100, where gold mines did have the lowest priority rating in existence for repair parts, and that could have been revoked. The record establishes that the gold mines, particularly the Homestake mine, had on hand in October 1942 large amounts of materials, equipment and facilities needed in the mining of gold and that Homestake, and some of the others whose circumstances we shall discuss separately, could have continued operations with such inventories for a considerable period after October 8, 1942. L–208 did not in fact "allocate" any of such materials, equipment or facilities away from the mines but, on the contrary, left the mine owners and operators free to dispose of them in any manner they saw fit, by delivering or selling them to nonessential users or by keeping them in the mines. What the order did do, and do directly, was to prohibit the continued operation of the gold mines.

A comparison of L-208 with General Preference Order M–251 which was involved in the *St. Regis* case, *supra*, may aid in evaluating the Government's contention that the two orders were alike in their purpose, operation and effect, and

that the loss of the gold mine owners' right to make profitable use of their mining properties was merely a consequential injury resulting from a valid allocation of critical materials away from the mines in the same way that the injury to the paper company's right to do business was the consequence of a valid allocation of pulpwood away from the company.

The preamble to the St. Regis Order, M–251, was in all material respects identical with the preamble of the gold order, L–208.[6] The order was issued on October 19, 1942, ten days after the issuance of the gold order, and the authority cited for its issuance was identical with that cited in the gold order.

Order M–251 provided that in areas declared by WPB's Director General for Operations to be shortage areas, the Director General could allocate the available supply of pulpwood held or accumulated in that area away from and to specific persons; that he could direct the holders of pulpwood in the area to maintain their accumulations of pulpwood *available for disposition* by the Director General who might direct the delivery of specific quanties of such accumulated pulpwood to specific persons. The Director General was authorized to direct that no one in the area might acquire, consume, process or deliver any pulpwood of the types defined, and which were held or accumulated in the area, *except as the Director General might order.* The Director General was also authorized to require the manufacture of particular types of woodpulp or other wood products by manufacturers. On October 23, 1942, this order was applied specifically to the St. Regis Paper Company and that company was forbidden to acquire, consume, process or deliver any pulpwood, except on authorization or by direction of the Director General for Operations of WPB. Immediately upon issuance of the order to St. Regis, that company was directed by the Director General to deliver during the month of November its entire inventory and supply of pulpwood to

[6] General Preference Order M–251 contained the following preamble:

"The fulfillment of requirements for the defense of the United States has created in certain areas and is expected to create in other areas a shortage in the supply for defense, for export and for private account, of wood for pulp and lumber, and has created a shortage in the supply for defense, for export and for private account of various materials and facilities required for the production of pulpwood; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense."

specified persons "at regularly established prices and terms", subject to OPA regulations. St. Regis was permitted to continue processing and manufacturing its customary products from pulpwood during the balance of October. Although the order did not direct plaintiff to close its factory and plaintiff was left free to make any use of its factory it could, its inability to secure pulpwood resulted in the closing of the mill, plaintiff having decided that it was not feasible to convert its facilities to some other type of manufacturing that would not require the use of pulpwood.

In its suit in this court, the St. Regis Paper Company contended that M–251 amounted to a temporary taking of its paper factory and of its right to do business. Although it was not made an issue in the case, M–251 probably did amount to a taking of plaintiff's inventory of pulpwood (cf. *Edward P. Stahel & Co., Inc., et al.* v. *United States*, 111 C. Cls. 682, cert. den. 336 U. S. 951), but plaintiff did not sue for the taking of its pulpwood, probably because shortly after the order was issued plaintiff received what it considered to be just compensation on the mandatory sales to the Government's designees pursuant to M–251. The court held that M–251 did not require the closing of plaintiff's plant nor did it interfere with plaintiff's use of the plant; that, on the contrary, the order represented a valid exercise of WPB's admitted power to allocate a scarce material such as pulpwood, and that any injury to plaintiff's profitable use of its plant, or any loss in value of its plant, were merely consequential and therefore did not amount to a taking and were not compensable. The terms of the order itself certainly bore out the court's conclusion since the order merely represented an attempt by the Government to secure all the available supply of pulpwood in the area by freezing the supplies on hand with the owners in the area and immediately placing mandatory orders directing delivery to specified users elsewhere, and by prohibiting the users in the area in question from acquiring any more pulpwood.

Like M–251, the gold order prohibited the acquisition, consumption or use of certain personal property used in the mining of gold. L–208 did not, however, require the gold mine owners to hold for the use or disposition of the Government their inventories and supplies of the personal prop-

erty covered by the order but left the owners free to use that personal property in any way they wished except in the mining of gold. The plaintiffs might have sold their inventories of machinery, supplies and equipment to any user whether or not that user was conducting a business which was essential to the defense effort. The record establishes that the Government did not intend to, nor did it ever, requisition any of this personal property or direct the mine owners to sell it to anyone else. From the language of the order itself and from the circumstances surrounding its promulgation, it is apparent that its only purpose was to deprive the gold mine owners and operators of their right to make use of their mining properties.

Since the subject matter of L–208 was the gold mine owners' right to make use of their gold mines and was not the materials equipment and facilities they had on hand and in which the Government apparently had little interest, the next question is whether L–208 amounted to a "regulation" of that property right or to a "taking."

"Regulation" implies a degree of control according to certain prescribed rules, usually in the form of restrictions imposed on a person's otherwise free use of the subject matter of the regulation. Where the restrictions imposed are temporary and narrow, and where the persons on whose property the restrictions are imposed are assured an opportunity to receive "reasonable" compensation as determined by an impartial arbiter, the courts have held that enforcement of such regulations has not deprived the owner of the regulated property of due process, nor has it resulted in the "taking" of a property right in the constitutional sense. Typical of this type of regulation are the rent control regulations referred to above, regulations issued under the renegotiation statute (*Lichter* v. *United States*, 334 U. S. 742) limiting the right to make excessive profits on war contracts, and restrictions imposed in mortgage moratorium legislation (*Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398). On the other hand, where the restrictions imposed by the so-called regulations are so broad that the owner of the property regulated is deprived of most or all of his interest in the property, for all practical purposes there has been a

taking of that property. *Louisville Bank* v. *Radford*, 295 U. S. 555.[7]

The case of *Edward P. Stahel & Co., et al.* v. *United States*, referred to earlier herein, has much in common with the issues raised in the instant controversy as well as with those involved in the earlier case of *St. Regis Paper Co.* v. *United States*, *supra*. In the *Stahel* case, as in the others, plaintiffs alleged that an order of the Office of Production Management (predecessor agency to the War Production Board) though in form a regulation, operated in such a manner as to take valuable property rights of plaintiffs without payment of just compensation. The order in question was General Preference Order M–22 issued on October 16, 1941. M–22 prohibited the owners of raw silk, including the plaintiffs, from selling or delivering their silk to any user but the Government or persons designated by the Government, and further provided that any orders placed with such owners by the Government or its designees had to be accepted and filled. The order did not prohibit the acquisition of raw silk by plaintiffs. Some two months after the issuance of M–22, the Government and its designees began placing mandatory orders with plaintiffs for the silk which was paid for, upon delivery, at the OPA price. Plaintiffs sued for additional compensation for the silk, alleging that the "taking" had occurred on the issuance of General Preference Order M–22 on October 16, 1941, and that, accordingly, they were entitled to recover an additional amount to compensate them for delay in payment, plus amounts expended for storage and handling of the silk after October 16, 1941, until

[7] *The Home Building & Loan Association* case, *supra*, involved the constitutionality of a Minnesota statute which, in time of economic depression sought to relieve the plight of needy mortgagors by providing for a possible extension of the redemption period of their mortgaged property. Citing the many safeguards contained in the statute to protect the rights of the mortgagee and the fact that the mortgagee would ultimately receive all that he was entitled to under the mortgage, the Court upheld the statute as a *limited* and *temporary* restriction on the mortgagee's right to enforce his contract, such restriction being justified by the great public calamity, i. e., the depression. This case was relied on by the mortgagor, Radford, in *Louisville Bank* v. *Radford*, *supra*, to uphold the constitutionality of the Frazier-Lemke Act of 1934, which also sought to relieve the plight of needy mortgagors during the depression. The Supreme Court held that the restrictions imposed by the federal act were neither limited nor temporary and that they amounted to a taking of valuable property rights of the m rtgagees without any compensation whatsoever.

the silk was finally delivered to and paid for by the Government or its designees. The Government contended that M–22 was merely a regulation which placed certain limitations or restrictions upon plaintiffs' right to sell their silk and that these limitations were imposed in the proper exercise of the sovereign's lawful power to allocate scarce materials in wartime *away from* nonessential to essential users, and that while the restrictions imposed in the interest of the defense effort may have decreased the value of the silk to the plaintiffs, the silk was not taken on October 16, 1941, citing *Omnia Commercial Company, Inc.* v. *United States*, 261 U. S. 502, *Bowles* v. *Willingham*, 321, U. S. 503.[8] The Government pointed out that on October 16, 1941, when the order was issued, the Government did not take any positive action regarding plaintiffs' property which, on the contrary, was left in the possession and control of the plaintiffs subject only to the negative power of the Government evidenced by the restriction that it might not be sold or delivered to anyone but the Government or its designees. The court held that the restrictions imposed by M–22 on plaintiffs' use of its silk were so broad that, for all practical purposes, plaintiffs were deprived of their silk; that although the silk did remain in the actual possession of the plaintiffs after October 16, 1941, it was held not for their own use but for the use of the Government whether the Government ever exercised its right under the order to demand delivery of the silk or not.[9] The court noted that the Government had the statutory power to requisition plaintiffs' silk and pay just compensation therefor on October 16, 1941, and held that the

[8] In the *Omnia* case the Government had requisitioned the entire output of steel by the Allegheny Steel Company and had directed the company not to comply in that year with any contract calling for steel. The Omnia Commercial Company had a contract with the Allegheny company entitling Omnia to Allegheny's steel at a price well under the market. Omnia sued the United States alleging that the Government had "taken" its right to have its contract with Allegheny performed. The court held that the contract had not been taken but only its performance frustrated and that Omnia's loss of the expected profit was a consequential loss resulting from lawful governmental action of requisitioning Allegheny's steel. In the *Bowles* v. *Willingham* case the Supreme Court held that rent control imposed only temporary and narrow restrictions on an owner's use of his property.

[9] In its motion for a new trial which was denied, the Government pointed out that under the court's decision a holder of silk on October 16, 1941, who had never received a mandatory order for any of its silk, would still be entitled to the same compensation as the holder who sold all of his silk on mandatory orders.

Government's choice of a general preference regulation as a means of acquiring the use of plaintiffs' property in preference to a formal requisition did not deprive the operation of M–22 of its character of a taking, or lessen plaintiffs' constitutional right to just compensation. Plaintiffs' recovery included an additional amount to compensate them for delay in payment, plus amounts expended by them in handling and storing the silk after October 17, 1941.

It seems to us that the restrictions placed by L–208 on the right of gold mine owners to mine and sell gold were neither conditional nor limited and were as complete as were the restrictions placed on plaintiffs' silk in the *Stahel* case. In neither the *Stahel* case nor the instant case did the Government, through the orders issued, attempt to vest in itself title to the subject matter of the orders, or to assert any proprietary rights in the subject matter. In both cases the orders merely sought to impose certain negative restrictions on the otherwise free use of their property by the owners. If plaintiffs' silk was taken by M–22 because that order served to deprive plaintiffs of all beneficial use of their silk, regardless of the fact that physical invasion of the property right was merely threatened in the order and might never have taken place, it would seem to follow that L–208 was equally a taking of the right of the gold miners to make profitable use of their mining properties by mining and selling gold.[10] It also appears that the loss of the gold mine owners of their right to mine gold was the direct result of L–208 and was not a consequential loss in the sense that it was the result of the exercise of defendant's power to allocate scarce materials, or to take such materials, as was

[10] It is not contended that their right to mine and sell gold was acquired by defendant in the sense that the Government actually took possession of the mines and carried on the business for its own benefit. It is contended, however, that the Government deprived plaintiffs of their right to make profitable use of their mining properties for the period during which the order was in effect and that this deprivation amounted to a taking. That Government action short of acquisition of title or short of physical occupancy may constitute a "taking" in the constitutional sense has been upheld by the Supreme Court. *United States* v. *General Motors, supra; United States* v. *Welch*, 217 U. S. 333; *Richards* v. *Washington Terminal Co.*, 233 U. S. 546. As Justice Roberts pointed out in the *General Motors* decision, it is the "deprivation of the former owner rather than the accretion of a right or interest to the sovereign" which constitutes the taking, and if the effects of the Government's actions are so complete as to deprive the owner of all or most of his interest in his property, that property has been "taken."

plaintiffs' loss in the *St. Regis* case, *supra*, because, as we have seen, L–208 neither allocated nor took plaintiffs' inventory and supply of critical materials, equipment and facilities.

To allocate means to distribute or to assign. Allocation is the act of distributing or of putting one thing to another. Insofar as L–208 prohibited the *acquisition* by gold mine owners of materials, equipment and machinery, the order was allocating the available supply of those items *away from* the gold mines so that there might be more to distribute or allocate to mining enterprises considered to be more essential to the war effort. Insofar as L–208 prohibited the mine owners from using any of the materials, supplies, equipment, machinery and facilities owned by them and on hand, that prohibition allocated nothing, i. e., it distributed nothing because the order contained nothing which required the gold mine owners to sell those items to the more essential users. Furthermore, because the order merely deprived the owners of the machinery, materials, supplies, etc., on hand, of the use thereof for one single purpose, i. e., for the continued mining of gold and left the owners free to otherwise dispose of those items as they pleased, that prohibition did not amount to a "taking" of the materials, equipment, machinery, etc., owned by the gold mine owners and operators. The fact that occasional voluntary sales of idle gold mining machinery were made to some more essential mines does not give to that part of L–208 prohibiting the owners from using those items to mine gold the character of an allocation order; it merely emphasizes the fact that those items were not "taken." But the petitioners herein are not suing for the taking of their machinery, facilities and supplies on hand.

We turn next to a consideration of whether L–208 was in fact a limitation order. Limitation orders were used to supplement priority orders which were not always effective to keep nonessential manufacturers of nonessential products from acquiring critical materials. Such nonessential manufacturers, even with the lowest priority rating, might be able to pick up from time to time a significant amount of critical materials which at a later time might be needed by essential manufacturers. To remedy this situation, limitation orders were directed to the manufacturers of *specified end prod-*

ucts which were considered nonessential in war time, such as office machinery, furniture, bicycles, stoves and passenger automobiles, and they prohibited the manufacture of such end products into the manufacture of which went critical materials.

No critical materials went into the end product of a gold mine, i. e., refined gold. The gold mining industry used critical materials only for the maintenance, repair and operation of the mines. If it had been the sole purpose of WPB to prevent gold mines from *acquiring* critical materials to a greater extent than they were already prevented by P–56, under which they could acquire nothing because their serial numbers had been revoked, and under P–100 under which they could acquire only limited amounts with their lowest (A–10) priority rating, that part of L–208 which absolutely prevented the acquisition of those materials to operate the mines, effectively did that.

It has been suggested by defendant that a further purpose of a limitation order was to prevent the consumption of critical materials already on hand and owned by a nonessential industry in order to "conserve" such critical materials. The question immediately arises in connection with L–208: In what significant way did L–208 *conserve* such critical materials, i. e., the equipment and machinery and supplies of the gold mines? Presumably something is "conserved" for the purpose of putting it to some more important use, otherwise what is the object of "conservation"? A material may be in short supply but if it is not needed by anyone, it seems hardly a proper object of conservation, and if it is kept idle or saved up, it would appear to be merely hoarded rather than conserved. Also, if something is scarce and is urgently needed by others, it cannot be said to be conserved unless the so-called conservation measure makes some effective provision for getting that scarce and needed material into the hands of essential users. The provision may appear in the same measure or in a supplemental measure. This was not done in L–208 and it was this omission which robs the order of the character of a *bona fide* limitation order.

L–208 was labeled a "Limitation Order", and up to a point it followed the pattern of true limitation orders. But a limitation order has a specific purpose: it is issued to conserve critical materials so that those materials may be used by essential war industries. It is not issued to insure that those critical materials will deteriorate through disuse or be preserved for future use by the nonessential owners thereof. L–208 made specific provision for the gold mine operators to preserve their own critical machinery and equipment so that they, i. e., the nonessential owners, would have that equipment and machinery in good condition for use in gold mining when the limitation order was finally lifted.

Paragraph (b) (3) of L–208 provided that no gold mine operator might acquire, consume or use any critical material, facility or equipment *except to the minimum amount necessary to maintain the gold mine's buildings, machinery and equipment in repair and its access and development workings safe and accessible.* Paragraph (c) of the order authorized the Director General for Operations of WPB to assign such preference ratings as might be required to gold mine operators to enable them to obtain the minimum amount of critical materials necessary to maintain their nonessential mines on the basis set forth in subparagraph (b) (3), i. e., to keep their machinery and equipment in repair, *inter alia.*

The above makes it quite clear that the "conservation" brought about by L–208 with respect to the mining machinery and equipment owned by the mine operators was not the usual conservation purpose of a limitation order of WPB, i. e., conservation so that the equipment, machinery and materials owned by a manufacturer of nonessential products might be converted to the manufacture of essential end products either by the owner or by some manufacturer of an essential end product. Any actual conservation intended and brought about by that part of L–208 which prohibited the use of the gold mine owners' equipment and machinery for the mining of gold was for the purpose of conserving that equipment and machinery for future use by the nonessential gold mines in the production of nonessential gold.

In summary, it appears to us that only to the extent that L–208 prohibited the *acquisition of new materials and equip-*

ment was that order either a limitation or an allocation order. The balance of the order, having to do with the prohibition of the consumption and use of materials, equipment and machinery owned by the mines and on hand, in the operation of the gold mines, was not intended to and could not, under the very terms of the order itself, accomplish any of the purposes of allocation or limitation orders. Since that prohibition on use of materials and equipment on hand was neither a limitation nor an allocation order, the destruction of the right to mine and sell gold was not consequential to a limitation or allocation order.

L–208 was aimed, in all its provisions, directly at the beneficial use of the mining properties of the gold mine owners, and the only intention reasonably inferrible from the language of the order itself and the circumstances surrounding its issuance was an intent to temporarily deprive them of that property right. By the issuance of Order L–208 the defendant prohibited the carrying on of otherwise lawful mining operations and thereby placed a definite servitude on plaintiffs' profitable use of their mines which resulted in a temporary taking of that property right. See *Peabody* v. *United States*, 231 U. S. 530; *Matthews* v. *United States*, 87 C. Cls. 662, 720.

We come next to the question whether the War Production Board had the necessary authority to issue an order which would have the effect of depriving plaintiffs of their right to make profitable use of their mining properties. The Government contends that if, as argued by plaintiffs, WPB acted "arbitrarily" in issuing L–208, it acted without authority and the Government is not liable to pay just compensation for property destroyed by the unauthorized act of its agents.

While it is true, in general, as urged by defendant, that the Government is not liable for damages occasioned by the unauthorized acts of its agents, the problem of determining whether or not a particular act was "authorized" is not always a simple one.

If the statute under which the Government agent is acting specifically forbids the particular act complained of, that action is clearly unauthorized and the Government will not

be liable for damages resulting from that action. *Hooe* v. *United States*,[11] *supra*.

If an agent of the Government acts without any statutory authority, that action is unauthorized and the Government will not be liable for damages resulting from that action. In such a case the injured person's remedy would be by injunction against the individual government official acting without authority. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579. In that case the President issued an order directing the Secretary of Commerce to take and operate most of the Nation's steel mills. Although there were in existence at that time two statutes authorizing the President to take both personal and real property under certain conditions, the Supreme Court held, and the Government admitted, that those conditions were not met. Furthermore the Court noted that the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment but that Congress had refused to adopt that method of settling labor disputes when it was considering amendments to the Taft-Hartley Act in 1947. The Court further held that not only was there no statutory authority for the seizure or taking of the steel mills, but also there was no constitutional authority for such a taking in that the President had no such inherent power. In the instant case Congress had by legislative enactment given the President authority to take for title or for use both real or personal property or interests therein, and those statutes did not impose "cumbersome, involved, and time-consuming" conditions referred to by the Supreme Court in connection with the statutes referred to in the *Youngstown* case. On the contrary, the conditions imposed by the wartime statutes were simple, and involved (1) that

[11] In the *Hooe* case a federal statute provided that in renting space for Government use, Government officials might not obligate the Government for the future payment of money in an amount in excess of the appropriation. A Government official rented from plaintiff a part of his building at a rental in the full statutory amount, but occupied additional space in the building for which plaintiff was not paid. Plaintiff sued for the additional rent either on the ground of an implied contract or as just compensation for private property taken for public use. It was held that the Government was not liable on either theory since the officer acted without lawful authority when he did anything which tended to commit the Government to pay more rent than the statutory maximum and that in so doing he was not representing the United States.

the taking be *deemed* by the President or his designee to be necessary for the prosecution of the war and (2) that just compensation be paid the owner of the property interest taken. It is true that the wartime statutes under which the President and WPB operated did not specifically authorize the closing of any business as a means of taking over that business. But the closing amounted to a taking and the President and WPB were authorized to take private property when, *in their opinion*, such taking would be in the interests of national defense. We have here then, merely the use by WPB of an unorthodox and perhaps *unauthorized means* of accomplishing an *authorized end* or result, i. e., a taking. And if a taking is authorized by Congress, it is compensable under the Constitution despite the means used to accomplish it, as we shall discuss more fully hereinafter.

Where the agent's actions are not prohibited by statute and where they are within the general scope of his authority, although under general law they may be tortious, the modern trend is to hold such actions to be the acts of the sovereign. This subject was discussed at some length in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, in which the Court held that the District Court did not have jurisdiction to grant an injunction preventing officials of the War Assets Administration from selling coal to anyone other than the petitioner on the ground that the suit was actually one for specific relief against the Government which had not consented to be so sued. The petition in that case alleged that the War Assets Administration had sold certain surplus coal to the petitioner; that the Administrator for that agency had then refused to deliver the coal to petitioner and had entered into a new contract to sell the coal to others; that the petitioner's contract with the Government was an immediate contract of sale under which title to the coal had passed to the petitioner; that, accordingly, retention of the coal by the Administrator, after demand was a conversion of petitioner's property and the Administrator's actions illegal so that the relief prayed for was not against the Government but against the Administrator individually to enjoin his threatened tortious action. The Supreme Court held that the Administrator had statutory authority to make

decisions concerning the meaning and effect of the contracts he entered into on behalf of the Government, and that such authority included the authority to make incorrect as well as correct decisions, whether of law or of fact; that any action taken pursuant to an incorrect decision was not, *ipso facto*, an unauthorized or illegal act, but might well be the act of the sovereign even where the act involved the wrongful withholding of property belonging to the petitioner, i. e., a conversion. The Supreme Court then held that the action of an officer of the sovereign, "be it holding, taking or otherwise legally affecting the plaintiff's property," could only be regarded so illegal as to permit suit for specific relief against the officer as an individual where that action was clearly outside the officer's statutory powers or where, though within those powers, the powers themselves were constitutionally void. The Supreme Court stated at page 695:

> There is, therefore, nothing in the law of agency which lends support to the contention that an officer's tortious action is *ipso facto* beyond his delegated powers. Nor, we think, is there anything in the doctrine of sovereign immunity which requires us to adopt such a view as regards Government agencies.

The Supreme Court concluded that since the Administrator's tortious actions were taken pursuant to erroneous decisions (of law) which he was authorized to make, he was acting for and as the representative of the Government and not in his individual capacity. The injunction was denied because it would have required specific relief against the Government itself. The Supreme Court suggested that the petitioner's remedy was in the Court of Claims for damages for breach of contract or for just compensation for the taking of the petitioner's coal.

Where a Government agent exercises a statutory power in a manner not provided for in the statute, the courts have held that his action was not "unauthorized" if the result of the action was one contemplated by the statute. In *Hurley* v. *Kincaid*, 285 U. S. 95, petitioner had obtained an injunction in the District Court restraining certain Government officials from proceeding further with the construction of a flood control project then being carried out under the Federal Flood Control Act. It was clear that the continued construc-

tion would necessarily destroy portions of plaintiff's property. The lower court granted the injunction on the ground that the Government officials were acting "illegally" and therefore in their individual capacity in threatening to proceed with the project without first acquiring by formal eminent domain proceedings, as they were specifically required to do by the Flood Control Act, the necessary flowage rights over petitioner's land. The Supreme Court reversed the action of the lower court granting the injunction, on the ground that the acts complained of were the acts of the sovereign and not the individual acts of the officials; that the Flood Control Act authorized the taking of petitioner's land or of an easement therein; that the only "illegality" involved was the failure of the Government officials to compensate petitioner for the land taken and that such a circumstance afforded no basis for an injunction where, as in that case, compensation might be procured by the petitioner in an action at law in the Court of Claims. The Supreme Court held that the Fifth Amendment assured plaintiff of just compensation but that (p. 104, footnote 3) it did not entitle him to be paid the compensation in advance of the taking:

> Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury.

Although the Supreme Court did not characterize as "arbitrary" the action of the Government officials in refusing to institute condemnation proceedings as provided for in the Flood Control Act, it would seem that such action was arbitrary in the same manner that a willful breach of a Government contract by a contracting officer is arbitrary. In neither case, however, are such arbitrary actions "unauthorized" in that they were forbidden by statute or were clearly outside the scope of the powers delegated by statute.

A regulation may be so arbitrary in its application to the particular subject matter and under the circumstances that it actually results in the regulatory body exercising powers not conferred on it by statute. This was the case in *Berwind-*

White Coal-Mining Co. v. *United States*, 9 F. 2d 429. Plaintiffs therein were owners of coal mines and private coal cars. They sought to enjoin the enforcement of an order of the Interstate Commerce Commission relating to the distribution among bituminous coal mines of coal cars during times of car shortages. Enforcement of the order would have prevented the plaintiffs from using their private coal cars. The court observed that the rights of private car use and ownership are recognized by Congress, and that Congress had not delegated to the Commission any power over private car owners or over the soft coal industry. The court held that in issuing the order in question the Commission, through what purported to be an exercise of its regulatory power over carriers, actually abolished the use of private coal cars to a substantial extent and thus deprived the private car owners of the full enjoyment of their rights to operate their mines and supply themselves with coal from other mines. The order of the Commission was held to be unjust and unreasonable and to amount to an unlawfully arbitrary exercise of power which had the effect of regulating that which the Commission had no power to regulate.

It would seem to follow from the above, that the "arbitrary" action of a Government official is not necessarily "unauthorized" and "illegal" if the action represents an exercise of powers delegated to the official by the sovereign.

In the instant case the record establishes that as an order allocating critical materials away from a nonessential user, L–208 was arbitrary and unreasonable. The amount of such materials which were thereby prevented from being delivered to the gold mines was not significantly greater than was already prohibited by existing priority orders, and a simple revocation of those orders insofar as they applied to the gold mines, would have cut off all such deliveries. L–208 did not require the owners of the critical materials to hold the materials they had on hand for the use of the Government or some essential user to be designated by the Government, nor did it require that the owners deliver the materials to such essential users, but rather left them free to dispose of the critical materials in any way or to anyone they pleased. The only use which the gold mine owners were forbidden to make of the critical materials, equipment and supplies which they

owned and had on hand, was in the operation of their gold mining properties. Despite its preamble and the authority cited for its issuance, the language of the order itself and the circumstances surrounding its issuance indicate that neither its purpose nor its effect was to conserve or allocate critical materials, equipment and facilities needed for defense, but was rather to deprive the gold mine owners of their right to make profitable use of their gold mines. Viewed as a taking of that property right, the order was equally arbitrary since the record discloses that those officials responsible for its promulgation either knew or should have known that the only reason for the order, i. e., relieving the manpower shortage in the nonferrous metal mines, would not be accomplished thereby. However, we think that the only "illegality" involved in WPB's arbitrary action was its failure to pay just compensation for the property right of which plaintiffs were deprived, because we believe that WPB had the necessary statutory authority to take this property. By October 1942, Congress had conferred upon the President authority to requisition, place mandatory orders for, or take for title or for use, any real or personal property or interests therein which he deemed necessary to successfully prosecute the war. These statutes left the determination of war necessity to the absolute discretion of the President, but they required the payment of just compensation for any property taken or used. Congress also authorized the President to take possession of factories or other business establishments and to operate them if it was deemed by him to be in the interests of the national defense to do so. All these powers were delegated to the War Production Board except the President's power to condemn real property. Although none of the statutes contained specific language authorizing the requisition of a business in order to keep that business from operating at all, if the Government felt that the idleness of a business would be of benefit to the defense effort but did not believe the business sufficiently evil or dangerous in wartime to justify its closing,[12] we suppose its powers of requisitioning were broad enough to permit such action, subject, however, to the obligation to pay just compensation

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[12] *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146.

to the owner. Neither party has suggested that the Government lacked such power.

Defendant also urges that if, as plaintiffs contend, the only purpose of the order was to divert manpower from the gold mines to the nonferrous metal mines, then the action taken by WPB in issuing the order was unauthorized because the War Production Board had no authority to issue orders affecting manpower.

From our study of the statutes, executive orders and regulations relating to WPB, we think that WPB was authorized to take into consideration the manpower implications of any order it might issue. The relationships between manpower and the consumption of scarce materials, and between manpower and increased production of vital end products, are of too obvious significance in the whole war production situation to suppose that they were not the legitimate concern of the War Production Board. The establishment of the Labor Division early in the life of the Office of Production Management and the presence on the War Production Board itself and on the War Manpower Commission of the Director of the Labor Division, are ample evidence of this concern. While Congress never enacted legislation which gave the Government the power to order a civilian worker to leave one job and go to another, or to order an employer to discharge an emplovee in order that the employee might be hired by someone else, it was no objection to an order of the Government, otherwise valid, that one of the results of its enforcement would be a better utilization of available manpower in the interests of the national defense. That the main objective of the gold limitation order may have been to bring about a shift in the employment of underground gold miners from the gold mines to the nonferrous metal mines is, we think, immaterial on the issue of the order's validity, since the order did not in any of its provisions attempt to exercise authority with respect to manpower and provided no possible basis for any attempted enforcement of the latent manpower purpose.

The only circumstance under which the Government may escape the obligation to pay for property which is destroyed or taken by the authorized action of its agents, is where, in time of war, that property is inherently dangerous, or is be-

ing used in such a manner as to clearly endanger the public safety. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *United States* v. *Caltex*, 344 U. S. 149. Gold mines which did not possess a serial number under WPB Order P–56 because they did not produce significant amounts of critical metals in addition to gold, were determined by WPB to be "nonessential," but we know of no precedent which would justify our holding that a nonessential industry or business was, *ipso facto*, one endangering the public safety in time of war. That such an industry could be regulated, and strictly regulated in wartime, is unquestioned, and resulting losses are not compensable if the action taken is truly regulatory in nature. But the power to regulate a nonessential but nondangerous industry in wartime is not the power to destroy, and limitation is not the equivalent of confiscation. *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307, 331. As the Supreme Court said in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

That the taking of the gold mine owners' right to make use of their mining properties was not in fact necessary to the successful prosecution of the war, and that the officials responsible for the issuance of L–208 either knew or should have known this fact, does not, we think, relieve the Government of its obligation to pay just compensation for the destruction of this right. The statutes and executive orders granting to the Government authority to take property which would aid in the prosecution of the war left to the discretion of those officials to whom the authority was delegated the determination of "war necessity." No tests or procedures were prescribed in connection with the making of that determination and no criteria furnished. That the determination was without foundation would be no defense in a prosecution by the Government of the owner for refusal to give up his property on the Government's demand for it accompanied by a tender of just compensation. Similarly, we think the same lack of wisdom in determining that the Government actually needed certain property which it took

or destroyed would be no defense to the Government in a suit by the owner for just compensation.

That the Government did not make any physical use of the gold mines does not deprive its action of its character of a taking. The Supreme Court has held that *destruction* of private property for a *public purpose* is the equivalent of a *taking* of private property for a *public use*. *United States* v. *Welch*, 217 U. S. 333; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1.

In concluding that L–208 amounted to a temporary taking of plaintiffs' profitable use of their mining properties for which just compensation should be paid, we have had the following considerations in mind. If L–208 had merely denied plaintiffs the right to acquire any materials, facilities or equipment needed to operate a gold mine and, as a result thereof, plaintiffs had ultimately found it necessary to cease operations because of lack of needed materials, new or repair parts, their losses would have been consequential to the exercise by WPB of its lawful regulatory power of allocation in connection with scarce materials and therefore would not have amounted to a taking. If WPB had had the power to allocate civilian manpower from and to industries, and, as a result of its allocation, plaintiffs' mines had been forced to close down, there would similarly have been no taking. If L–208 had not only denied the gold mines the right to acquire materials, equipment and facilities but had ordered the mine owners to cease using what they had on hand, to hold them for the possible use of the Government, and not to dispose of them to anyone but the Government or its designees, such an order would have amounted to a taking by the Government of those materials, facilities and equipment, whether the Government or its designees ever actually took physical possession of them or not, and the loss of the gold mine owners' ability to carry on their business would have been consequential to the taking of the materials, equipment and facilities and would not have been compensable under the Fifth Amendment.

L–208 did not do any of the above things except to deny the gold mine owners and operators the right to acquire additional materials, facilities and equipment. However, the

loss of plaintiffs' right to make profitable use of their mining properties was not, in many cases, the result of that denial. The record establishes that a number of the plaintiffs herein could have operated for a time at least with what they had on hand and without acquiring any additional materials, facilities and equipment which were under Government restriction. How long they could have operated is of importance on the question of damages rather than of liability. But L–208 did not stop with a mere denial of the right to acquire materials, equipment and facilities. The real substance and intent of the order was embodied in the prohibition directed at the continued operation of the gold mines. The so-called limitation on the gold mine owners' use of the equipment and supplies and facilities which they owned was not intended to make those items available to the Government or to the war effort but was expressly included in the order to insure that they would not be used in the mining of gold, and was part and parcel of the express order to cease doing business.

We conclude that L–208 by prohibiting the carrying on of otherwise lawful mining operations placed a servitude on plaintiffs' profitable or beneficial use of their mines and thus amounted to a temporary taking of that property right in the case of those mine owners and operators who were forced to close their mines by virtue of their compliance with those provisions of L–208 which prohibited them from using their materials, facilities and equipment to mine gold and which ordered them to close down their mines. Such mine owners and operators are entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution.

Homestake Mining Company

The Homestake Mining Company is a California corporation. Homestake is and was in 1942 the owner of patented mining claims covering more than 5,000 acres of mining properties containing gold-bearing ores of great value located in the Black Hills area of South Dakota near the city of Lead. For some 65 years prior to October 8, 1942, Homestake had been engaged in the business of mining, proc-

essing and selling gold, and in 1942 it was the largest gold producer in the United States.

The mine was located in an isolated area and was therefore required to observe a policy of self sufficiency. From its early days it maintained larger inventories of supplies and equipment than was customary in most mining enterprises. It owned extensive timberlands which provided lumber needed for the mine. It had developed a coal mine, and it produced all of its own electric power. Prior to the issuance of L–208, Homestake had completed two deep mine shafts and had equipped them with modern hoists. It had also erected a new lumber mill. Its steam power plant was relatively new and its ore processing mills were in excellent operating condition.

The mine maintained its own foundry and machine shops to fabricate and repair a variety of mining and processing equipment. Homestake's inventory of supplies and materials, which it could not make for itself, was sufficient in October 1942, to permit the company to operate its mine during the entire period of the closure. Dynamite, which the company would have had to obtain within a few months, was readily available without restriction.

The working and living conditions at Homestake in 1942 were superior to those of any of the nonferrous metal mines to which the Government hoped to transfer the Homestake miners. Homestake had lost some of its manpower in October 1942, but had it been permitted to continue operations it could have maintained normal production levels by using mining techniques requiring less labor and by increasing its workday from seven to eight hours.

In October 1942, the Homestake mine constituted the largest single source of potential nonferrous metal mining labor, with a total payroll of approximately 1,800 workers of all kinds. Following the closing order, Homestake released 473 men of whom 183 were classified as miners, 39 of whom had had less than six months' experience. The nearest nonferrous metal mines were about 500 miles from the Homestake mine—Anaconda copper mine at Butte, Montana, and the Climax molybdenum mine at Climax, Colorado. Representatives of the United States Employment Service attempted to induce released Homestake workers to accept

employment at those nonferrous metal mines. Fifty-one Homestake employees accepted employment at Climax, 41 staying less than 6 months and only 6 remaining as long as a year. One hundred seventy-eight Homestake employees went to Anaconda and more than 100 left before the end of a year. Between October 8, 1942 and November 12, 1942, the United States Employment Service placed 207 Homestake employees of all kinds in other mining districts. A number of these employees, however, returned to Lead shortly after November 12, 1942.

Prior to October 8, 1942, employment at Homestake had not suffered as had employment in the nonferrous mines and, although some employees had left the mines, most of the old employees stayed on. The reasons for the greater stability of employment in this mine, which constituted the largest single source of experienced miners, were probably the good living conditions, the free medical and hospital service, group insurance, pensions, recreational and other facilities provided for Homestake employees by the company. These conditions were unusual in the mining industry and had no counterpart in the nonferrous metal mines.

After the issuance of L–208, Homestake was permitted to hoist and process ore already broken until the latter part of May 1943. After June 1, 1943, the mine was closed for all except maintenance purposes until July 1, 1945, when the mine was reopened.

Without acquiring new machinery, parts, supplies or other materials, and with a greatly reduced labor force, Homestake could have operated profitably during the entire period of closure.

Although Homestake had a large inventory of supplies and materials, and large amounts of machinery and equipment in good condition, neither WPB nor any other Government agency sought to requisition, purchase or compel the transfer thereof to the Government or to a war industry.

The properties of Homestake were useful for no other purpose than the production of gold and were adaptable to no other use than the conduct of a gold mining business. The closing of the mine had far-reaching and drastic repercussions in the city of Lead and in the surrounding communities. The population of Lead declined sharply. More than 750

homes and apartments were left vacant and 36 business establishments which had served the communities were closed. About ten percent of the State's annual revenue derived from Homestake was lost to the State.

We conclude that L–208 amounted to a temporary taking of the profitable use of the Homestake mining properties for which Homestake is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

Idaho Maryland Mines Corporation

Idaho Maryland Mines Corporation, a Nevada Corporation, owned in fee certain gold mining properties known as the Idaho Maryland Mines, consisting of approximately 8,000 acres of gold-bearing lands situated in the Grass Valley Mining District in the County of Nevada, State of California, together with all the necessary mining plant and equipment located on those lands.

On October 8, 1942, Idaho Maryland had extensive equipment and facilities for the operation of its mining enterprise, including machine shops, electric shops, welding shops, blacksmith shop, carpenter shop, cyanidation plant and smelting plant, a sawmill and other mills, all the usual automotive and other equipment. It also had on hand a large inventory of supplies and materials necessary for operating the mine, including pipe and rail, steel, drill steel, tires, tubes, repair parts for milling machinery, valves, pipe fittings, mercury, etc. The mine was a fully developed one comprising extended drifts, cross-cuts raises and winzes, fully equipped with modern mechanical equipment. The mine had its own timber supply and its own sawmill. Its electric power was furnished by the Pacific Gas and Electric Company and there was no shortage of electric power at the mine nor was it curtailed during the shutdown period.

Prior to the issuance of L–208, the mine had lost considerable manpower. Its payroll was reduced from 800 employees to 212 employees[13] between December 1941 and

[13] The average age of the 212 employees was 47.7 years. Forty-three of the underground workers were 50 years of age or over.

October 8, 1942. Alterations in mining methods enabled the mine to continue a profitable operation with the smaller force of workers.

With a greatly reduced labor force and without acquiring any critical material, supplies, equipment or facilities subject to Government control, Idaho Maryland could have operated its mining properties on a profitable basis during the entire period of L–208.

The properties of Idaho Maryland were useful for no other purpose than the production of gold. Its various machine shops were not capable of being utilized in the mass production of any item.

The closing of the mine caused considerable community dislocation and individual hardship in Grass Valley, California, which was wholly dependent upon the operation of the gold mine for its continued prosperity. Since 1848, the principal occupation of the inhabitants of the communities of Grass Valley and Nevada City had been gold mining.

On May 3, 1944, Idaho Maryland was permitted by WPB to resume operations on a limited basis to be carried out with a force not to exceed 200 men who were required to be over 40 years of age and not employed by other industries. Production was limited to 7,800 tons of ore per month, but because of the length of time it took to prepare for production and to open up the necessary ground workings after extensive damage caused by the shutdown, Idaho Maryland was not able to produce 7,800 tons a month in 1944. Permission to hire additional labor was denied by WPB on November 24, 1944.

The closing of Idaho Maryland was brought about by reason of compliance with the provisions of L–208 which ordered that the mine be closed and that the owners not use materials, supplies, machinery and facilities on hand to operate the mine. We conclude that L–208 amounted to a temporary taking of the profitable use of the Idaho Maryland mining properties for which Idaho Maryland is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

Central Eureka Mining Company

Central Eureka Mining Company, a California corporation, owned approximately 641 acres of gold-bearing land located at Sutter Creek, Amador County, California. On October 8, 1942, the mine had been producing gold for about 80 years. It then employed 117 men of whom 73 were classified as underground workers. The average age of these employees was 41.74 years. Most of them were married and had children and a number owned their own homes in the vicinity of the mine. Following the closing of the mine, the company was permitted to retain 42 men for maintenance purposes.

Central Eureka's equipment included machine shops, electrical shops, blacksmith shop, carpenter shop, an assay office, a complete mill from primary crush to cyanidation, and its own source of timber. It had all the automotive and other necessary equipment required to carry on its mining operations and the servicing of the underground workings. On October 8, 1942, the company was operating profitably and could have continued to so operate throughout the entire period of the L–208 closure without acquiring any critical materials, machinery or equipment and with a reduced force of labor. The properties of the company were useful for no other purpose than the production of gold, and were adaptable to no other use than the conduct of a gold mining business.

Following the issuance of L–208, Central Eureka attempted to operate a copper mining project at Battle Mountain, Nevada, but abandoned the work in the summer of 1943. Central Eureka leased some mining equipment to individuals engaged in tungsten mining. It does not appear that any of the company's equipment or materials were ever requisitioned by the Government or acquired on mandatory orders by the Government's designees.

The closing of Central Eureka mine was brought about by compliance with the provisions of L–208 which ordered the mine to close and to cease using its materials, supplies, machinery and equipment to operate the mine. We conclude that L–208 amounted to a temporary taking of the profitable use of the mining properties of Central Eureka for which Central Eureka is entitled to be paid just compensation with-

in the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

Oro Fino Consolidated Mines, Inc.

On October 8, 1942, certain gold mining properties located in Ophir Mining District, Placer County, California, were operated by J. C. KempvanEe under lease, dated September 5, 1935, from Hazel P. Gridley. Subsequent to receipt of L–208 from WPB, the lessee was permitted by WPB to continue the removal and milling of broken ore until January 15, 1943. Thereafter, operations at the mine were discontinued and the mine closed down.

As of October 8, 1942, there were approximately 11 employees in the mine as contrasted with about 40 in normal times. The mine was equipped with the necessary machinery and equipment on October 8, 1942, but how long the mine could have continued in operation without acquiring additional materials, supplies or equipment, is not established by the record. The mine could be used for no other purpose than the production of gold, and its closing in early 1943 was due to compliance with those provisions in L–208 which ordered the mine to be closed and prohibited the operator from using materials, equipment and facilities on hand to operate the mine.

Defendant raises a special defense in this case. Defendant urges that plaintiff, Oro Fino Consolidated Mines, Inc., is not the real party in interest and that the claim, if any, with respect to the closing of the mine, resides in J. C. KempvanEe because the assignment of the lease by KempvanEe to the corporation did not include this claim. Plaintiff argues that the language of the assignment is sufficiently broad to cover the claim of KempvanEe against the United States.

The assignment, dated February 2, 1950, states that the lessee, KempvanEe

> "does hereby sell, assign, transfer and grant unto ORO FINO CONSOLIDATED MINES, INC., a corporation, all right, title and interest in and to that certain mining agreement and the real property therein described and all rights arising by virtue of said agreement, dated

> September 5, 1935, by and between HAZEL P. GRIDLEY, a widow, designated as lessor and J. C. KEMPVANEE, designated as lessee, * * *."

At the time of the alleged taking, KempvanEe was the owner of the lease covering the mining properties and the damage, if any, was to KempvanEe. It appears that in 1948 the financial backer of KempvanEe died and he turned for financial assistance to another individual who suggested that the mining operation be incorporated. As a result, the plaintiff corporation was organized on January 4, 1950, and on February 2, 1950, KempvanEe assigned his rights in the lease to the corporation.

We think it immaterial whether or not the somewhat ambiguous assignment conveyed to plaintiff the original lessee's right to receive just compensation or not since, if it did, the anti-assignment statute, 31 U. S. C. 203, bars plaintiff's recovery. *United States* v. *Shannon*, 342 U. S. 288; *Potts* v. *United States*, 130 C. Cls. 88. In the *Shannon* case, the Shannons had purchased from the Boshamers a tract of land part of which had previously been leased by the Boshamers to the United States. Buildings on the land had been damaged by soldiers of the United States, and the contract of sale to the Shannons provided that the sellers, the Boshamers, released to the purchasers any claim, reparation, or other cause of action against the United States Government for any damage caused the property. The Boshamers were themselves unwilling to institute a claim against the United States. The Supreme Court held that the assignment of the claim fell clearly within the ban of the Anti-Assignment Act as a voluntary assignment, as distinguished from an assignment by operation of law. In the *Potts* case, *supra*, Potts held an oil and gas lease on land inundated by Lake Texoma with the building of Denison Dam. Drilling operations by Potts were damaged by the rising water in 1945. In 1950 Potts assigned the lease to Godfrey and O'Hearn. All three persons sued the United States for a taking. The Court of Claims denied the claims of Godfrey and O'Hearn, holding that whatever claim Potts may have had against the Government, he could not validly assign it to anyone.

If the assignment in evidence in this case did not convey to this plaintiff the claim of KempvanEe against the United

States, plaintiff is obviously not the real party in interest. If the assignment did convey the claim, recovery is barred by the anti-assignment statute. Accordingly, the petition of Oro Fino Consolidated Mines, Inc., is dismissed.

Alaska-Pacific Consolidated Mining Company

Alaska-Pacific Consolidated Mining Company is a State of Washington corporation owning and operating mining properties located in the Willow Creek (Wasilla) Mining District in the Territory of Alaska. The properties consisted of an underground or lode mine with about 5 miles of underground workings and with two entries. The mine is in an isolated area and except for timber, all supplies, including foodstuffs, were imported from the States by ship, rail and truck. Because of its isolation, the mine customarily carried a substantial inventory of parts, equipment and supplies and at the time the mine was closed by virtue of L–208, Alaska-Pacific had an inventory of parts, equipment and supplies sufficient to permit continued operations for at least one and one-half years. A company village was maintained at the mine, consisting of the mine and mill buildings, various warehouses, shops, dormitories, a school and an office building, a store, messhall and various recreational facilities.

The normal crew at the mine was about 125 men. On October 8, 1942, the mine had a crew of 101 men. The only other mines in Alaska at that time, aside from gold mines, were two coal mines. Only three of Alaska-Pacific's employees had any coal mining experience. There appears to have been an aversion, at least on the part of Alaskan gold miners, to working in coal mines, partly because of the hazards involved and partly because the equipment and machinery were different. Although the record does not establish the exact number of gold miners who transferred to the two coal mines, there were at least four and possibly a few more.

Alaska-Pacific was able to produce a small amount of concentrate essential to the smelting of copper and a certain amount of tungsten. WPB was inclined to permit the mine to continue operating for the production of tungsten and, in response to a series of appeals, the mine was permitted to continue operations until August 8, 1943, on which date WPB

required the mine to close down. Subsequent to the closure of the mine, Alaska-Pacific sold most of the perishable items in its inventory to such agencies as the Alaska Road Commission and the Alaska Railroad, and stored at the mine the other items.

The closing of the Alaska-Pacific mine was brought about by reason of compliance with the provisions of L–208 which ordered that the mine be closed and that the owners not use the materials, supplies, equipment and facilities on hand to operate the mine. We conclude that L–208 amounted to a temporary taking of the right of Alaska-Pacific to make profitable use of its mining properties, for which it is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

Bald Mountain Mining Company

Bald Mountain Mining Company is a South Dakota corporation owning certain gold-bearing lands in Lawrence County, South Dakota. On October 8, 1942, Bald Mountain was engaged in mining gold on those properties. Pursuant to appeals to WPB, Bald Mountain was permitted to continue gold mining operations until August 8, 1943.

On October 8, 1942, Bald Mountain employed approximately 150 men. How many of these men were hardrock miners or where they went after the mine closed in August 1943, the record does not disclose.

It appears that the mine closed in August 1943, because of L–208. The mine was reopened shortly after revocation of L–208 in the summer of 1945. The record does not disclose the nature or size of the mine's inventory of mining equipment, materials and supplies on hand when the mine finally closed, or how long the mine could have continued to operate without acquiring new materials, etc.

We conclude that L–208 amounted to a temporary taking of the right of Bald Mountain to make profitable use of its mining properties for which it is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

In that connection, however, consideration should be given to the probable length of time Bald Mountain could have operated its mine without acquiring additional materials, facilities or equipment for which priorities were required during the period L–208 was in effect and while the mine was closed.

Alabama-California Gold Mines Company

Alabama-California Gold Mines Company, a State of Washington corporation, owned certain gold-bearing lands located in the State of California. On August 8, 1942, Alabama-California closed its gold mine and ceased all operations because of its inability to secure sufficient manpower or materials. Inasmuch as the mine of Alabama-California was not closed by virtue of compliance with the provisions of L–208, there has been no taking of its right to make profitable use of its mining properties and the petition will therefore be dismissed.

Consolidated Chollar Gould & Savage Mining Company

Consolidated Chollar Gould & Savage Mining Company, a California corporation, owned certain gold-bearing lands in Story County, Nevada. Its method of operation on October 8, 1942, was an open-pit one. It had explored the location and size of the veins of gold and silver through an underground shaft, but finding the cost of mining through that shaft to be excessive, it had stripped off the rock above the veins containing precious metal, and was recovering ore by use of power shovels. Some time prior to the issuance of L–208 officials of the mine had determined that because of the shortage of rubber essential to the trucking of waste from the stripping operations, the development of new ore would no longer be practicable. The mine's management had also been making preparations to conduct operations which would consist of rehandling previously mined and processed ore, and machinery was installed for this purpose. On October 30, 1942, the company requested of WPB permission to conduct operations which would consist of the rehandling of previously mined and processed ore (tailings). It represented that such operations would require a crew

of only six men who would be available from the local community and were of such an advanced age that they were precluded from employment in copper mines or defense plants. It also stated that the planned operations would require no steel consumption and that the supplies on hand and available from mines already closed down would enable the operations to be carried to completion. WPB permitted such operations to be carried on first to February 26, 1943, and then to June 30, 1943.

The above-described rehandling operations proved to be financially impractical and on April 28, 1943, Consolidated Chollar requested permission of WPB to resume its normal open-pit operations. It stated that it expected equipment to be available as a result of the completion of defense projects in the area, and that it would require no more than 20 men from the locality whose average age was over 50 years. Consolidated stated that steel consumption would be low and that it had the necessary steel on hand to operate for at least six months. Consolidated had been granted a serial number for use in its permitted rehandling operations, but on June 19, 1943, WPB refused to transfer the application of that number to the resumption of open-pit operations. Consolidated then advised WPB that there were 15 men not suitable for work in war industries available in the locality and that there were sufficient operating supplies and fabricated repair parts on hand, with the exception of sodium cyanide, for the conduct of open-pit operations for six months. It stated that if such operations were authorized, priority assistance for supplies and equipment would not be required for six months except in the event of unexpected equipment breakdown.

On August 28, 1943, WPB issued Serial No. 36–26–T under Preference Rating Order P–56 which had the result of removing this plaintiff from the restrictions of L–208, and permitted the mine to conduct open-pit operations. It was also authorized by the serial number to the use of a priority rating for obtaining maintenance, repair and operating supplies. The rating was extended through the first and second quarters of 1944.

In December 1943, Consolidated Chollar advised WPB that during the previous ninety days' operations under its

serial number it had been unable to bring its operations up to capacity because of the inefficiency of available labor and the lack of adequate equipment in the form of power shovels and trucks but that it hoped this condition would improve in time. It stated that with 23 men it had been producing an average of 320 tons per day, compared with 400 tons per day in 1942, with approximately the same number of men.

The record does not disclose how long Consolidated Chollar continued open-pit operations under its serial number or its reasons for discontinuing its operations if, in fact, it did discontinue them.

The record discloses that after the war Consolidated found it necessary to first remove overburden from above the ore vein because no ore was clear for breaking. The reason for this was that during the effective period of L–208, Consolidated Chollar had been able to process all the ore which it had stripped of overburden prior to the close of 1942.

From the above, it appears that open-pit mining operations of Consolidated, in which it was engaged in October 1942, were not discontinued as a result of the issuance of L–208 except for the period from sometime in November 1942 to August 28, 1943, and during that period Consolidated was permitted to carry on the rehandling of previously mined and processed ore in accordance with plans it had made early in 1942. We conclude that while Consolidated's operations were curtailed by WPB, they were never required to close down as provided in L–208, nor were they ever made to comply with that part of the order which prohibited the use of materials, equipment and facilities owned by them for any purpose having to do with the operation of the mine. The right of Consolidated Chollar to make profitable use of its mining properties was regulated but it was not taken or destroyed for any period and this plaintiff is accordingly not entitled to recover. The petition of Consolidated Chollar Gould & Savage Mining Company will therefore be dismissed.

Ermont Mines, Inc.

Ermont Mines, Inc., an Oregon corporation, owned a compact block and contiguous quartz lode mining claim, desig-

nated by numbers 1 through 34 inclusive, and located in the County of Beaverhead, State of Montana.

At the time of the issuance of L–208 in October 1942, Ermont was working claims numbered 1 (with drifts on claims numbered 2, 3 and 4), 2 (working over into claim number 6), 7, 9, 19, 20, 23, 24, 28 and 32. After receiving the WPB order to close down pursuant to L–208, Ermont continued taking out ore already mined, ran it through the mill and refinery, and shipped it to the mint. Sometime in November, the mine and buildings were closed and a watchman was employed to look after the property.

An October 8, 1942, Ermont employed a crew of men adequate to work the above claims. The men had homes in the vicinity of the mine. The mine had sufficient supplies, machinery and equipment in good working order which would have enabled the mine to continue operations for at least a year from October 8, 1942, if the mine had not been closed down pursuant to L–208. Mining operations were resumed at Ermont at sometime subsequent to the revocation of L–208.

We conclude that L–208 amounted to a temporary taking (for at least one year) of the right of Ermont to make profitable use of its mining properties for which Ermont Mines, Inc., is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

In summary, the following plaintiffs have established their right to recover just compensation for a temporary taking of their right to make profitable use of their gold mining properties and their cases will be remanded to a commissioner of the court for trial on the question of damages: Homestake Mining Company; Idaho Maryland Mines Corporation; Central Eureka Mining Company; Alaska-Pacific Consolidated Mining Company; Bald Mountain Mining Company, and Ermont Mines, Inc. In view of our decision in these cases it is unnecessary to discuss the various contentions relative to the special jurisdictional act of July 14, 1952, 66 Stat. 605.

The petitions of Alabama-California Gold Mines Co., and Consolidated Chollar Gould & Savage Mining Company will

be dismissed, inasmuch as it does not appear that they were closed down as a result of compliance with the provisions of L–208, which circumstance also removes them from any possible coverage by the special jurisdictional act.

The petition of Oro Fino Consolidated Mines, Inc., will be dismissed for the reasons set forth hereinbefore. It is so ordered.

MADDEN, *Judge*, and WHITAKER, *Judge*, concur.

JONES, *Chief Judge*, dissenting:

I concede that that part of order L–208 which directed certain mines to be closed down was invalid. The statute did not authorize such action. Paragraph (b) (1) of that order undertook to do that and was therefore issued without authority. However, paragraphs (b) (2) and (3) of the same order, which forbade the use of critical materials in nonessential industry, were valid exercises of the President's power under the allocation statute and they would have produced the closing down of the mines whether or not paragraph (b) (1) had been included.[1] I would hold that paragraph (b) (1) of order L–208 should therefore be construed as mere surplusage and not an exercise of the President's powers of eminent domain. Since the valid portions of the order would have produced the closing of the mines, the added part of the order becomes immaterial.

During the war limitation orders were issued to curtail or prohibit the use of critical materials in the manufacture of nonessential products. L–208 (b) in its second and third paragraphs did just that. The majority concedes that such mines as did not have critical materials on hand are not entitled to recover for the reason that the gold mining process did consume critical materials and that regulations (other than L–208) depriving the operators of the effective right to acquire such materials were valid under the statute.

It follows that L–208, in so far as it prohibited the acquisition of critical materials, was valid. In so far as this order or other priority or allocation orders, either working together or separately, forbade the use of critical materials on hand for nonessential purposes, they were also valid wartime regulations. *St. Regis Paper Co.* v. *United States*, 110

[1] The full text of L–208 is set out in finding 43.

C. Cls. 271; cert. den., 335 U. S. 815. I do not think it matters whether the acquisition or use of critical materials was prohibited by L–208 or by it in conjunction with other priority or allocation orders.

The majority concludes that those operators who had critical materials on hand are entitled to recover for the time that these materials would have allowed them to continue operation. In this respect the court seems to rely mostly on its conclusion that in so far as L–208 prohibited the use of critical materials on hand, it was arbitrary. The court bases this conclusion in turn primarily on the fact that the Government took no affirmative steps to allocate the materials "away from" the gold mine operators into more essential uses.

We do not think this was necessary under the circumstances. If indeed these materials were critical, then it is natural to expect that, under the operation of supply and demand, such materials would find their way into essential uses. In fact it would have been wholly impracticable in a great national emergency for any agency of government to allocate and assign every bolt, nut, and piece of critical materials. Thus, for example, even those who were engaged in essential wartime industry were often merely given priority orders which were little more than hunting licenses and these industries had the task of locating and securing the critical materials. The fact that our nation, unprepared though it was, was able to produce wartime materials on a vast scale is a magnificent tribute to our free economy.

It was reasonable to suppose that the gold mine operators would attempt to reduce their capital investment in materials which they had no authority to use. This did in fact happen in the case of the Central Eureka Mining Company which leased some of its equipment to persons engaged in tungsten mining. Thus, while it may be true that there were other motives and purposes in issuing L–208 than the allocation of critical materials, I do not think that in so far as L–208 was intended to allocate critical materials it was arbitrary. There can be no question that some strategic materials could be expected to be saved by the dual prohibition of forbidding the gold mines to acquire new strategic

materials and preventing the use of the materials and equipment they had on hand.

It cannot be said that L–208 and concurrent orders in their prohibition of the use of strategic materials on hand had no reasonable relation to the execution of the lawful purpose of allocating strategic materials. *Jones* v. *City of Portland*, 245 U. S. 217, 224. That this may have been done more effectively by other means does not matter.

The President had neither the constitutional power nor the statutory authority to close the mines directly. It is probable that as a legal matter the enforcement of that part of the order which directed the closing of the mines could have been enjoined. However, in wartime that is not a very practical remedy because it puts any individual or company in the position of hindering the war effort. In any event the Supreme Court has ruled that the defendant cannot be held for damages flowing from an unauthorized act of its officials. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380, 384. Besides, if that portion had been enjoined, the valid portions of the order, as well as concurrent orders freezing the uses of critical materials, would have remained in effect. These would have compelled the closing of the mines, and the injunction would have been useless.

There is no doubt that plaintiffs were damaged by the necessity of closing the mines. War produces many hardships. It entails many sacrifices. When ceilings are placed on the prices of the products of farm and factory, when wages are frozen and when young men are taken and sent to face hardships and even death on distant battlefields at a small rate of pay in the fixing of which they have had no part, when prices generally are fixed, when all the interests of the nation are fused in the common purpose—losses are inevitable. No nation could justify such action in normal times. It would be next to impossible to measure and pay all the losses involved in an all-out war.

If the Congress should see fit to acknowledge liability to these owners on the ground that their losses were unusual, the court should willingly undertake to determine the amount, but unless this is done I do not think the court should select these losses to be compensated.

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LARAMORE, *Judge*, dissenting:

The majority opinion points out that L–208 was not an allocation order, as it purported to be, but rather was clearly an order closing gold mines deemed nonessential to the war effort; *i. e.*, those mines whose gold production in dollar value exceeded 30 percent of their total production.

There was no authority vested in the President to directly close a business. The President could regulate the gold mines, allocate materials away from them, or requisition their materials, or even the business itself, if he determined their need essential for defense, and that such need was immediate and would not admit delay or resort to any other source of supply, and all other means of obtaining the use of such property for defense had been exhausted. See Act of October 16, 1941, 55 Stat. 742. Instead of determining that these gold mines were needed for defense, the President determined that they were nonessential and that the national defense would be better served by their closing.

The majority considers the closing under such circumstances to be a taking of plaintiffs' right to do business and compensable under the Fifth Amendment. I believe that the President lacked the constitutional power and statutory authority to close these mines and, therefore, the unauthorized closing could and should have been enjoined. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

Inasmuch as the President lacked authority to close these mines, and such closing has not been ratified by Congress, the unauthorized closing is not compensable under the Fifth Amendment. *Hooe* v. *United States*, 218 U. S. 322; *United States* v. *North American Transportation & Trading Company*, 253 U. S. 330; *United States* v. *Goltra*, 312 U. S. 203.

FINDINGS OF FACT

The court, having considered the evidence, the briefs and argument of counsel, and the report of Commissioner William E. Day, makes the following findings of fact:

1. On January 7, 1941, the President of the United States established the Office of Production Management, hereinafter referred to as OPM, and delegated to it the powers and duties described in Executive Order 8629 (6 Fed. Reg. 191) and Executive Order 8942.[1] On August 28, 1941, the President by Executive Order 8875 established the Supply Priorities and Allocations Board, hereinafter referred to as SPAB, and directed it to determine general policies for OPM.

2. By Executive Orders issued January 16 and January 24, 1942,[2] the President established the War Production Board, hereinafter referred to as WPB, and vested in the Chairman of that Board, acting with the advice and assistance of the members of the Board, the functions and powers formerly vested in OPM and SPAB. The Chairman of WPB was authorized by the Executive Order of January 16, 1942, to exercise the powers, authority and discretion conferred upon him through such officials or agencies as he might determine.

3. The function of WPB and its predecessor agencies was to exercise general direction over the war procurement and production program, to regulate the production and supply of materials and equipment necessary for the national defense, and after the declaration of war for the prosecution thereof, and to determine when and in what manner priorities should be accorded to deliveries of such material and equipment. These agencies fulfilled this function by the issuance of various orders, the most common of which were designated as "P" orders (priorities), "M" orders (materials), and "L" orders (limitation).

The "P" orders were generally addressed to buyers of materials and authorized them to attach to their purchase orders a letter or symbol entitling them to preference in

[1] In Executive Order 8629, the President delegated his priorities power under section 2 (a) of the Act of June 28, 1940, 54 Stat. 676, and his power of requisitioning under section 9 of the Act of September 16, 1940, 54 Stat. 885, 892, including the power to take possession of plants. Further requisitioning power conferred on the President by the Act of October 10, 1940, 54 Stat. 1090, and the Act of October 16, 1941, 55 Stat. 742, were delegated to OPM by Executive Order 8942, Nov. 19, 1941.

[2] Executive Order 9024, January 16, 1942; Executive Order 9040, January 24, 1942. The latter order delegated to WPB the President's power under section 120 of the National Defense Act of 1916, 39 Stat. 213, to place mandatory orders and to take possession of plants.

delivery. Once having been granted, this preference could usually be applied on a repetitive basis.

The "M" orders were usually directed to the manufacturers or distributors of materials and were aimed at controlling either the use or the distribution of particular materials. These orders frequently prohibited producers from selling to any buyer unless the buyer had some preference rating.

The "L" orders were usually issued to prohibit or curtail the manufacture of end products containing critical materials, continued production of which would have necessarily consumed such critical materials. Sometimes an additional purpose of such "L" orders was to accomplish the conversion of scarce manufacturing facilities to war production.

"L" orders were issued prohibiting or limiting the production of end products such as office machinery, furniture, bicycles, stoves, refrigerators, laundry equipment, automobiles, and other products. In most instances a prohibition against the production of a product resulted in the facilities being transferred to war production. Thus, the automobile industry's facilities were largely converted to war purposes although some of the facilities may have become inoperative because of a lack of adaptability to other purposes or to war production.

Issuances of "L" orders sometimes released manpower employed in the production of the prohibited end products. Working with the particular industry branch involved in the "L" order, the Labor Production Branch [3] of WPB, assisted in making arrangements whereby the application of the "L" order to the industry would be most effective in terms of the utilization of the services of the manpower so released.

Where an area was threatened with serious economic dislocation by reason of the threatened closing down of a primary industry resulting from an "L" order because substitute

[3] On March 18, 1941, OPM issued Regulation 5 (6 F. R. 1598, 32 CFR 2875—1941 Supp.), establishing a new operating division known as the "Labor Division". The functions and duties of this division were (1) to ascertain labor requirements for national defense; (2) to develop programs and coordinate efforts for assuring an adequate and trained labor supply for defense purposes; (3) to advise regarding problems and standards of work and employment in defense industries; (4) to assist in the prevention and adjustment of labor controversies which might retard the defense program; (5) to advise and collaborate with other divisions of OPM on all matters affecting labor.

materials were not available to produce that industry's product, either the area or the industry could be certified as "distressed" by WPB. Such a certification entitled the firms in the area to special treatment in the awarding of war orders, i. e., the orders did not have to go to the lowest bidders, and financial assistance could be given to enable the plants to convert. The entire washing machine industry was so certified.

The preference ratings assigned under the "P" orders originally ranged from A–1 to A–10, with the highest rating, A–1, being further subdivided. There was no control over the number of buyers who might be given a particular rating, and a buyer having one of the lower preference ratings might and often did find it impossible to purchase any material because the holders of the higher ratings had exhausted the available supply.

4. In the decisions by OPM and WPB to issue a "P", "M", or "L" order, a number of considerations might be involved such as the conserving of essential materials, supplies and equipment for use in essential war industries, the increasing of production of strategic raw materials or essential end products, and the maximum utilization of available manpower. In the earlier months of the war some areas of the country were still suffering from large scale unemployment.

5. On July 29, 1941, OPM issued Preference Rating Order P–23 in order to facilitate the acquisition of materials by producers of machinery and equipment used in the mining, beneficiation and preparation of coal and metallic ores. Said order authorized such producers to use a preference rating of A–3 for the acquisition of such materials.

6. On September 9, 1941, OPM issued Preference Rating Order P–22, known as the General Repair Order. It authorized a broad variety of industries, including mines and quarries generally, to use an A–10 rating for the acquisition of material needed for the repair of their property or equipment.

7. On September 17, 1941, OPM issued Preference Rating Order P–56 and amended it on September 22, 1941. Said order, as amended, authorized recognized mining enterprises to use a preference rating of A–8 for the acquisition of materials needed for operating supplies and for the main-

tenance of the property and equipment of such mines. Under the terms of said order OPM was to issue so-called mine serial numbers to all mines certified by an appropriate agency of a State, Territory or possession as constituting a recognized mining enterprise.

Placer gold mines but not lode gold mines were expressly excluded from the benefits of Order P–56. Placer mining is the derivation of gold from streamborne materials in contrast with lode mining which is the underground working of auriferous quartz veins in hard rock.

The reason for the distinction between lode and placer mines in the assignment of preference ratings under Order P–56 was set forth in a report entitled "Status of Gold Mining" submitted to SPAB on November 18, 1941, by its Executive Director, Donald Nelson. The report read in part as follows:

> * * * Most lode mines are underground, and consequently subject to the hazards of rapid depreciation if they are shut down. Flooding by water is the chief hazard. Though not all lode-mining is deep enough to suffer seriously if a shutdown occurs, continuity of operation is clearly desirable to prevent depreciation of installed equipment and structures. On the other hand, placer operations can be discontinued (and often are, seasonally) without injury to equipment. * * *

Another reason for this distinction was stated in November 1941 by Dr. Wilbur Nelson, who was then Priorities Specialist and Administrator of Order P–56 and who later became the Chief of the Mining Branch of WPB, to be "that we felt that we must start restricting mining activities where they were not essential to the production of materials needed in a defense effort." This referred to the fact that placer mines produced only gold, while many lode mines produced other metals.

8. In the memorandum submitted to SPAB on November 18, 1941, Mr. Donald Nelson had reviewed the problems relating to furnishing materials both to gold mines in the United States and to gold mines in foreign countries, and had said, in part:

> 1. A general announcement of policy toward gold-mining is needed. Otherwise, specific *administrative* actions will be questioned by the mines as unfairly dis-

criminatory. This is particularly necessary if the purchase of new machinery for gold production is to be virtually prohibited after November 30. A necessary preliminary to such a declaration would be a request to the Treasury for an immediate formal opinion on the significance of new gold production to monetary policy. It is to be emphasized that from a consumption of scarce materials standpoint, this whole issue is a minor one. Only about $7,000,000 of equipment, not including a lesser amount for repairs and maintenance, is involved annually at a maximum. Such importance as the issue possesses is largely political. It is political from two opposing standpoints—that of popular reaction to the continuation of an industry widely regarded as unnecessary (to the point of jocularity), and contrariwise, that of the regional interests delineated in the report.

2. The continuation of the right of lode gold mines to use the A–8 rating under Order P–56 could be made entirely discretionary with the Director of Priorities. The guiding principle might be established by SPAB of requiring their purchases to be held to the bare minimum necessary to prevent disastrous shut-downs. SPAB might also wish to establish a separate test of eligibility in terms of the amount of other more useful metals that are produced jointly with gold. For example, if the selling value of the essential metals is 25 percent and that of gold produced 75 percent, the mine might be permitted to buy machinery and supplies on the same basis as other essential metal producers. Or the minimum ratio might be set at 40 percent in the value of other metals, and 60 percent gold. The intent would be to avoid any discouragement to production of the essential metals.

3. An alternative, and more drastic, policy would be to eliminate all domestic gold mines, whether lode or placer, from Order P–56 and also from the general repair Order, P–22. Gold mine operators would thus be forced to buy repairs and supplies without A-ratings, but could apply for special help on Form PD–1. It is quite possible that only very gradual declines in output and employment would result, because of managerial ingenuity. Here again, exceptions could be made for mines producing other metals.

4. In lieu of any blanket privileges to foreign mine operators, all foreign mine needs could be reviewed continuously with the Economic Defense Board, so that considerations of inter-American and British American policy could be consistently applied to decisions authorizing or forbidding shipments of gold-mining machinery

and repair parts. No serial numbers authorizing several purchases would be issued, but applications for individual shipments would be entertained. Here again, the specific quantities of burdened material (which are not large) are not the issue, but the political considerations involved and the question of treating nonessential industries consistently are paramount. In the special case of Canada, the Joint Economic Committees could secure all relevant statistical data.

5. Some special basis of treatment might be worked out for Alaska, where gold mining assumes the proportions of a majority industry. To cut off suddenly all shipments of new equipment needed for replacement, and to make it unduly difficult to secure supplies, might have several effects upon employment in Alaska, and upon the revenues of the Territory. The Labor Division might be asked for a formal opinion on the probable impact upon employment in the Territory of the restrictions suggested in this report. The Territorial Government could also be asked for a formal report on the importance of gold mining, with all relevant statistical data.

On November 24, 1941, a meeting concerned with priorities and export licenses for gold-mining machinery was called by A. A. Berle, Jr., Assistant Secretary of State. It was attended by representatives of the Treasury Department, the Federal Reserve Boa d and OPM, as well as the State Department. The consensus of opinion at such meeting was reported that:

> * * * preference ratings for gold mining equipment should be granted only after careful scrutiny with a view to maintaining, at the very most, existing rates of output and to refusing equipment for any expansion of output; subject to exceptions in cases where extraordinary hardship might result—as in the case of isolated communities having no alternative forms of employment—preference ratings for exports of gold mining equipment should be made to depend on a showing that the maintenance of the present level of gold production is necessary (a) to supply dollars for an otherwise deficit dollar position in the balance of payments of the country (or in the case of South Africa, for the dollar position of the sterling area), or (b) for special political reasons; whenever the current gold mining is maintained mainly to prevent a dollar deficit and especially where the labor could be used for more direct contribution to defense production, this Government

should endeavor to find other means of meeting this deficit such as lend-lease activities, purchase of gold "in the ground" for postwar delivery, and the like. To give effect to the foregoing conclusions, no general priority ratings for gold mining equipment, including repair and replacement parts, should be granted but individual consideration should be given to each application on its merits unless adequate periodic compliance investigations can be made (particularly in Canada) as is done in the United States.

On December 2, 1941, SPAB, having before it the report of the November 24 meeting quoted above, directed Donald Nelson to obtain the official opinions of the State Department, Treasury Department, Federal Reserve Board and the Board of Economic Warfare on "supplying gold mining equipment abroad and on other possibilities of providing dollars to offset probable dollar deficit positions."

9. Donald Nelson complied with the directions of SPAB, and secured the official comments of these departments and agencies. The Secretary of the Treasury stated in part as follows:

> * * * Domestic gold production in wartime serves no military purpose, but does consume labor and materials that have usefulness in military production, particularly in the mining of scarce metals. We do not believe, therefore, that domestic gold mines should receive any preference rating for machinery unless the gold is produced with a substantial amount of much needed by-product metals or ores, or unless it is produced in a mine so peculiarly situated that serious and sustained unemployment of men not eligible for defense jobs would result from its shutdown.

The Secretary of State confined his reply to the subject of supplying gold-mining equipment abroad, and said in part:

> It is the Department's opinion that preference ratings for gold mining equipment should be granted only after careful scrutiny with a view to maintaining, at the very most, existing rates of output, and to refusing equipment for any expansion of output. * * *

The Chairman of the Board of Governors of the Federal Reserve System stated in part that:

> Priority measures tending to reduce new gold production under present circumstances are, in my judgment,

highly desirable. The United States stock of gold is already redundant. Its dollar value is more than five times as great as in the 1920's. From the standpoint of credit control in this country further additions to gold stock are not only unnecessary; they are harmful. By swelling excess bank reserves, they add to inflationary dangers and make the maintenance of a stable and productive economy more difficult. From the standpoint of war output of the allied countries, the materials, machinery, and labor devoted to gold production are largely wasted.

* * * * *

Since new gold output is largely unnecessary and diverts materials, machinery, and labor from production of war supplies, I strongly favor curtailing it so far as is practicable through the priorities system. I would suggest that no machinery be allowed to foreign mines for the expansion of gold output; and that machinery and supplies for the maintenance and repair of gold mines should be restricted to the minimum consonant with the principles adopted by the Supply Priorities and Allocation Board for other nondefense industries.

Milo Perkins, Executive Director of the Board of Economic Warfare, after discussing the question of supplying mining equipment to foreign gold mines, proceeded to outline a policy with an ultimate objective of eliminating the domestic gold-mining industry in the postwar era. In this connection he stated:

The system of priorities on gold mining equipment was devised as part of the general effort to economize on scarce facilities and thereby to maximize the joint war effort of the nations fighting for the democratic cause. But in dealing solely with the question of gold mining equipment there is a danger of losing an opportunity both to solve the longer-term aspects of the gold problem and to maximize the joint war effort. Such an opportunity exists now. The United States can and should use the power that it derives from being practically the sole buyer of the yellow metal in order to initiate a program of a gradual reduction in gold production. Such a program would contribute to a maximization of the joint war effort and, at the same time, would facilitate a solution of the postwar gold problem.

* * * * *

It is essential therefore, that a reduction in gold mining should be envisaged for the postwar period. It is, however, obviously impossible to effect a cessation of

gold production overnight because of the enormous dislocation it would involve in the national economies of the more important gold producing countries. The purchase of gold in the ground leaves the problem unsolved, and merely adds to the difficulties of the immediate postwar period. A program of gradual reduction and final cessation of all new gold production spread over a period of fifteen to twenty years is the only satisfactory solution to the general gold problem. This is the moment to institute such a program. Further, the United States possesses the necessary powers to initiate such a program. Being practically the only buyer of the yellow metal, the United States is in a position to demand that its future purchases will be on an increasingly restricted scale. * * *

On December 23, 1941, Donald Nelson sent his summary of the foregoing letters to SPAB in the following terms:

As directed by the Board at its December 2d meeting I have obtained the official opinions of the State Department, Treasury Department, Federal Reserve Board and Board of Economic Warfare on supplying gold-mining equipment abroad and on other possibilities of providing dollars to offset probable dollar deficit positions.

The following is a summary of these opinions:

1. In a war economy labor, materials, and machinery applied to gold production are largely wasted. Moreover, dollars made available through Lend-Lease, R. F. C. and stabilization loans, etc., have made new gold unnecessary as a provider of dollar exchange. Therefore:

(a) Nothing should be allowed for expansion, although minimum amounts for maintenance and repair should to some extent be provided.

(b) Only high-grade ores or those yielding high percentages of other minerals useful in the war effort should be mined.

(c) Labor, materials and machinery should be converted to more vital production except where extreme political or economic hardship would result.

2. In-the-ground purchase of gold is neither necessary nor desirable. It is an experiment which raises serious complications and not only fails to solve the present problem but also presents a new one for the postwar period.

3. Agreements should be entered into with gold producing countries, to the end that they do not divert labor, materials and machinery from more essential uses to gold production.

On the same day SPAB adopted the spirit of these recommendations. It stated:

> It was the judgment of the Board that in view of the military program only limited priorities and export licenses should be granted to the gold mining industry,

and it was agreed

> that in granting priorities and export licenses for gold mining machinery, materials should not be allowed for expansion of production although minimum amounts for maintenance and repair may be provided,

10. On December 18, 1941, OPM issued a new General Repair Order, Preference Rating Order P–100, to replace Order P–22, which was revoked on the same day. The stated purpose of Order P–100 was to effectuate the policy of SPAB in maintaining governmental, charitable and industrial property located in the United States, its territories and possessions, upon an adequate operating basis, without expansion or improvement of facilities except where duly authorized or approved. Industries coming within the terms of Order P–100 were entitled to an A–10 Preference Rating (the lowest rating used) for their maintenance, repair and operating supplies.

P–100 represented a continuation of SPAB's policy of granting some preference rating for maintenance, repair and operating supplies to industries in general without regard to essentiality in the war program, and this policy prevailed throughout the war. This policy was designed to avoid unnecessary dislocations in the civilian economy. The percentages of critical materials such as steel, aluminum and copper used in all industries for maintenance, repair and operating supplies ranged from one-half of one percent to three percent of the total amounts available for the entire economy.

11. On December 31, 1941, OPM issued Preference Rating Order P–56–a to supersede P–23, which had expired on that date. Order P–56–a continued to authorize the manufacturers of mining machinery to use a preference rating of A–3 to acquire material entering into the production of machinery and equipment ordinarily used in the mining industry, including the gold-mining industry.

12. By a letter dated February 18, 1942, John P. Gregg, Assistant Chief of the Bureau of Priorities, WPB, proposed to C. H. Matthiessen, Jr., Chief of that Bureau, that gold and silver mines be closed forthwith in order to conserve materials. The letter stated in pertinent part:

> 4. The Committee is of the view that the restrictions with respect to materials to be used in the mining of gold and silver are not sufficiently restrictive and that a limitation order should be drafted forthwith to stop production of gold and silver in the United States, appropriate consideration being given to the continuance of such production in Canada, Mexico, South Africa, and other areas now permitted to obtain materials and equipment from this country under Lend-Lease or direct purchase.

13. Said proposal of February 18, 1942, to close the gold and silver mines as a means of conserving materials was rejected. Instead, on March 2, 1942, WPB amended Preference Rating Order P–56 so as to deprive gold and silver mines of all priority ratings formerly available to them under that order. This was accomplished by revoking the so-called mine serial numbers of all mines the production of which in dollar value consisted of more than 30 percent of gold and/or silver.

14. Although the amended Order P–56 required the revocation of the mine serial numbers held by gold mines coming within the foregoing 30 percent exclusion clause, in actual practice WPB restored such numbers to mines whose production included significant quantities of materials important to national defense. However, over 200 gold mines, including those of the plaintiffs herein, never again received serial numbers under Order P–56.

15. The amended Order P–56 was the subject of vigorous objections in the mining districts, and public meetings were held in Reno, Nevada, and Denver, Colorado, to protest the amendment. These meetings were attended by the Governors of five states, several United States Senators and Representatives, mine operators, Wilbur Nelson as Chief of the Mining Branch of WPB, and other interested parties.

16. In addition to the aforementioned meetings the 30 percent exclusion clause was the subject of extensive hearings before a special Senate Committee (U. S. Senate, 74 Cong.,

2d Sess., Subcommittee of the Special Committee on the Investigation of Silver, *Hearings*, May 5, 6, 8, and 28, 1942).

17. WPB on May 15, 1942, amended Order P–56 so as to eliminate the 30 percent exclusion clause. However, the amendment effected no practical change, since no person could use the ratings assigned by Order P–56 unless a serial number was granted by WPB. After March 2, 1942, serial numbers were never restored to gold and silver mines producing no substantial quantities of critical materials.

The gold mines excluded by the above amendments to Order P–56 were reduced to the same priority position as that of the least essential industries in the United States, i. e., they were entitled only to an A–10 preference rating for the acquisition of maintenance, repair and operating supplies under Order P–100. They were excluded from obtaining any critical materials which might have been needed by any of the nonferrous metal mines or by any other industry deemed by WPB to be more essential. While it was possible for gold mines excluded from any benefits under P–56 to apply for equipment under the general repair order P–100, the demand for desired equipment was so far above available supply that the possibility of the gold mines obtaining any was remote. Thus, by March 2, 1942, a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment.

18. By July of 1942, the Labor Division of the War Production Board, and officials of the War Department and the War Manpower Commission, were all becoming concerned with the fact that the production of nonferrous metals in the United States, particularly copper, would not be adequate to meet current and anticipated demands. Investigation revealed that this condition was due not only to the increased wartime demands, but to an alarming shortage of miners in the nonferrous metal mines. The agencies concerned were agreed that the success of the country's armament program was basically dependent on increased production of basic raw materials such as copper and other nonferrous metals.

The reasons for the poor production of nonferrous metals were found to be (1) the out-migration of workers in the nonferrous mines to other war industries offering higher

wages and better working conditions, (2) drafting of the workers for the armed services by Selective Service, (3) excessive labor turnover within the industry, (4) low morale of the workers, (5) the short workweek in the mines, and (6) the lack of an organized and effective program of recruitment of workers for this industry.

Labor scouts employed by the aircraft and shipbuilding plants were working through the mountain states offering high wages and were inducing men to leave the mines. Armed services construction projects in the vicinity of the mines offered higher wages and were recruiting miners for work on such projects.

19. An informal committee organized by officials of the War Department to study the copper shortage situation submitted a report on July 8, 1942, recommending a program for dealing with the problem. For the War Manpower Commission it recommended a program for the recruitment of mine labor, involving among other things the expansion of the offices and personnel of the United States Employment Service in the mining areas, and including "a program for the orderly transfer of workers in gold mines and other nonessential industries to the nonferrous mines," as well as assistance in securing Selective Service deferments for mining occupations. For the WPB, the report recommended a Labor-Management Production Drive Committee to secure increased production through improved morale and greater efficiency; the report then recommended that:

> 2. Production of gold, with the exception of required amounts of essential silicious gold ores, should be curtailed by an order of the War Production Board to free labor which is urgently needed in the nonferrous mines which are essential to the war effort. * * *

For the War Labor Board the recommendation was that in the cases then pending before it, involving about half of the copper-mining industry, it give careful consideration to the wage differential problem. The recommendations for the Army and Navy were the establishment of morale building programs for the miners and the exertion of influence on their contractors to prevent further recruitment from the nonferrous mines.

20. The Labor Production Division[4] of WPB was also studying ways to relieve the shortage of underground workers in the nonferrous metal mining industry. On July 4, 1942, the Acting Chief of the Priorities Branch of the Labor Production Division sent a memorandum to the Director of Operations of the War Manpower Commission who was also in charge of the Labor Supply[5] functions of WMC at that time. The memorandum pointed out the acute labor shortage in the nonferrous metal mining industry and observed that the 15 largest producers of gold in seven Western States had some 6,700 employees; that the gold mines of these producers were sometimes located in the vicinity of nonferrous metal mines and that in some cases one company would own both a gold mine and a nonferrous metal mine in an area. The statistics upon which the above figures were based were as of 1941, and were later found not to represent the situation in the summer of 1942, because the gold mines, as well as the nonferrous metal mines, had been losing workers to the war industries and the draft. The 6,700 figure employed in the memorandum represented employees of all kinds, including clerical employees, and no figure was given of the number of hardrock miners which were the type of employee needed in the nonferrous metal mines. In speaking of the "15 largest producers of gold in seven Western States", the memorandum did not point out that several of such gold producers also produced nonferrous metals in substantial quantities and therefore would not be classified as gold mines for the purpose of any anticipated action.

The above memorandum described the large turnover in employment in the copper mines and the steady decline in over-all employment; it noted that most of the men leaving the copper mines were going into war plants or were being drafted into the armed services, and that the companies were requesting permission to hire Japanese and Mexican labor in their operations. The memorandum concluded as follows:

> Steps should be taken to remedy the critical labor situation in nonferrous metal mining, including arrangements for the transfer of miners from gold and

[4] See footnote 3, supra, for the functions and duties of this division.

[5] When the War Manpower Commission was organized under Executive Order 9139, April 18, 1942, WPB's labor supply functions were transferred to WMC.

silver mining to copper, lead, zinc, tungsten, chrome, and molybdenum mining. This can be done through curtailment of gold and silver production, but it would be necessary to make sure that the workers released went into nonferrous metal mining and did not go into war plants in the vicinity or on the West Coast. It has been customary for metal miners in the mountain states to move considerable distances with the opening and closing of mines and ordinary turnover.

21. On July 9, 1942, the General Counsel of the War Manpower Commission sent to a member of his staff a memorandum concerning the possibility of transferring gold miners to work in the nonferrous metal mines. The memorandum stated:

> At a meeting of the War Manpower Commission yesterday, the following problem was referred to this office.
>
> General McSherry [Director of Operations of WMC] wishes to secure the release of men employed in the gold mining industry for transfer to the copper mining industry. Concededly the War Manpower Commission cannot accomplish this result directly. May the result be accomplished (1) by the War Production Board refusing to the gold mine operators critical materials used in their operations thus compelling the closing of the mines; (2) may the Chairman of the War Manpower Commission direct the War Production Board to take that action?
>
> The specific situation suggested is simply illustrative of the general problem in this field.

22. The proposal for closing the gold mines in order to divert their miners to nonferrous metal mines was gaining momentum in August 1942, and accordingly, Wilbur Nelson, Chief of the Mining Branch, WPB, who was not in sympathy with the method of the proposed plan, expressed opposition to it on August 14, 1942, in a memorandum to H. O. King, Chief of the Copper Branch, WPB, reading in pertinent part as follows:

> The Mining Branch views with serious alarm the dissipating of the only appreciable reserve of highly competent mining labor through the hasty closing of the gold mines in the United States.
>
> The gold and silver miners constitute the last reservoir of the skilled mining labor. We must, therefore, be

certain that that labor is directed toward the most critical points before permitting it to be disbursed. [Sic.]

The present critical situation developed when copper, lead, zinc, mercury and other miners left their jobs and went to the West Coast on shipbuilding and on aircraft jobs, and into the mountain areas in new war industries work.

If we close down the gold mines while these same opportunities are available for work at substantially high rates of pay in other war industries, the miners will not move to a copper, lead, or zinc mine but will do just as their predecessors have done, move on to other more fruitful jobs on the coast.

Logic dictates this, for when a copper miner at Butte is willing to leave his home and go to the coast, I am sure that a gold miner, living in the excellent living conditions at Lead, is not going to leave his family and stop at Butte if he could go to the west coast.

* * * * *

23. Late in August 1942, Guy N. Bjorge, General Manager of plaintiff Homestake Mining Company, the largest gold-mining company in the United States, learned that consideration was being given by the Government to a proposal to close domestic gold mines in order to divert their miners to the nonferrous metal mines. He therefore went to Washington and conferred with several officials of WPB, including Donald Nelson, Chairman, and Wilbur Nelson, Chief of the Mining Branch, as well as Brigadier General McSherry, Director of Operations of the War Manpower Commission, and Lieutenant General Somervell, commanding the Services of Supply, War Department. In the course of these conferences Mr. Bjorge furnished figures as to the small number of men who might be obtained for work in the copper mines by such order. He pointed out that many men had already left the Homestake Mine in 1942 for the same reasons that men had left the copper mines, mainly to accept employment at West Coast aircraft factories and shipyards. Mr. Bjorge also pointed out that the miners remaining at Homestake were an older, more stable class of men, a large percentage of whom were home owners, and asserted his belief that it was improbable that they would leave their homes for the poor housing facilities and undesirable working conditions at the nonferrous metal mines.

24. On August 26, 1942, United States Senator Pat McCarran of Nevada wrote a letter to Donald Nelson, Chairman of WPB, setting forth various reasons why he believed the proposed closing of the gold mines would not accomplish its purpose of obtaining any considerable number of miners for the nonferrous metal mines. Senator McCarran wrote, *inter alia:*

* * * * *

> In the first place, the transfer of necessary labor from closed gold and silver mines to mines producing copper, lead, zinc, etc., would be negligible, due to the fact that very few operations exist today where only gold and silver are mined, and in these districts (mainly, the Homestake Mining activity in South Dakota and the Mother Lode Mining district in California), the number of men who could be so transferred is small. Many of the usual workers have joined the armed forces; many are familiar only with the routines of this type of mining and cannot be successfully transplanted. Thus little good would result and great hardships would be inflicted upon affected families and communities.
>
> Secondly, there is no rule or procedure by which such workers could be legally forced to transfer to other mines. The labor that would be denied employment by reason of the shutting down of the mines producing gold and silver would most likely go to the places where they would receive higher wages than are paid in mines.

* * * * *

On September 1, 1942, Donald Nelson replied to Senator McCarran in pertinent part as follows:

* * * * *

> A serious study has been and is being made of sources from which mine labor could be made available to the nonferrous metal mines. Naturally, our thoughts have included gold mines, but we have not at this time reached any conclusion thereon.
>
> We quite agree that no legal power exists today by which workers may be forced to transfer to other mines. This accentuates the mine labor problem which faces us today.
>
> Because of your experience in mining matters, and the factual evidence you secured in your recent hearings in the West, I am asking our people responsible for mine production to carefully consider your suggestions.

* * * * *

25. The minutes of the War Production Board for the meeting held September 1, 1942, provide in part as follows:

1. Labor Supply for Copper, Lead, and Zinc Industries

The Chairman stated that since the labor supply in the copper industry had reached a critical stage and already had resulted in a decline in the production of copper, he had asked the Labor Production Division and the Copper Branch to report to the Board on the manpower problem in the nonferrous metals industries (Doc. 135).

Mr. King reported that 6,000 miners have been lost by the copper, lead, and zinc mines to other industries during the past several months and that the shortage of labor will become increasingly acute next year when new facilities will require 2,000 additional miners. Preliminary reports indicate a shortage of 2,100 workers in smelters and refineries. Mr. King pointed out that the loss of 5 or 6 thousand workers at the copper mines might so influence the subsequent fabricating processes that 100 thousand workers in war plants at the end product state would be affected. Although monthly production of copper increased steadily from early 1941 to a peak of 95,000 tons in May and June 1942, output in July dropped 5,000 tons to 90,000. The copper outlook is even more critical than shown by the drop in production, since at many mines labor is being transferred from developmental and stripping operations, necessary to provide for future production, to current ore extraction. The position of the smelters and refineries is exemplified by a smelter at Tacoma where output of 2,000 tons of copper per month is being lost for lack of only 300 unskilled common laborers. Mr. King emphasized that production at the mines, smelters and refineries will continue to fall unless the exodus of labor is checked and the supply of workers augmented. Output of lead and zinc likewise declined in July, and the labor-production situation in these metals is similar to that in the copper industry.

Mr. Lund pointed out that there is general agreement that the higher wages paid to workers in competing occupations in other industries are the prime factor causing the out-migration of labor from the mines and mills. Average weekly earnings in April of 37.28 dollars for mine workers and 35.18 dollars for smelting and refining workers compared with an average of 53.30 dollars in shipbuilding and 45.94 dollars in aircraft, the principal competing industries. Corollary factors in the out-migration of workers have been rumors of ceil-

ings on wages and proposals to confine workers to their present jobs, the hazards of mining, and inadequate housing and transportation facilities.

Mr. Lund pointed out that the decision of the War Labor Board, expected within a month on 30 or 40 cases involving higher wages for copper miners, will have an extremely important bearing on the out-migration problem.

Mr. King reported that following a resolution of the War Production Board (See WPB Minutes, March 3, 1942, Item 7), labor-management committees were established in the metal mining areas and the importance of having mine workers stay at their jobs was publicized. On June 13, 1942 the Chairman of the War Production Board formally launched the War Production Drive in the nonferrous metals industries by a radio address to the miners at Butte, Montana.

As further steps in halting out-migration, the Inter-Departmental Committee on Nonferrous Metals was established on August 11 and various letters and literature have been prepared for distribution to mine operators and labor unions; an order has been prepared to prohibit the use of materials in nonessential gold mines, which may free about 8,000 workers; plans to prevent employment of miners on Army and Navy construction projects are being considered; and training programs are being introduced into mining properties. To increase the efficiency of present working forces, mine equipment is being accorded high priority ratings, and labor is being trained and upgraded by improving working and living conditions, and by lowering age and other restrictions on hiring. Mr. Lund observed that in many cases labor standards have shown no change from those existing in normal times when a surplus of labor is available. He suggested that the pooled employment interviews which the War Manpower Commission is now conducting in some parts of the country should be pursued with increasing vigor.

Mr. Lubin inquired if the order to prohibit the use of materials in nonessential gold mines had actually been issued and, if not, what steps are being taken toward its issuance. Mr. King, replied that a first problem is to define a nonessential gold mine since gold is frequently found in association with other metals and it is necessary to avoid denying materials to mines that produce important quantities of critical metals jointly with gold. It is hoped that an appropriate definition can be developed very shortly and an order issued promptly thereafter.

* * * * *

The Chairman remarked that since other uses have been cut to a minimum, the major use of copper is in munitions, especially small arms ammunition, and any reduction in the copper supply will be reflected in a reduced output of ammunition. He expressed the belief that the War Production Board must take an active and leading role in assuring an adequate supply of copper and Mr. Lubin added the suggestion that the concern of the War Production Board in this problem is sufficiently great to establish its own employment offices, if this is necessary to obtain additional copper miners.

After further discussion it was agreed that:

> Inadequate production of copper, lead, and zinc will result inevitably in reduced output of munitions, including small arms ammunition needed by the fighting forces. The output of these metals is now being reduced by a shortage of manpower in mines, smelters and refineries.
>
> The War Production Board is charged with the primary responsibility for providing the maximum possible production of critical metals, but the solution of the problem of assuring a sufficient supply of labor involves the responsibilities of other agencies of the Government as well. The coordination of the efforts and activities of other agencies of the Government with those of the War Production Board is needed, therefore, to ensure an adequate supply of critical metals.
>
> The War Production Board urges all agencies involved to promote and support such actions as may be necessary to provide to nonferrous mines, smelters, and refineries a supply of labor adequate for the maximum possible output of such metals. It is especially important that the facilities of the United States Employment Service be expanded and strengthened to meet this particular need.

* * * * * *

The Chairman referred to above was Mr. Donald Nelson, Chairman of the War Production Board. The Mr. King referred to was Mr. H. O. King, Chief of the Copper Branch, Industry Operations, WPB. The Mr. Lund referred to was Mr. Wendell Lund, Director of the Labor Production Division, WPB. The Mr. Lubin referred to was Mr. Isadore Lubin, acting for Mr. Harry L. Hopkins, Special Assistant to the President.

26. On September 4, 1942, Mr. A. I. Henderson, Deputy Director General for Industry Operations, WPB, directed that an order be drafted by the Miscellaneous Minerals Branch which would curtail the output of gold and which would not be related to Preference Rating Order P–56.

27. On September 9, 1942, Mr. R. J. Lund, Chief of the Miscellaneous Minerals Branch, sent the following memorandum to Mr. A. I. Henderson:

> At a meeting held in your office on September 4, attended by Messrs. Dodge and Scribner of your staff, Mr. Parks of the Miscellaneous Minerals Branch, and Mr. Stow of the Mining Branch, you issued instructions that an order be drawn up either by the Miscellaneous Minerals Branch or the Mining Branch which would curtail the output of gold and which would not be connected with Order P–56. You indicated that this Branch should prepare the order but that the order could be administered by this Branch or the Mining Branch as later determined.
>
> It was understood that the purpose of the order was to make mining labor now producing gold available to copper and other strategic nonferrous metal mines. This end can be attained by WPB only through its authority to control materials.
>
> Attached is copy of the order [6] for your consideration. This order has not been circulated, except in discussions with the Mining Branch.
>
> The order is designed to close all mines producing gold to the extent of 50 percent or more of the value of the total output. In considering the order the following matters are pertinent:
>
> (1) *Number of mines affected*
>
> Based on 1940 production figures obtained from the Bureau of Mines, the latest they were able to supply, about 220 lode mines will be affected by the order. This figure is not exact, because production in the 1941 or 1942 base period specified in the order is not strictly comparable with the 1940 picture. Geographic distribution of these lode gold mines is as follows: California, 58; Colorado, 32; Montana, 30; Nevada, 27; Arizona, 18; Alaska, 12; Idaho, 12; Utah, 8; South Dakota, 6; with the remainder distributed among five other states.
>
> Detailed data on placer operations affected by the order are not presently available, but the Bureau

[6] The copy of the order is not in evidence.

of Mines reported that in 1940 a total of 3,107 placer mines produced gold and silver in the United States, and 1,069 in Alaska. Undoubtedly, sizable numbers of these produced such small quantities that they would be exempted by the order.

The Bureau of Mines reported that in 1940 there were 49 connected-bucket floating gold dredges operating in Alaska, 46 in California, 12 in Idaho, 7 in Montana, 6 in Oregon, 1 in Colorado, and 1 in Nevada. In addition there were large numbers of mechanized placer operations using drag line and power-shovel excavators, but no separate figures on these operations are available.

(2) *Labor involved*

Based on 1941 data, latest available from the Bureau of Mines, approximately 12,400 employees in lode gold mines will be thrown out of work by the order. Incomplete data indicate that about 70 percent of this labor is employed underground. Geographic distribution of this total labor was as follows: California, 3,394; South Dakota, 2,123; Colorado, 1,689; Alaska, 1,251; Arizona, 911; Montana, 602; Nevada, 601; Idaho, 590; Utah, 484; with the remainder distributed in a number of Western and Eastern states.

No detailed data are available showing number of employees in placer operations, except that the number would probably amount to at least several thousand in the United States and perhaps two thousand in Alaska.

(3) *Estimated recapture of employees affected*

Assurances were given by General McSherry at a meeting of the Interdepartmental Committee on Non-Ferrous Metals, September 8, that the U. S. Employment Service had adequate staff available to go immediately into the several hundred mining camps which might be affected by the gold curtailment order and to recruit labor for transfer to copper mines and other nonferrous metal mines in dire need of such labor. At a previous meeting of this Committee, an estimate was made that about 25 percent of the mine labor might be recaptured for work in other mines.

(4) *Other metals lost*

Production of other metals in 1940 by mines affected is as follows: copper, 2,751,000 pounds; zinc, 92,000 pounds; lead, 12,047,000 pounds; silver, 4,947,000 ounces. Other metals such as antimony,

arsenic, tungsten, molybdenum and manganese are also produced in minor amounts by some of these mines.

(5) *Fluxing ore problem*

Some gold mines affected by the order produce large tonnages of siliceous ore required by smelters working primarily on other nonferrous metals, such as copper, lead and zinc. This flux is necessary to their operation, and gold values in the flux naturally make operations more economical than by adding barren siliceous material which may, or may not, be available at the smelter.

(6) *Critical materials saved*

Sizable amounts of critical materials will be saved in closing these gold mines. Estimates as to total current consumption of such materials are not available but the general order of magnitude of such consumption is indicated by the fact that in 1939 gold mines in the United States (excluding Alaska) spent about $17,000,000 on supplies and materials, $2,000,000 for fuel and about $5,000,000 for purchased electric energy.

(7) *Effect on economy of states and communities*

Shutting down the operations at mines affected by the order will result in loss of sizable tax revenues, in respect to state tax revenues alone, in some of the states involved. There has been insufficient time to obtain complete data on this point, but two examples are cited as follows: (a) In South Dakota, total state taxes collected in fiscal year 1941, exclusive of motor fuel taxes, amounted to $11,700,000; taxes paid to the state by mines in South Dakota affected by this order amounted to $1,000,000, or about 9 percent of the total; (b) in Nevada total taxes collected in fiscal year 1941, excluding motor fuel taxes, amounted to $3,300,000, of which about $65,000, or 2 percent, was collected from mines affected by this order.

Losses in county and municipal taxes will be felt much more severely by the communities in the vicinity of the mines. In this respect, shutting down mining operations is not comparable with shutting down other industrial operations in communities where enterprise is diversified; in the West it is generally true that the mine is the sole major source of income for local communities. For example, it has been reported that the Homestake Mining Company pays 65 percent of the local community taxes

and 50 percent of the county taxes; that the wage earners and those servicing them pay the balance largely from the $4,500,000 in annual wages paid by the company. At least 19,000 people, the population of the county, are directly or indirectly dependent upon its operation.

For reasons stated in the last paragraph, hardships faced by old established mine employees will be severe. . There is virtually no possibility of converting the facilities at the mines to war work.

(8) *Probable loss of deep mining operations and dredging equipment.*

Although the order permits gold mining companies to maintain buildings, machinery and equipment in repair, and to keep access and development workings in a safe and accessible condition, it is probable that most of the deep mines situated in heavy, caving ground will be unable to take full advantage of these provisions in the order. As a result it is probable that many of these old, deep mines may never be reopened.

Costly dredging equipment forced to lie idle will be subject to more rapid depreciation than if it were maintained in operation.

The suggestion was made at a meeting this morning that the order should be tightened further by lowering the exemption from the 4,000-ton figure to 1,500 tons annually, or a monthly rate of 100 tons. Such a change would result in a large increase in the number of mines affected by the order, in the total labor involved, and in items 3 to 6, inclusive, discussed above. Tabulations covering these smaller operations are just now being made, so details in respect to these items cannot be presented herewith. The order will be modified to the lower exemption figure before clearance, if these studies indicate a considerable amount of labor involved.

A factor which would tend to lower the number of mines affected, labor involved and other items discussed above, is the fact that many of the gold mines affected by the order have already been forced to curtail or close operations through difficulties encountered in obtaining material and equipment, or through loss of labor to other industries. In one known instance, a recent fire destroyed the mill of a sizable mine so this operation is completely shut down and no labor available for recruitment.

There is, of course, an appeal provision in the order, through which, again, the number of mines, number of employees, other critical materials and fluxing ores af-

fected will be lowered from the estimates cited in items 1 to 5 above.

Concluding Statement

Administration of an order such as the above, entirely divorced from provisions of Order P–56, necessarily involves duplication of work, both here in Washington and in the companies affected by the order. Those gold mines producing needed metals and fluxing ores will have to submit an appeal under the provisions of the order before they can be exempt. There is no practicable way of defining, in an order, such mines that should be exempted. This appeal procedure duplicates, in large measure, the appeals that were already made under the administration of P–56, and it is likely that the repercussions throughout the mining industry of such duplication of effort will be unwholesome.

Without using the mine serial numbers already established as a means for determining essential mining operations, there appears to be no alternative other than to use a percentage value basis in defining gold mines, and to provide for continued operation of essential ones through an appeal procedure.

Other pertinent considerations are presented in the attached memorandum to you from Dr. Wilbur Nelson, and I suggest that they be given careful attention.

The adverse repercussions mentioned above might be overcome in some measure by including an additional provision in the accompanying order which would automatically exempt those gold mines now having serial numbers until they are notified by the Director General for Operations that they are to cease operation. Each of these cases, in the meantime, should be carefully reviewed and judged in the light of the more acute situation now prevailing.

I shall await your written instructions before proceeding further.

28. On September 11, 1942, Mr. J. M. Scribner, an assistant to Mr. A. I. Henderson, sent the following memorandum to Donald Nelson:

In accordance with instructions issued by Mr. A. I. Henderson, you will find attached a copy of the proposed curtailment order on gold. This order is in process of circulation in accordance with the procedure for order clearance and should be presented to the Clearance Committee for action about September 21.

Mr. Henderson requested that the order be prepared in a manner completely divorced from Order P–56.

However, in his absence, after a consultation with Mr. H. W. Dodge and Dr. Wilbur A. Nelson, and a meeting with Messrs. Fred M. Eaton, Richard Lester, and myself, it was determined to be most practical that the order not be divorced from P–56.

The effect of this order will be to close down all gold mines not having a mine serial number, within 30 days from issuance. It is the intention of the Mining Branch to review all mine serial numbers assigned to mines producing 50% or more gold in dollar value and to withdraw such serial numbers unless the balance of the production represents critical materials urgently needed for the war effort in amounts sufficient to justify continuance of the operation.

In addition to the draft of the proposed order, there was also included an explanation of its effect in the following terms:

The Order requires that all mines producing gold, except those having a serial number under P–56, cease operation and development within 30 days after the date of issuance of the Order. The Order makes provision for the minimum maintenance and repair necessary to maintain the mines plant in condition and for the granting of preference ratings to accomplish this after application made to the Director General for Operations.

All gold mines which produce needed quantities of copper, lead, zinc, and other minerals, or of silicious fluxes, already hold serial numbers under Order P–56. Therefore, the mines closed down by this proposed order would be only those which have, after examination by the Mining Branch, already been determined to be nonessential to the war effort.

The result of closing these nonessential mines will be to conserve all the material which they have been using for operational and development purposes. Heretofore they have merely been denied the right to use the high preference ratings granted by Order P–56, but have been able not only to obtain certain material under P–100, but also to use their own inventories.

29. The effect of the proposed limitation order was further summarized in the following terms at about the same time:

A draft of a limitation order on materials and supplies for gold mining is being circulated within the War Production Board. The order provides for complete shutdown of nonessential mines in the United States with the following exceptions:

(1) Mines producing less than 1,200 tons of ore per year will be permitted to continue operations at

their rate of operation in 1941 or early 1942. Such mines are usually individual or partnership enterprises worked by men who are not likely to be employed by others.

(2) A limited amount of supplies and equipment will be made available for the purpose of keeping the mines accessible and safe. This is intended to avoid flooding or otherwise damaging mines which would be in a position to produce after the emergency has passed.

A nonessential mine is defined as a mining enterprise in which gold is produced, unless the operator holds a serial number for such enterprise issued under Preference Rating Order P–56, as Amended. Since producers of siliceous fluxing ores and of complex ores containing substantial amounts of critical metals as well as gold have already been granted serial numbers, the order will not affect the production of essential metals.

The basic purpose of this curtailment of gold mining is, of course, to free manpower for the mining of essential minerals, particularly nonferrous metals such as copper, zinc and lead. Because many of the gold mines are located much closer to other mines producing such strategic metals as mercury, molybdenum, tungsten, vanadium, chromium, manganese, etc., it is expected that workers will also be made available to these industries.

The War Manpower Commission through the Employment Service is now taking steps to insure orderly recruiting of these gold miners and to provide for a minimum of delay in reemployment as well as to provide transportation expenses. It is expected that this procedure will make possible the maximum diversion of labor to essential mining industries where their skills can be used to best advantage.

Beside diverting manpower to essential industries, this order, when in effect, will also conserve some materials and supplies used in gold mining, such as mercury, drill steel, etc.

30. The minutes of the Interdepartmental Committee on Non-Ferrous Metals for September 15, 1942, provide in part as follows:

* * * * *

Dr. M. Stow presented a report on the proposed order to curtail gold mining operations. He distributed a copy of the proposed order which, he said, had been brought up for consideration before the Clearance Committee.

Dr. Stow explained that the persons responsible for drafting the order favored the method of curtailing gold mines by denying them serial numbers under P–56, rather than the type of blanket order which would shut down any gold mine whose gold ore production was above a stipulated proportion of its total production by dollar value. Under the former type of order the gold mines would be closed by being denied serial numbers under P–56, as a result of which they would be unable to obtain either supplies or equipment and would be prohibited from using their present supplies and equipment.

Mr. Harbison [Army representative] expressed some concern over the delay in issuing the gold order. He outlined the steps that various agencies had taken to meet the manpower shortage in nonferrous metal mines, and pointed out that the transfer of gold miners to essential mining was being held up by the lack of a gold curtailment order. He pointed out that the U. S. Employment Service had been unable to obtained any recruits at Rapid City, South Dakota, because the gold mines had not been closed down, although Anaconda Copper Mining Company had agreed to pay transportation costs. He made it clear that the War Department was impatient at the delay.

Mr. Lester of the War Manpower Commission asked that his organization be kept informed of what mines would be affected by the directive, in order that representatives of the Employment Service might be on the spot beforehand.

In this connection, since the primary purpose of the order was to free manpower rather than to curtail materials, Mr. Lipkowitz suggested that an advisory committee be established with representatives from Labor Production Division and War Manpower Commission.

The meeting was attended by representatives of the various minerals branches, the Mining Branch, the Labor Production Division, and the Legal Division of the War Production Board, as well as representatives of the War Manpower Commission, the Office of Price Administration, and the War Department. Dr. Wilbur Nelson presided at the meeting. Dr. Stow was immediately subordinate to Dr. Wilbur Nelson in the Mining Branch.

31. The draft of the proposed limitation order for the goldmining industry was submitted to Morris Creditor, Special Assistant to Donald Nelson. On September 15, 1942, he sent the following comments upon it to Donald Nelson:

I have reviewed the proposed limitation order for the gold mining industry and I wish to raise certain points as to the soundness of such an order.

You will recall that we received a letter from Senator Gurney on August 31 in which he set forth the harmful effects that such an order would have on the economy of the State of South Dakota. In your reply you stated in effect that we were confronted with the manpower problem and something had to be done to overcome the losses of production which are being experienced in the mining of copper and other strategic materials through the shortage of experienced miners.

In the preamble of the limitation order no mention is made of manpower requirements. It simply states that the order is made necessary because of the shortage in the supply of critical materials which are used in the maintenance and operations of gold mines.

It would seem to me that if the order is based on the premise of critical materials alone, the question might be raised as to why such an order would not apply to materials being sent by this country to other gold mines in Canada, South America, and South Africa.

If the main purpose of this order is to divert miners from the gold mining industry to copper and other mining industries, it seems to me that there is no assurance that this order would accomplish the desired results. As Gustav Peck pointed out to you in his memorandum of September 9, it would be too bad to close the Homestake Mine, for instance, without the assurance that most of the miners will continue to practice their trades in the copper mines.

Would it not be more practical to accomplish the purposes by a freeze order similar to that which is now in effect for workers in the copper mines and the lumber industry. This may be more drastic but, on the other hand, may give better assurance that the miners in the gold mines would eventually find their way into the copper mines. Consideration might also be given to the idea of having the Army give indefinite furloughs to Service men who in the past were engaged in the mining of nonferrous materials.

Even aside from the possible dissipation of these skilled miners into other occupations, there is a question whether the closing of all the gold mines will release any relatively large number of workers. As I understand it, in the case of Homestake Mine the proposed order would affect only about 450 miners. This is the largest gold mine and has from a third to a half of all the miners to be released. The Alaska-Juneau miners, incidentally,

will be stuck in Alaska. Where are they expected to go?

I am sure that a great deal of thought has been given to the proposed limitation order on gold mining, but unless there is a high degree of assurance that the main purpose will be accomplished; namely, the diversion of these miners to the nonferrous mines, I feel it is important to weigh the adverse effects it might have in other directions.

Actually, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, the preamble should give the real reason; which is to divert this labor to more necessary industries.

32. On September 17, 1942, Mr. J. M. Scribner, assistant to Mr. A. I. Henderson, sent the following memorandum to Dr. Stow of the Mining Branch:

Acting in accordance with instructions received from Mr. Donald Nelson's office this morning, please be advised that the gold order is to be cleared with all of the branches involved as promptly as possible, but it is not to be presented to the Clearance Committee for clearance until further word is received from Mr. Nelson's office.

The order is to be held in the branch in such shape that it may be presented to the Clearance Committee for action immediately upon advice from Mr. Nelson's office that it is to go through.

33. On September 25, 1942, representatives of the branches of WPB concerned with mineral production met and discussed the proposed gold limitation order which, by that time, had been designated L–208. A resolution was passed urging that representatives of the gold-mining companies be called to Washington to discuss the proposed gold order so that:

A. Where possible, existing organizations may be utilized for important mining operations, or prospective operations, necessary in the war effort.

B. Labor, and especially experienced miners, can be made available to the mining industry, rather than lost to vital metal production.

34. On September 25, 1942, William L. Batt, Vice Chairman of WPB, sent a memorandum to A. I. Henderson, Deputy Director General for Industry Operations, WPB, which stated, *inter alia:*

I have told the Chairman that my judgment is that the limitation order on gold mining should be released at the appropriate time, and he has agreed. It was the consensus of opinion that we should wait until the War Labor Board had acted on certain wage matters, and I shall expect to be advised when the situation is clear on this point.

It seems to me imperative that we very carefully word our press release so that the predominant objective, namely of releasing less essential labor for more essential requirements, shall be clearly evident. And I particularly direct the attention of those who have to do with this matter at this point.

* * * * *

35. On September 30, 1942, a conference was held in Mr. Batt's office. Senator McCarran of Nevada and Senator Gurney of South Dakota, as well as Congressman Englebright of California, and Congressman Case of South Dakota, attended. Samuel Hill of the War Manpower Commission and members of the WPB staff, including Wilbur Nelson and Samuel Lipkowitz, also attended. The Members of Congress spoke of the hardships that would be imposed on the inhabitants of the gold-mining communities and of the detrimental effects on the morale of such people if the mines should be closed down by the issuance of a WPB order. The WPB representatives, except Wilbur Nelson, countered with statements emphasizing the need for labor in copper mines. Some discussion arose as to the number of gold mine employees who would be released by such a closing order.

36. On September 29, 1942, at the direction of W. L. Batt, Wilbur A. Nelson telephoned the following representatives of the gold mining industry and requested them to attend a meeting in Washington: Guy N. Bjorge, General Manager of Homestake Mining Company, Errol MacBoyle of Idaho Maryland Mines Corporation, Merrill Shoup of Golden Cycle Corporation, Carroll Searles of Newmont Mining Corporation, and Thomas McCormack of the Natomas Company. The meeting took place on October 1st and lasted for approximately five hours.

Those in attendance at the meeting included W. L. Batt, Wilbur A. Nelson, Allen Buchanan and Samuel Lipkowitz of WPB's Labor Division, Messrs. Hill, Harbison, Ayer, Hayes,

Heikes and Hatch, General Lucius Clay representing the War Department Services of Supply, General Frank J. McSherry of the War Manpower Commission, Senator Chan Gurney and Representative Francis Case of South Dakota, Representative Harry Englebright of California, and the five aforementioned representatives of the gold mining industry.

At the opening of the meeting Mr. Batt stated that he had brought the gold mine operators to Washington to tell them that a decision had been made to close the gold mines in order to transfer the released labor to the copper mines. In justification of such an order, Mr. Lipkowitz of WPB's Labor Division stated that there were between 10,000 and 12,000 men who were then employed in the gold mines. The gold mine owners immediately protested that the figures stated were completely inaccurate; that the gold mines had already lost their most active men who had either gone to the shipyards and aircraft plants on the West Coast or had been drafted into the Armed forces; that the miners remaining in the gold mines were settled residents of their communities and that it was doubtful that they would move away to work in the copper mines if the gold mines were closed.

In response to General McSherry's statement that the need for underground workers in the copper mines was urgent, Mr. Bjorge of Homestake pointed out that it was unreasonable to hope that gold miners would accept the jobs which the nonferrous metal miners were already leaving for more desirable employment, and that it was more likely to expect that miners forced to leave Homestake would go to the same type of more desirable jobs to which the copper miners were going. He also pointed out the great hardships which the closing of the Homestake mine would inflict upon the local communities and upon the State of South Dakota. Similar arguments against a closing order were advanced by the other gold mine operators and by the Senators and Representatives in attendance. Messrs. Hatch, Heikes and Ayer, all of WPB, questioned the possible effectiveness of the proposed order. General Clay, representing the Army, spoke strongly in support of a closing order. Late in the meeting, Wilbur A. Nelson undertook to determine how

many miners and muckers would actually be released by a closing order.

37. On October 3, 1942, Wilbur Nelson furnished Mr. Batt with figures which he had obtained directly from the gold mine operators. He reported that while there were 3,270 workers employed by gold mining companies at that time, only 896 of them were hardrock miners and muckers. He further reported that approximately 300 of these men would be needed to maintain the buildings, machinery and equipment in repair, and the access and development workings safe and accessible as provided for under the proposed order. His report concluded that if all the gold mines and dredges in the United States were put on a stand-by basis, it would make available only about 600 miners and muckers for other mining enterprises "provided they [could] all be induced to go into other mines."

38. On October 1, 1942, Mr. Batt sent the following memorandum to Donald Nelson, Chairman of the WPB:

> The more I study the gold mining situation, the more uncertain I am as to the form which a restriction of operations should take. Complete closing without exceptions will produce very serious economic dislocations, and the total possible gain in men is a small figure. If the question comes up in your press conference, I would suggest that you refer to the need for miners and the lack of need for gold, and say that the matter is being studied from all angles.

39. On October 2, 1942, Under Secretary of War Robert P. Patterson sent Mr. Batt the following letter:

> I hope that prompt and effective action will be taken with regard to gold mining. I need not call your attention to the urgent need for more miners in the production of copper and other nonferrous metals as you know the situation as well as I do. The longer the delay in shutting down gold mining, the further off will be the relief of the copper shortage. The matter has hung fire for some time, and I trust that there will be no further delay.
>
> If it is thought best to have the order approved by the War Department and the Navy Department, I will be glad to give the War Department's approval, and I believe that Mr. Forrestal will do the same for the Navy.

40. On October 5, 1942, Under Secretary of War Patterson and Under Secretary of the Navy Forrestal sent the following memorandum to Donald Nelson:

> The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.
>
> There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production. These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.
>
> The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step and others will not give complete relief if nothing is done to transfer gold miners to copper mining.
>
> The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided.

41. The matter was presented to the War Production Board at its meeting on October 6, 1942. The minutes of that meeting, insofar as here material, and which accurately reflect what transpired, read as follows:

> Mr. Batt reported that the matter of shutting down United States gold mines had been receiving detailed attention. On conferring with Brigadier General McSherry of the War Manpower Commission and representatives of the gold mining companies, it had been found that at present the gold mining industry employs 3,270 workers; 750 are engaged in dredging and only 896 are hard-rock miners. Loss of labor to the Services and to war industries, and higher costs have already sharply curtailed operations of all domestic mines except Homestake. Homestake's labor force has dropped from a peak of slightly over 2,000 workers to 1,876, including lumbermen and machine shop workers. If Homestake were shut down except for standby operations, all but 500 of these workers could be released for work elsewhere. Lead and Deadwood, South Dakota, with aggregate populations of 16,000 are totally dependent on the mine's operation.
>
> Although it has recently emphasized other forms of production, the State Department, because of broad in-

ternational considerations, heretofore has urged that gold mining in South Africa and Honduras be maintained. The South African economy and the stability of the present government are largely dependent on gold mining. The basic industries of Honduras are the cultivation of bananas, of which exportation to the United States has been reduced to 20 percent of normal, and gold mining. Mr. Leon Henderson reported that Canadian gold mining is being curtailed very sharply. The Vice President pointed out that questions pertaining to production of gold abroad should appropriately be discussed with the Board of Economic Warfare.

Mr. Batt stated that after investigation he recommends that: (1) All nonessential domestic mining of gold other than that incident to the mining of critical metals be stopped as soon as possible and not later than within 60 days; and (2) gold mines not producing critical metals be allowed to continue standby maintenance operations lest it be impossible to reopen them at the close of the war.

General Somervell stated that because of the critical shortage of copper, which is drastically curtailing ammunition production, the Army has taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines and that, under these conditions, failure to stop gold production immediately would be inexcusable.

After further discussion it was agreed that:

> An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within 60 days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition.

42. Those in attendance at the October 6, 1942, meeting of WPB to consider the gold closing order included Donald M. Nelson, W. L. Batt, A. I. Henderson, Wilbur A. Nelson, Under-Secretary of War Robert P. Patterson, Lieutenant General Brehon B. Somervell, and Paul V. McNutt, Chairman of the War Manpower Commission. The meeting was also attended by numerous other persons who were there for the purpose of considering the so-called feasibility program. The gold curtailment order was discusssed for some fifteen to thirty minutes and it was decided to issue the gold closing order immediately.

43. On October 8, 1942, the WPB issued Limitation Order L–208 directing that operations at gold mines not holding

serial numbers under Order P–56 be discontinued. Order L–208 read as follows:

The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.

Section 3093.1—LIMITATION ORDER L–208

(a) *Definitions.* For the purposes of this order, "nonessential mine" means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P–56.

(b) *Restrictions upon production.*

(1) On and after the issuance date of this order, each operator of a nonessential mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.

(2) In no event on or after 7 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any development work or any new operations in or about such mine.

(3) In no event on or after 60 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below ground, or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair, and its access and development workings safe and accessible.

(4) The provisions of this order shall not apply to any lode mine which produced 1200 tons or less of commercial ore in the year 1941, provided the rate of production of such mine, after the issuance date of this order, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1000 cubic yards of material in the year 1941, provided that the rate of treatment

of such placer mine, after the issuance date of this order, shall not exceed 100 cubic yards per month.

(5) Nothing contained in this order shall limit or prohibit the use or operation of the mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a preference rating of A–1–k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P–56.

(c) *Restrictions on application of preference ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the Director General for Operations issued after application made to the Mining Branch, War Production Board.

(d) *Assignment of preference ratings.* The Director General for Operations, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in subparagraph (b) (3) above.

(e) *Records.* All persons affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore.

(f) *Reports.* All persons affected by this order shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

(g) *Audit and inspection.* All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(h) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to:

War Production Board
Mining Branch
Washington, D. C. Ref: L–208

(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or fur-

nishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(j) *Appeal.* Any person affected by this order who considers that compliance therewith would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting forth the pertinent facts and the reason he considers he is entitled to relief. The Director General for Operations may thereupon take such action as he deems appropriate.

(k) *Applicability of Priorities Regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the Priorities Regulations of the War Production Board, as amended from time to time.

(P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 1, 7 F. R. 561; E. O. 9024, 7 F R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R 2719; sec 2 (a), Pub. Law 671, 76th Cong., as amended by Pub Laws 89 and 507, 77th Cong.)

Issued this 8th day of October, 1942.

Ernest Kanzler
Director General for Operations

44. Coincident with the issuance of L–208, the War Manpower Commission issued a directive relating to the employment of workers previously employed as production or maintenance workers in gold mines. This directive was issued on October 7, 1942, by Paul V. McNutt, Chairman, and stated in material part as follows:

I. On and after the date hereof no employer shall hire in, or hire for work in, Alaska or any State west of the Mississippi River, any person who on or after October 7, 1942, has ceased to be employed as a production or maintenance worker in connection with gold mining except upon referral of such worker to such employer by the United States Employment Service.

II. No person who on or after October 7, 1942, has ceased to be employed as a production or maintenance worker in connection with gold mining shall be referred by the United States Employment Service to any work in Alaska or a State west of the Mississippi River other

than work in essential nonferrous metal mining, milling, smelting, and refining activities unless such referral would be in the best interests of the war effort or unless the denial of such referral would entail an undue hardship upon the individual concerned, as determined in accordance with regulations and standards prescribed by the Chairman of the War Manpower Commission.

45. Immediately following the issuance of Order L–208 on October 8, 1942, a statement was issued by Paul V. McNutt, Chairman, War Manpower Commission, and Donald Nelson, Chairman, WPB, appealing to all workers in gold mines to transfer to nonferrous metal mines and not to other war industries.

46. The dominant consideration by Chairman Donald Nelson of WPB in the issuance of Limitation Order L–208 was the releasing of mine labor from the gold mines for employment in mines that were producing other metals, such as copper, which were in short supply and urgently needed in the war program.

47. The closing of the gold mines did very little to relieve the manpower shortage in the nonferrous metal mines because (1) a relatively small number of the type of workers needed in those mines, i. e., hardrock miners, were released (finding 37); (2) a number of these men were required to remain in the gold mines to keep them in safe condition; (3) the older and more settled experienced miners remained in their home communities doing what they could to make a living or remaining idle; (4) most of the younger hardrock miners released sought employment in the better paying war industries, construction projects, or were drafted in the armed services. Approximately 100 hardrock miners are known to have gone to work in the nonferrous metal mines and to have remained there for a year.

48. Although the preamble to the order stated that it was issued to conserve critical materials, supplies and equipment needed for defense and in short supply, the only part of the order itself which attempted to effect such a conservation was that part which prohibited the gold mines from acquiring such materials, and that acquisition had already been effectively curtailed and in large part cut off by existing priority orders (finding 17). That part of the order which

prohibited the use by the gold mines of the supplies, materials and equipment and facilities they owned and had on hand did nothing to assure that those materials, etc., would be available for use by more essential industries of by the Government. The order left the owners free to dispose of them as they pleased.

49. Prior to the issuance of L–208, and afterwards until the end of the war, critical materials, machinery and equipment subject to allocation and control by WPB were shipped in substantial quantities to foreign countries for use in their gold mining industry. These countries included South Africa, Canada, Honduras, Nicaragua and Columbia, in all of which gold mines continued to operate throughout the war.

50. On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of L–208 knew (1) that existing priority orders insured that the gold mines would not receive any critical materials needed by more essential users; (2) that the closing of the gold mines would release only a small number of hardrock miners and helpers; (3) that no agency of the Government had the power to compel these men to accept employment in the nonferrous metal mines; (4) that in all likelihood unemployed gold miners would accept employment in shipbuilding, aircraft and construction industries rather than go to work in the nonferrous metal mines where wages were low and working and living conditions poor; (5) that L–208 was not in fact directed at the known reasons for the shortage of underground workers in the nonferrous metal mines, i. e., low wages, bad working and living conditions, and the refusal of Selective Service to defer miners; (6) that a substantial number of the employees of the gold mines were middle-aged men with families who owned their own homes and would not leave their communities if any alternative were possible; (7) that in many instances the communities in the vicinity of gold mines were entirely dependent upon the operation of the mines for their continued prosperity; (8) that the deeper mines were likely to deteriorate and become flooded if closed down, and that many operators would not be able to afford the cost of keeping their mines safe and accessible or their machinery, equipment and buildings in repair during a long period of unproductivity.

51. It is reasonable to conclude that in issuing L–208 WPB acted without any justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines.

52. On October 10, 1942, 21 United States Senators from 12 gold-producing Western States sent the following letter to the President of the United States:

> Some days ago the War Production Board announced a decision to close all gold mining operations in the United States. This order was made by the Board against the emphatic protest of those representing the largest mining operations engaged in the mining of gold from lode and placer operations.
>
> The largest mining operations affected by this order are in the states of South Dakota, California, and Colorado.
>
> The Homestake Mine in South Dakota has been operating for some sixty years and has supported a community immediately surrounding the operation of some sixteen or eighteen thousand souls.
>
> The Mother Lode Mines in California extend along the western base of the Sierra-Nevada range of mountains for a distance of 150 miles or more. These mines have been depended upon by communities the total of which would approximate one hundred thousand souls.
>
> The population dependent on the Cripple Creek Mines of Colorado has varied from time to time and is not definite at this moment. Suffice it to say that it would be in the neighborhood of five or six thousand souls.
>
> The economy of communities and states in which these mining operations are located has depended largely upon these operations, in that all of these mines have contributed materially by way of taxation to the states, counties, and municipalities in which they are located.
>
> The labor employed by these mining operations in the respective states has been to a very large extent contributed by the communities that surround the respective mine operations. Homes have grown up through the years in each of these communities, and sons followed their fathers into the mines.
>
> The record made before the War Production Board discloses that in each of these mining communities the young men, that is, men under 50 or thereabouts, have already either gone into the military branches of the United States, or have gone into war activities where alluring wages attracted them. The record discloses that the men now engaged in mining operations in the

mines affected by the order are by and large about 50 years of age or over. The record before the War Production Board discloses that the men now engaged in mining operations in these localities have, with but rare exception, been employed in the mines of the respective localities for many years.

It is stated that the object of the order made by the War Production Board closing down these gold mines is because of a shortage in the supply of critical materials for defense, and the making of the order is supported by the theory that the labor employed in these gold mines will go into mines of copper or lead or zinc.

We respectfully draw your attention, Mr. President, to the record as made before the War Production Board that if all of the gold mines affected by the order of the Board are put on a standby basis, that is, if they are permitted to retain only enough labor to keep the mines from becoming flooded and caved, there will be in all about 2,020 of all types put out of employment.

The record before the Board shows that there may be another 500 men put out of employment from other mines of smaller capacity, making a total of 2,520 men put out of employment from lode mines.

It is estimated that the number of men put out of employment from dredger operations will be about 750 men. The men engaged in dredger operations are as a rule much older than those engaged in lode mining, at the present time.

It is estimated that the total number of men put out of employment by the order of the War Production Board will be approximately 3,270. The record before the Board establishes that of this number about 900 are miners and muckers.

From this number, it is estimated that between 150 and 200 miners and muckers would be necessary to retain the gold mines and dredges in a stand-by condition; hence, not to exceed 750 men, accustomed to actual mining and generally termed "miners" and "muckers" would be available for employment in mines of copper, lead or zinc.

The record made before the War Production Board discloses that miners, who have been for a long time engaged in gold mining, do not go into the mining of other minerals, such as copper, lead and zinc. There are many reasons stated for this custom.

It is emphatically stated before the War Production Board that if this mine labor population is released from

employment in the gold mines in the respective states, only a negligible number, if any at all, will seek employment or remain employed in mining operations of other metals.

The impairment of the morale of communities in the states affected by the order of the War Production Board; the far-reaching effect upon the economic structure of the communities; the irreparable destruction of private property that will be accomplished by the flooding and caving of gold mines; the discouragement and heartache that will come into thousands of homes, many of them the homes of boys now in the military service of this country, but whose parents and relatives remain in the communities affected by this order—all of these things will not be compensated by the negligible number, if any, of mine laborers who will go from the closed mines to communities far remote to engage in other mining activities.

We respectfully draw your attention to the fact that at this very time Great Britain is urging and aiding the production of more gold by the gold mining operators of South Africa.

We respectfully draw your attention to the fact that our neighbor ally in this war, the Dominion of Canada, is going forward and encouraging the production of gold in that country, and in a telephonic communication within the past few days with those in authority on the subject in Canada, the information was received that the Canadian government has no intention of closing down its gold mine operations.

We respectfully urge that no beneficial result inuring to the defense of the United States in its time of war will flow from the order made by the War Production Board closing the gold mines of this country. The record needs no emphasis that great and irreparable injury will result.

We respectfully bring this matter to your attention with the request that you stay the order made by the War Production Board affecting the gold mine operations of the United States, at least until the whole subject of marshalling of manpower and the allocation of labor may be considered, and the vital questions involved, concluded; thus that the gold mining industry of the United States may not be subjected to unwarranted and unusual hardship and injury which may not eventually be considered necessary, and which may not be equitably borne by other industries.

In May 1944, the Policy Analysis and Records Branch of the WPB submitted a report concerning Limitation Order L–208 providing in part as follows:

> It is generally agreed by the WPB divisions concerned with mining activities that a very small percentage of the released gold mine workers actually were employed by other mines. A majority of them probably went into work of greater value to the war effort than gold mining, such as lumbering, agriculture, construction, shipbuilding, aircraft manufacture;[96] but the fact remains that the primary justification for closing the gold mines was to get labor for the production of the strategic metals. Wilbur Nelson, Arthur S. Knoizen, present Director of the Mining Division, and F. H. Hayes, Chief of the Primary Production Branch of the Copper Division, concur in the statement that the number of gold mine workers who went into other mines and remained there for a year or more was not over 100.[97]

[96] A partial analysis based on the records of the Social Security Board, indicates that the released gold mine workers went into a wide variety of occupations, including in addition to those mentioned in the text, coal mining, steel working, communications, transportation, and many others; they scattered, in short, through a fair cross-section of American industry. Letter, John J. Corson, Director, Bureau of Old Age and Survivors Insurance, Social Security Board, to Stacy May, October 22, 1943.

[97] Wilbur Nelson and Arthur S. Knoizen, in interviews with the writer, March 7, 1944; F. H. Hayes, in an interview with writer, March 4, 1944.

FINDINGS RELATING TO PLAINTIFF HOMESTAKE MINING COMPANY

53. Homestake Mining Company (hereinafter referred to as Homestake) is and was at all times herein mentioned a corporation organized and existing under the laws of the State of California.

54. Homestake is and was at all times herein mentioned the owner of patented mining claims covering more than 5,000 acres of mining properties containing gold-bearing ores of great value located in the Black Hills area of South Dakota, near the city of Lead, South Dakota.

55. On October 8, 1942, and for 65 years prior thereto, Homestake was and had been engaged in the business of mining, processing and selling gold, and in 1942 was the largest gold producer in the United States.

56. On October 15, 1942, Homestake notified its employees of the issuance of Order L–208 and informed them of the necessity of concluding its gold-mining operations pursuant

to the order. Homestake urged such employees as would be released to consider the opportunities for employment in the copper mines.

57. Pursuant to the terms of Order L–208 Homestake discontinued breaking new ore on October 15, 1942, and began to lay off miners on that date.

58. On or about October 17, 1942, Homestake appealed to WPB, requesting permission to continue mining operations on the ground that Order L–208 would work an exceptional and unreasonable hardship upon it. On November 25, 1942, WPB decided the appeal, granting Homestake only limited relief. The WPB advised Homestake of this decision in a letter dated November 25, 1942, which stated in part as follows:

> Permission granted to remove and mill broken ore from underground and refill the stopes with suitable material during a period of six months beginning December 8, 1942, provided that no more than 60 employees are at any time assigned to or used in such operations and provided further that workers shall not be assigned to such operations when the War Manpower Commission finds that they are needed in mining operations elsewhere. Permission is denied to break any new ore or to proceed with any development work or any new operations in or about the Homestake mines.

59. Homestake, with the aid of the limited additional personnel authorized by WPB, continued the hoisting and processing of ore already broken from on or about October 15, 1942, until the latter part of May 1943. After June 1, 1943, the Homestake gold mine was closed down for all purposes, except necessary maintenance, until on or about July 1, 1945. It reopened on that date and has operated continuously since then.

60. On October 8, 1942, the life of operations of Homestake's gold mine based on ore bodies, indicated by reserves of ore in sight and ore that could be expected from development, was at least 20 years at the then current rate of mining.

61. Homestake, at the time of its founding in 1877, was located in an isolated part of the United States and as a result was required to maintain a policy of self-sufficiency. From its early days it established a program of maintaining larger inventories than customary in most mining en-

terprises. Prior to October 8, 1942, Homestake had acquired extensive timberlands which provided lumber for the mine, and continued this program up to the time of the issuance of Order L–208. Prior to October 8, 1942, Homestake also had developed a coal mine, and was producing its own electric power.

62. In October of 1942, Homestake had recently completed two deep mine shafts equipped with large modern hoists, and had erected a new lumber mill. Its steam power plant was relatively new and its ore processing mills were in excellent operating condition.

63. On October 8, 1942, Homestake maintained its own foundry and machine shops used in the fabrication and repair of a variety of mining and processing equipment. In addition, Homestake was capable of supplying all of its own needs with respect to mine timber, coal, and electric power.

64. The chief items of materials and supplies used by Homestake in its mining and milling operations consisted of pipe, rail, rock drills, parts for rock drills, drill steel hoisting ropes (wire), electrical wire, cyanide, lime, shoes and dies for stamp mills, balls and rods for grinding mills, liners for grinding mills, and cones and mantles for crushers. Items of necessary equipment included locomotives, mine cars and mechanical shovels.

Homestake's inventory of these and other necessary materials and supplies was sufficient to operate its mine during the entire period of the closure. This did not include items such as dynamite and explosives. Only a three months' supply of dynamite was on hand on October 8, 1942, but it was readily available without restriction.

65. At no time did WPB requisition or order Homestake to surrender or transfer any of its supplies, equipment or machinery, nor did it make any inquiries regarding the amount, nature or availability of Homestake's supplies, equipment and machinery, although the Board was furnished with an inventory of supplies on hand and other information relating to equipment and machinery.

66. The working conditions at Homestake and the living conditions in the communities surrounding Homestake in 1942 were superior to those at the nonferrous metal mines to which the Government sought to transfer the Homestake

miners. Homestake employees enjoyed free medical and hospital services, group insurance, pensions, recreational facilities, and many of the older miners owned their own homes. In 1942, approximately 440 of Homestake's employees had seen more than 21 years of service with the mine, and some had been employed there for more than 40 years. For these reasons, Homestake had enjoyed greater employment stability than the nonferrous metal mines despite the lure of higher pay in the war industries.

67. In October 1942, Homestake had sufficient labor available to operate at full capacity. Even in the event of reduction of available manpower Homestake could have maintained normal production levels by using mining techniques requiring less labor and by increasing its workday from seven to eight hours.

68. The Homestake Mining Company released 437 men from its employment during the period from the issuance of L–208 on October 8, 1942, to a date shortly prior to November 12, 1942. Of these 437 employees, 391 came from the mine department, 21 from the metallurgical department, 21 from the mechanical department, and 4 from the carpenter department. Of the 391 employees from the mine department, 183 were classified as miners on Homestake's payroll. And of these 183 miners, 39 had less than six months' experience. Of the 437 released, 110 men did not register with the United States Employment Service. Of the remainder, 207 of them were placed by the United States Employment Service in other mining work as of a date shortly prior to November 12, 1942.

Homestake reported to the U. S. Social Security Agency that it had in its employ during the third quarter of 1942 a total of 2,129 employees. In its report for the fourth quarter of 1942, the company reported that 921 of these employees received less wages than they had received in the preceding quarter, which indicates that these employees were separated from the company's employ before December 31, 1942. Of these 921, there were 401 also reported by another employer, although not previously so reported, which indicates that these employees transferred to such other employers after leaving the Homestake Mining Company. These figures did not include transfers after Decem-

ber 31, 1942, although Homestake continued limited operations through that date.

69. In October 1942, Homestake was the largest single source of potential nonferrous metal mining labor. Representatives of the United States Employment Service, immediately following the issuance of L–208, attempted to induce released workers to accept employment at the Anaconda copper mine at Butte, Montana, and the Climax Molybdenum mine at Climax, Colorado, both about 500 miles from the Homestake mine.

Fifty-one Homestake employees accepted employment at Climax. Forty-one stayed less than six months and only six employees remained as long as one year.

One hundred and seventy-eight Homestake employees accepted employment at Anaconda, and of these more than 100 left before the end of a year. A great many Homestake employees never transferred to nonferrous metal mines but remained at the mine doing maintenance work, remained idle at home, or went into other pursuits. As early as November 1942, some of the miners who had been assigned to jobs in other mining districts began returning to Lead.

70. The properties of Homestake were useful for no other purpose than the production of gold and were adaptable to no other use than the conduct of a gold mining business.

71. The closing of the Homestake mine pursuant to Order L–208 had far-reaching and drastic repercussions in the city of Lead and the surrounding communities. The population declined sharply, more than 750 homes and apartments were left vacant and boarded up, and 36 business establishments which had served the communities were left vacant.

72. In the years immediately prior to the issuance of Order L–208, the State of South Dakota received about $1,000,000 per year, or approximately ten per cent of its annual revenues, from Homestake. The State was deprived of this source of revenue by the order closing the gold mines.

73. Without acquiring new machinery or repair parts, or supplies on which there were restrictions concerning acquisition, and with a reduced labor force, Homestake could have operated profitably during the period of closure.

74. By reason of the issuance of Order L–208 Homestake was deprived of the use and benefit of ownership of its gold-

mining properties, to wit, the right to obtain gold from the ore bodies on its properties and to sell such gold.

75. No compensation has been paid to plaintiff Homestake by defendant for the closing of its mine as hereinbefore described.

FINDINGS RELATING TO PLAINTIFF CENTRAL EUREKA MINING COMPANY (A CORPORATION)

76. Central Eureka Mining Company (hereinafter referred to as Central Eureka) is a corporation organized and existing under the laws of the State of California, with its principal places of business located in Sutter Creek, Amador County, California, and in San Francisco, California.

77. On October 8, 1942, Central Eureka owned approximately 641 acres of gold-bearing land located at Sutter Creek, Amador County, California. On that date the mine employed a total of 117 men, of whom 73 were classified as underground workers.

The average age of the total number of employees was 41.74 years; 74.36% of the employees were married and had an average of 2.64 dependents. These employees had resided in the community wherein the mine was located for an average of 4.26 years, and 31 of these employees owned their own homes in that community.

78. Immediately following the issuance of L–208 on October 8, 1942, all but 64 men left the mine, that group having been retained by the company to maintain the mine until January 1943, when the National War Labor Board ordered that thereafter the company would not be authorized to employ more than 42 men in the maintenance of the mine. The record does not disclose how many of either the 64 or the 42 men were underground workers.

79. Prior to October 8, 1942, Central Eureka Mining Company was engaged in the successful operation and development of its gold mining property at a profit. In the five-year period immediately preceding the issuance of L–208, the company paid $355,414.04 in Federal and State taxes. During that same period of time the company paid to its shareholders dividends in the amount of $1,182,000.

80. On October 8, 1942, Central Eureka had an inventory of supplies on hand which would have enabled the mine to operate for a period of two or three years without replenishment.

81. Central Eureka's mining equipment included on October 8, 1942, machine shops, electrical shops, blacksmith shop, carpenter shop, an assay office, a complete mill from primary crush to cyanidation, its own source of timber, automotive and all other necessary equipment required to carry out mining and servicing of the underground workings and the extraction of gold from ore bodies.

82. During the period October 8, 1942 to June 30, 1945, while L–208 was in effect, Central Eureka, which had been producing gold for about 80 years, could have continued to operate its mine on a satisfactory basis with a reduced force of men. It had on hand sufficient inventory for that purpose and had approximately 100,000 tons of blocked out ore (exposed on four sides) in reserve and had additionally inferred ore and probable ore in reserve which would substantially increase the 100,000 ton figure.

83. The properties of Central Eureka Mining Company were useful for no other purpose except the production of gold, and were adaptable to no use other than the conduct of a gold mining business. The mine was closed by reason of compliance with L–208.

84. Within six weeks after the issuance of Order L–208, Central Eureka applied for a serial number under P–56 for the operation of a copper-mining project at Battle Mountain, Nevada. Some mining equipment was transferred from its gold mine to this copper project. It was closed down by Central Eureka about the middle of 1943.

85. In addition, Central Eureka leased some mining equipment, including flotation machines and feeders, agitators, classifiers, sand pumps, filters and compressors, to individuals who were engaged in tungsten mining. This material would not have been so leased had it not been for the issuance of Order L–208.

86. On December 9, 1943, Central Eureka, by its general superintendent, wrote the following letter to the Mining Division of WPB:

As General Superintendent of the Central Eureka Mining Company, an Amador County, California gold producer closed under War Production Board Order L–208 and placed on a maintenance basis, I wish to call your attention to our position as well as similar gold operations.

The cost of keeping our mine unwatered and of doing absolutely essential retimbering and repair work is becoming a great burden on this Company's treasury. If it became necessary to abandon the mine entirely and allow it to fill with water, I question seriously whether we or anyone else would be able to undertake a rehabilitation project at the present price of gold.

It appears to me that the situation could be helped very much if we could have the sympathetic consideration of the people charged with the administration of Order L–208 in a relatively small departure from the provisions of the Order. Such departures might include (1) the hiring temporarily or permanently of a few additional men, either as replacements or to meet emergencies, (2) the permission to extract a small amount of ore to help out the heavy deficit of the maintenance operation and to allow variations from time to time in the tonnage extracted, and (3) the consideration of use or exchange of a small amount of strategic materials as required. So far, we have been unable to make Washington officials understand these operating problems. I do not believe that such misunderstanding is the result of being arbitrary but is probably due to the fact that they are too far away from our operations to see the true picture. My thought is that if the administration of Order L–208 could be decentralized and placed in the hands of some Western representative—either Mr. Lane in Denver or Mr. Keating in San Francisco—our operations would receive a more sympathetic consideration based upon a personal understanding by the Administrator. I feel personally that this could be done without interfering in any material way with the purposes of Order L–208, understanding of course that the purpose of Order L–208 is the conservation of manpower and strategic materials for the war effort.

It is of vital concern to this Company and to this community to keep our operation alive if at all possible. The lack of authority given local administrators with respect to Order L–208 seems to unfairly discriminate against the gold mining industry as compared to other forms of business which have been forced to indirectly reduce operations. A local administrator with adequate authority could help materially to clear up this feeling

on the part of the gold operators and of the citizens of the gold mining communities.

Your early consideration of this request would be greatly appreciated.

87. On December 17, the WPB acknowledged and on December 22, 1943, replied to the above letter in part as follows:

> Supplementing our letter of December 17, your problem has been discussed very thoroughly in conference, and we fully understand your problems on maintenance in keeping your mine open and ready for operation.
>
> We suggest that you file an appeal from this order, stating your problems in detail, advising what is involved in getting your mine in operation and maintaining it on a minimum basis. In your appeal, also state whether manpower is available, and if so, can you get certification from the War Manpower Commission to use these men if they are not needed in other essential war industries.
>
> We assure you that as soon as this appeal is filed, we will give it immediate consideration to see what can be done to give you some relief under the order.
>
> We also suggest that you file with your appeal, the possible requirements of material of all types that you will need for approximately a year. If this is not possible, six months will suffice.
>
> * * * * *

There is no evidence of an appeal under L–208 other than the letter quoted in finding 86.

88. By reason of the issuance of Order L–208, Central Eureka was deprived of the use and benefit of ownership of its gold mining properties, i. e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

89. No compensation has been paid to Central Eureka by defendant for the closing of its mine as hereinbefore described.

90. On June 30, 1945, the WPB revoked Order L–208. Thereafter in 1947 or 1948 Central Eureka reopened its mine and has operated it continuously since.

FINDINGS RELATING TO PLAINTIFF IDAHO MARYLAND MINES CORPORATION

91. Idaho Maryland is now and was on October 8, 1942, and at all times hereinafter mentioned has been, a corpora-

tion duly organized and existing under the laws of the State of Nevada.

92. Idaho Maryland is now and at all times herein mentioned has been the owner in fee of certain gold-mining properties known as the Idaho Maryland Mines, consisting of approximately 8,000 acres of gold-bearing lands situated in the Grass Valley Mining District in the County of Nevada, State of California, together with all necessary mining plant and equipment located on said lands.

93. Idaho Maryland operated the above-described mining properties for many years prior to October 8, 1942, and continuously since July 1, 1945. It was recognized on October 8, 1942, as the second largest gold mine in the United States in terms of ore removed and treated.

94. Idaho Maryland's mining equipment located on said lands included on October 8, 1942, machine shops, electric shops, welding shops, blacksmith shop, carpenter shop, cyanidation plant and smelting plant, a sawmill and other mills, shops, automotive and all other necessary equipment required to carry out mining and servicing of the underground workings and the extraction of gold from the ore bodies.

95. It would not have been necessary for Idaho Maryland to acquire, during the life of L–208, any critical materials, supplies, equipment or facilities to enable it to continue operation on a profitable basis, because, (1) the mine was a fully developed mine comprising extended drifts, cross-cuts, raises and winzes, fully equipped with a large amount of modern mechanical equipment, including an efficient hoisting layout; (2) the company owned sufficient equipment in good condition, a large inventory of supplies and materials necessary for operating the mine, including large quantities of pipe and rail, steel, drill steel, building machine repair parts, tires, tubes, repair parts for milling machinery, valves, pipe fittings and miscellaneous supplies, a large supply of mercury and all other materials required to operate the mine. At no time during the war were industrial or commercial explosives, including dynamite, fuses and caps, subject to priority restrictions, and were available in large supply in the open market.

96. During the period of close down, Idaho Maryland was not wholly dependent upon the use of the mining machinery and equipment actually owned by it on October 8, 1942. There was a considerable quantity of secondhand mining machinery available at all times in California which could have been purchased by Idaho Maryland had the necessity arisen. Secondhand mining machinery was not rationed and was freely obtainable in the open market.

97. Idaho Maryland owned and operated its own cyanidation plant, but such operation was not essential to the continued operation of the mine as a gold mine. Two-thirds of the gold content of the ore is and was on October 8, 1942, recovered at the Idaho Maryland Mine in the amalgamation process, and prior to subjecting ore concentrates to the cyanidation process. Some of the free gold was recovered on the jig table prior to the amalgamation process. The Idaho Maryland mining properties are peculiar in that the ore contains considerable free gold. The cyanidation process is a further treatment of the residue of the concentrates to recover the remaining gold. The concentrates could have been sent to the American Smelting and Refining Company Smelter at Selby, California, for smelting and the final recovery of the remaining gold therefrom. The Selby smelter operated during the entire period of the war.

98. Idaho Maryland operated its own saw mill and had its own supply of timber. The mine obtained its power in 1942 from the Pacific Gas and Electric Company and continued to use such power throughout the period of shutdown. There was no shortage of electric power at the mine nor was it curtailed or restricted during the shut down but was available at all times.

99. The operations at Idaho Maryland were curtailed due to the loss of manpower between December 1941 and October 8, 1942. The payroll was reduced from over 800 employees to 212 employees between those dates. As the separations of employees reduced the number of employees, it became necessary before the closedown ordered by L–208 to alter their mining methods so as to more effectively utilize the employees who had stayed.

100. On October 8, 1942, 116 of Idaho Maryland's remaining employees were underground workers. The average age

of all employees as of October 8, 1942, was 47.7 years and 43 of the underground men were over the age of 50. If *all* of Idaho Maryland's underground workings had been kept safe and accessible as permitted by L–208, none of the 116 underground workers would have been released.

101. During the period of October 8, 1942, to June 30, 1945, while Order L–208 was in effect, Idaho Maryland could have continued to operate its mine, except for the prohibition contained in Order L–208, on a satisfactory basis with a reduced force of men by resorting to shrinkage stoping, which is a method of operation requiring fewer underground men. This method of operation has been customarily followed in the Idaho Maryland Mine. It is a method customarily used in other gold mines, such as Homestake. It would also have been possible to operate with a reduced crew by eliminating extensive development work. Extensive development work is not necessary in a mine such as Idaho Maryland, located in a well-known mineralized area such as Grass Valley Mining District. In fact, Idaho Maryland has operated continuously without the necessity of having blocked out proven ore bodies.

102. Upon the issuance of Limitation Order L–208 on October 8, 1942, Idaho Maryland, under threat of criminal prosecution for failure to comply therewith, immediately notified its employees that the mine was being closed down and discontinuing work. In compliance with said order Idaho Maryland completely closed down the operation of its gold-mining properties and suspended all mining production from and after the period prescribed in said Order L–208, to wit, on October 15, 1942.

103. The properties of Idaho Maryland are, and were, useful for no other purpose except the production of gold, and said mining properties were adaptable to no profitable use other than the conduct of a gold-mining business and were not capable of being used for any purpose other than the production of gold.

The blacksmith shop, machine shops and other shops and equipment of Idaho Maryland, which were used for the repair and maintenance of mining machinery, were not capable of being utilized in the mass production of any item and were

not devoted to any other use during the period of shutdown following the issuance of L–208.

104. With a greatly reduced labor force and without acquiring any critical material, supplies, equipment or facilities subject to government control, Idaho Maryland could have operated its mining properties on a profitable basis during the period L–208 was in effect.

105. On October 8, 1942, there were 81 employees who had terminated their employment with Idaho Maryland after October 8, 1942, who were thereafter reemployed by that firm, which obtained a record of the employees' intervening employment in most but not all instances. Of the 69 as to which the firm had a record of intervening employment, 6 were employed in other mining activities during some or all of the time they were out of the company's employ, 8 were in military service, 4 were employed in the Miners' Foundry, Nevada City, California, 6 worked with the railroads, 4 were employed in shipyards, and the remainder as to which there was information were engaged in other types of employment.

106. Grass Valley, Nevada County, California, located near Idaho Maryland's gold mining properties, was wholly dependent upon the operation of the gold mine for its continued prosperity. The closing of the mine caused considerable community dislocation and individual hardship. Since 1848, the principal occupation of the inhabitants of the communities of Grass Valley and Nevada City had been gold mining.

107. Pursuant to an appeal taken by Idaho Maryland Mine to the War Production Board, the mine was permitted to complete a second exit between the mine and the Brunswick Mine which was required by California State Law. On December 13, 1943, Idaho Maryland filed a second appeal calling to the attention of the Board specific conditions which existed underground in the mining properties by reason of the shutdown. The underground workings were caving and collapsing and the mine contended that it was essential for the protection of the underground workings that mining operations be resumed forthwith. On May 3, 1944, Idaho Maryland was permitted by WPB to resume operations on a limited basis with not over 200 men who must be over 40 years of age and not working for other industries. Produc-

tion permitted was limited to 7,800 tons of ore per month but Idaho Maryland was not able in 1944 to reach that production because of the time it took to prepare for production and to open up the necessary ground workings due to the destruction which had already occurred to the mine. A third appeal on November 24, 1944, asking permission to hire additional men was denied.

108. By reason of the issuance of Order L-208, Idaho Maryland Mine was deprived of the use and benefit of ownership of its gold mining properties, i. e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

No compensation has been paid to Idaho Maryland by defendant for the closing of its mine as hereinabove described.

FINDINGS RELATING TO PLAINTIFF ORO FINO CONSOLIDATED MINES, INC.

109. The petition as to this plaintiff was originally filed on February 8, 1950, in the name of Oro Fin*a* Consolidated Mines, Inc. Thereafter on September 9, 1952, an amended petition in this case was filed in the name of Oro Fino Consolidated Mines, Inc.

110. Oro Fino Consolidated Mines, Inc., was incorporated under the laws of the State of Nevada on January 4, 1950.

111. Under date of September 5, 1935, Hazel P. Gridley leased to one J. C. KempvanEe certain gold mining property in Ophir Mining District, Placer County, California, known and described in the lease as the Or*a* Fin*a* Mine. J. C. KempvanEe thereafter operated this property as Oro Fino Consolidated Mines, but this was simply a trade name, and the lessee continued to be the said KempvanEe.

112. Mr. KempvanEe was operating said gold-mining properties on October 8, 1942. On November 16, 1942, he requested permission of the War Production Board to continue the removal and milling of broken ore until January 15, 1943, representing that there were then 1,912 tons of broken ore in the mine. Such permission was granted by the War Production Board under date of December 2, 1942. The record does not disclose when operations at the mine

actually ceased, but it was apparently prior to March 27, 1943. The mine has never operated since that date.

113. As of October 8, 1942, there were approximately 11 employees in the mine as contrasted with about 40 in "normal" times. The record does not disclose the employments into which these men went following the closing of the mine, although it does show that as of November 8, 1942, one of these employees was awaiting a call to duty in the armed forces.

114. There is no evidence in the record as to the amount of machinery or equipment in the mine as of October 8, 1942, or as to the availability of materials for the maintenance of such machinery or equipment. The mill had been newly erected in 1938, and there were certain parts available for its maintenance, although it does not appear how long the mill could have continued operating without replenishment of this inventory of parts. The record does not indicate the disposition, if any, which was made of these parts and equipment following the closing of the mine.

115. The properties of Oro Fino were useful for no other purpose than the production of gold and were adaptable to no other use than the conduct of a gold mining business.

116. By reason of the issuance of L–208, Mr. KempvanEe was deprived of the use and benefit of the gold mining properties leased by him, i. e., the right to mine and sell gold.

117. In 1948 a Mr. MacBoyle, Mr. KempvanEe's financial backer, died. Mr. KempvanEe then turned to Mr. Nugent for financial assistance as there were certain royalty payments under a lease and certain other expenses recurring. Mr. Nugent agreed to furnish such assistance and did so. He suggested that the operation be incorporated. On January 4, 1950, Oro Fino Consolidated Mines, Inc., was organized. On February 2, 1950, Mr. KempvanEe assigned all his right, title and interest in the lease of the mining property from Mrs. Gridley to Oro Fino Consolidated Mines, Inc. The assignment provides in part as follows:

> The undersigned J. C. KEMPVANEE does hereby sell, assign, transfer and grant unto ORO FINO CONSOLIDATED MINES, INC., a corporation, all right, title and interest in and to that certain mining agreement and the real property therein described and all rights arising by virtue of said agreement, dated September 5, 1935, by and between

HAZEL P. GRIDLEY, a widow, designated at lessor and J. C. KEMPVANEE, designated as lessee, * * *

Said agreement is hereby incorporated herein and made part hereof for all purposes as though fully set forth herein.

118. No compensation has been paid to Mr. KempvanEe or to Oro Fino Consolidated Mines, Inc., by defendant for the closing of the mine as hereinbefore described.

FINDINGS RELATING TO PLAINTIFF ALASKA-PACIFIC CONSOLIDATED MINING COMPANY

119. Alaska-Pacific Consolidated Mining Company (hereinafter referred to as Alaska-Pacific) has been since prior to October 8, 1942, and still is a corporation organized and existing under the laws of the State of Washington. Alaska-Pacific is the successor in interest by way of merger of two predecessor corporations and has been, since 1938, the sole operator of the mining properties referred to hereinafter.

120. Alaska-Pacific is the owner and operator of certain mining properties located in the Willow Creek (Wasilla) Mining District in the Territory of Alaska. With the exception of two groups of mining claims hereinafter noted, all of Alaska-Pacific's properties on October 8, 1942, and thereafter were held in fee or by location notices which later matured into patents in fee issued to Alaska-Pacific by the defendant. As to one of the excepted groups, that known as the "Alaska Free Gold" claims, bearing General Land Office Survey No. 980, Alaska-Pacific held the mining rights on October 8, 1942, and has continued to hold them since then, by virtue of a lease and royalty agreement, coupled with a purchase option, which does not expire until 1961. The other excepted group, namely, the Hamburger, Red Eye and Weeny claims, were held by Alaska-Pacific on October 8, 1942, and are still so held by virtue of location notices.

121. On the aforesaid properties, Alaska-Pacific, since 1938, and its predecessors before them, operated an underground or lode mine, consisting of about 5 miles of underground workings with two entries.

122. Geographically, Alaska-Pacific's mine is located about 20 miles from Wasilla and 28 miles from Palmer, in an isolated section of the Wasilla precinct, there being no other

inhabitants except a few miners employed in neighboring mines. Except for timber which was purchased locally, all supplies, including foodstuffs, were imported from the States. These supplies moved by ship to the port of Seward, thence by railroad a distance of about 400 miles to Wasilla and thence by truck to the mine. Because of climatic conditions, as a result of which the road was often blocked, the isolation of the mine and the uncertainty of steamship schedules, Alaska-Pacific customarily followed a practice of carrying a substantial inventory of parts, equipment and supplies. At the time of the closure of the mine by virtue of Order L–208, Alaska-Pacific had in inventory, parts, equipment and supplies sufficient to permit continued operations for at least one and one-half years, special efforts having been made to accumulate a substantial inventory not only because of the foregoing factors but in anticipation of possible shortages.

123. Because of its isolated location, a company village was maintained at the mine, consisting of the mine and mill buildings, various warehouses, shops, dormitories, a school and an office building, a store, a messhall and various recreation facilities. All buildings were of frame construction and were serviced with central underground water and sewage systems. Because of severe winter conditions with snows ranging to 25 feet in depth and temperatures ranging to minus 50 degrees, and because of heavy rains in other periods of the year, constant maintenance and attention to surface installations were required to prevent early deterioration and serious damage from the elements.

124. Normally, Alaska-Pacific operated its mine with a crew of about 125 men. In October of 1942 it had a mining crew in its employ of 101 men. Of these, only three had experience in mining other than gold mining, that being in the employ of either of the two coal mines then operated in Alaska.

Aside from the two coal mines, there were no other types of mines in Alaska except gold mines.

125. Alaska-Pacific not only produced gold from its mine but also, as a kind of byproduct, a type of concentrate essential to the smelting of copper. Alaska-Pacific's concentrates were shipped to the Tacoma Smelter, Washington, and furnished about 10 percent of its requirements.

126. Under date of October 15, 1942, Alaska-Pacific submitted an appeal to the WPB for relief from the provisions of Order L–208. This appeal emphasized:

* * * * *

> First: The position of the company as a tungsten producer, actually and potentially.
>
> Second: The position of this company as the supplier of valuable and necessary materials to the copper smelting operations of A. S. & R.'s Tacoma Smelter.

* * * * *

It also referred to the hardship upon the company and its employees of closing the mine, and requested:

* * * * *

> In the light of these showings, and particularly in view of the progress made by this company in the production of a strategic metal, we again request the Board to restore the P–56 rating which had been revoked by the general order of March 2nd last. If the said rating is granted, the company will agree to curtail its gold production by at least 50% by ceasing development of sections of its mine where no deposits of scheelite in recoverable quantities exist.

* * * * *

The WPB granted this appeal, by telegram reading as follows:

> RE YOUR APPEAL FROM ORDER L–208 YOU ARE HEREBY AUTHORIZED TO CONTINUE OPERATIONS UNTIL DECEMBER 8TH, AT YOUR INDEPENDENCE MINE UNDER THE FOLLOWING CONDITIONS: DURING THAT PERIOD YOU WILL DRILL, BREAK AND DEVELOP, AS RAPIDLY AS POSSIBLE, THE SCHEELITE ORE SHUTE YOU HAVE OPENED, IN ORDER TO SHOW THE MONTHLY TONNAGE OF SCHEELITE WHICH YOU CAN MINE, TREAT AND SHIP TO THE METALS RESERVE COMPANY'S STOCKPILE AT ANCHORAGE (STOP) YOU ARE, UNDER THE TERMS OF THE ORDER, PERMITTED TO REMOVE FROM THE MINE ANY OTHER ORE BROKEN AND IN THE MINE AS OF OCTOBER 15TH, AND MILL THE SAME (STOP) YOU ARE AT THE SAME TIME REQUIRED TO PREPARE THAT PART OF YOUR MINE NOT CARRYING [T]HE SCHEELITE ORE TO BE IN STAND BY CONDITION BY DECEMBER 8TH (STOP) ON OR BEFORE NOVEMBER 30, YOU MUST FURNISH A COMPLETE PROGRESS REPORT TO US ON YOUR TUNGSTEN DEVELOPMENT AND ALSO ON THE AMOUNT OF BROKEN ORE YOU HAVE REMOVED FROM YOUR MINE AND MILLED, WITH METALLIC CONTENT (STOP)

127. Under date of November 27, 1942, Alaska-Pacific submitted to the WPB a report on its scheelite (tungsten) production, as requested in the grant of the appeal. This report pointed out that approximately 2,000 tons of ore had been processed since the grant of the appeal, yielding 113 pounds of gold, 56 tons of concentrates for the Tacoma smelter, and about 20 tons of crude scheelite ore containing at least 80 units of tungsten trioxide. In the letter transmitting the report, Alaska-Pacific stated that:

> * * * By no stretch of the imagination is scheelite likely to become anything more than an important by-product of our gold operation. Actual financial loss will attend the scheelite phase of our operations, and such losses are likely to persist for the entire period during which scheelite is produced, unless subsidies are granted, or scheelite prices raised. * * *
>
> * * * * *
>
> The scheelite situation at Independence is in the same category. Frankly, it is a case of no gold, no scheelite. We cannot waste the economic metal in order to produce the uneconomic one. This company would be hard put to maintain its predominantly gold workings in standby condition and at the same time undertake production of scheelite at a loss, unless income from its gold production was continued.
>
> We submit this letter and the accompanying Progress Report with confidence that the evidence offered will justify the issuance to us, at an early date, of a priority rating which will affectively [sic] suspend L–208 as it may apply to our operation at Independence. In the event that your Board should determine upon action according further time extension in the application of the order, we wish to suggest that not less than six months be accorded us, as any shorter time would be inadequate to bring our scheelite potentialities into production upon an efficient basis. The extension should permit continued normal gold production, so that the hardships referred to in our Appeal of October 15th would not materialize, and so that scheelite production, carried on at a loss, would be reasonably compensated for.

Under date of December 11, 1942, the WPB granted Alaska-Pacific an additional period of operation, its letter of authorization reading in material part as follows:

After careful consideration of the facts presented in your Appeal, the following relief from Order L–208 is hereby authorized:

> Permission is granted until June 8, 1943, to continue your normal lode mine operations of breaking, drawing and milling gold-bearing ore, for the purpose of producing tungsten-bearing ore and upon the condition that plans for proceeding with this operation shall meet with the approval of the War Production Board.

The provisions of Order L–208 are waived to the extent required to obtain the relief authorized above, provided that Order L–208 in all other respects and all other Orders and Regulations of the War Production Board are fully complied with.

128. Alaska-Pacific submitted certain additional reports and requests for relief in the succeeding months. In a report submitted under date of January 26, 1943, it stated that approximately 35 tons of scheelite ore had been produced in two full months, which "exceeded the 3% minimum of contained WO–3 prescribed by Metals Reserve Company."

129. Under date of April 14, 1943, the Director of the Mining Equipment Division of WPB wrote to Alaska-Pacific in part as follows:

> * * * Your report on the recovery and production of tungsten, and the information contained in the report by the United States Geological Survey, would indicate that it is neither desired or advisable, to attempt to continue your operations on any other basis than for the production of gold with tungsten as a by-product. The limited amount of tungsten that might be produced by hand-sorting of the ore is not impressive. Additional tungsten might be recovered by proper mill treatment of the ore, but the time involved in determining the method of recovery to be used in making installations in your plant, the manpower required in the operation of your mine and mill, the materials consumed, and the potential tungsten production, do not justify the continuation of your project.
>
> It is the opinion of all groups concerned, after a thorough review of your case, that neither your present production of tungsten or potential production under either of the proposed plans for recovery, justifies the continued operation of your gold mine.
>
> The production of a high iron sulphur concentrate as diluent, for use at the Tacoma Smelter, through the

mining and treating of an estimated 30,000 tons of ore annually, to produce 1,000 tons of concentrates, is not economical in the use of manpower or materials consumed. Every possible effort is being made to provide that type of flux from other than a gold mine. For these reasons, the issuance of a serial number under Order P–56 for your gold mine, has not been recommended.

The grant permitting continuation of your gold mining operations at the Independence Mine, Wasilla, Alaska, expires June 8, 1943. You are hereby advised that your mine and mill should be placed in standby condition by that date. This is in accordance with the policy of the War Production Board, established through the issuance of Limitation Order L–208, directing the closing of all nonessential mines in the United States. This policy has been extended to Latin America and other foreign countries, through the curtailment of supplies and materials being furnished for gold mining. The reduced consumption of materials, supplies and equipment, through the cessation of gold mining, transfer of idle equipment for use in production of strategic materials and defense projects, has been effective in stimulating production, accelerating completion of projects and reducing the load on the production lines, which are needed to produce for direct military requirements, as well as our vital industries.

130. Under date of May 12, 1943, Alaska-Pacific submitted to WPB a final and voluminous appeal, emphasizing the hardship to itself and its employees which would result from the close down of operations.

By telegram of June 6, 1943, the WPB allowed a further extension of operations to August 8, 1943. On June 21, 1943, the administrator of Order L–208 wrote to Alaska-Pacific advising that after August 8, 1943, the mine must be placed in standby condition.

131. On July 29, 1943, Alaska-Pacific sent the following letter to the WPB Mining Branch:

This is to advise you and the various members of the Board that on or before August 8th, 1943, our operations near Wasilla, Alaska, will be closed down pursuant to the above referred to Order and the various directions issued thereunder. This step is taken by us under the threat of the criminal and other penalties which are provided for in the order. It is not voluntary on our part, but under express protest.

We hereby advise you of such protest and that we reserve all of our legal rights against those responsible for the promulgation and enforcement of this order, it being the position of this company that the order itself and the various actions taken under it are without sufficient foundation in law and are illegal.

We are unable at this time to estimate the extent of the damage which we may sustain by virtue of the enforcement of this order. However, you are advised that it will amount to a substantial sum.

On August 13, 1943, the administrator of Order L–208 wrote the following letter to Alaska-Pacific:

Your letter of July 29 with reference to the closing of your Independence Mine at Wasilla, Alaska, has just been brought to my attention.

We regret that conditions necessitated the action which made the closing of your mine necessary, however, we feel that you are following the wisest course by ceasing operations at the expiration of the extension of the grant made to your company. Little hope of extension could be anticipated in view of present conditions in Alaska, with respect to coal shortage and the difficulty in securing men to work in those mines.

We trust that your company will encourage in every way possible the transfer of men released from your operations, to coal mines. That is one of the most important contributions that could be made to the war effort at this time.

132. The plaintiff received a formal notice dated August 13, 1943, from the WPB in the following terms:

This is with reference to your appeal filed under date of May 12, 1943, requesting relief from the provisions of Limitation Order L–208.

An extension of time was given you on the grant under which you had been operating, permitting you to continue your operations until August 8, 1943, under the same limitations and prohibitions as the original grant.

You ask that an exception be made in your case by the grant of permission to continue your lode mine operations in the Independence Mine located at Wasilla, Alaska, for the purpose of extracting gold in conjunction with your tungsten ore production.

The Appeals Board has given full and careful consideration to all of the facts brought out in your appeal and has consulted the War Manpower Commission as to the advisability of permitting your workers to con-

tinue in a non-essential mine. It is the War Manpower Commission's belief that your workers can be utilized to better advantage in the war effort in the coal mining operations in your immediate vicinity.

Therefore, we regret to inform you that your appeal for relief from Order L–208 must be denied.

133. There is no competent evidence in the record to show the employments to which former employees of Alaska-Pacific transferred upon the closing of the mine on August 8, 1943. On the whole, gold miners are unfavorably inclined toward employment in coal mines, partly because of the hazards involved and partly because equipment and machinery are different. Although the record does not establish the exact number of gold miners who transferred to the two coal mines, at least four, and possibly a few others, did. There were no other strategic metal mines in Alaska for the gold miners to transfer to.

134. Subsequent to the closure of the mine, Alaska-Pacific sold most of the perishable items in its inventory to such agencies as the Alaska Road Commission and the Alaska Railroad, and stored at the mine the other items.

135. Prior to the closure pursuant to L–208, Alaska-Pacific was operating its mining properties at a profit.

136. By reason of the issuance of L–208 Alaska-Pacific was deprived of the use and benefit of ownership of its gold mining properties, i. e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

137. No compensation has been paid to Alaska-Pacific by defendant for the closing of its mines as hereinbefore described.

FINDINGS RELATING TO PLAINTIFF BALD MOUNTAIN MINING COMPANY

138. Bald Mountain Mining Company (hereinafter referred to as Bald Mountain) is a corporation incorporated under the laws of the State of South Dakota.

139. On October 8, 1942, Bald Mountain was the owner of certain gold-bearing lands in Lawrence County, South Dakota. On that date it was engaged in mining gold on said properties.

140. Subsequent to the issuance of Limitation Order L–208 by the War Production Board, Bald Mountain filed an appeal for relief from its provisions, and was granted permission to remove broken ore from the mine and to operate its mill up to June 1943. This firm continued operations on that basis to that date. The War Production Board granted permission to continue operations to August 8, 1943, but notification of this action was received by this plaintiff after it had already ceased operations.

141. Bald Mountain had approximately 150 employees shortly before October 8, 1942. The record does not disclose the nature of the employments to which these men shifted after the closing of the mine.

142. The record does not disclose the nature or size of Bald Mountain's inventory of mining equipment, materials and supplies as of October 8, 1942, or the length of time it could have continued to operate without replenishment of such inventory. The record does not disclose the extent, if any, to which this plaintiff may have sold or otherwise disposed of any of its mining equipment during the period its mine was shut down.

143. Bald Mountain reopened its mine shortly after the revocation on June 30, 1945 of Limitation Order L–208, and has remained in operation since.

144. By reason of the issuance of L–208 Bald Mountain was deprived of the use and benefit of its ownership of its gold mining properties, i. e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

145. No compensation has been paid to Bald Mountain by defendant for the closing of its mine as hereinbefore described.

FINDINGS RELATING TO PLAINTIFF ALABAMA-CALIFORNIA GOLD MINES COMPANY

146. Alabama-California Gold Mines Company (hereinafter referred to as Alabama-California) is a corporation organized under the laws of the State of Washington.

147. On October 8, 1942, Alabama-California was the owner of certain gold-bearing lands located in the State of California.

148. On August 8, 1942, Alabama-California closed its gold mine, and ceased all operations at the mine either that day or the next. This closing was the result of a shortage of manpower and materials, and the possibility that such a closing would be necessary had been contemplated by the Board of Directors for several months.

149. During the year 1943, Alabama-California sold $40,000 to $50,000 worth of supplies and materials from its mine. Additional sales were made thereafter, and in 1949 most of the balance of the machinery and equipment at the mine was sold.

150. Alabama-California has never reopened its gold mine since its closing in August of 1942.

FINDINGS RELATING TO PLAINTIFF CONSOLIDATED CHOLLAR GOULD & SAVAGE MINING COMPANY

151. Consolidated Chollar Gould & Savage Mining Company (hereinafter referred to as Consolidated Chollar) is a corporation organized under the laws of the State of California.

152. On October 8, 1942, Consolidated Chollar owner certain gold-bearing lands in Story County, Nevada.

153. On October 8, 1942, the above-named firm was operating a mine producing gold and silver on this property, the proportion of the two metals produced being about fifteen ounces of silver to one of gold. Its method of operation at that date was an open-pit one, that is to say, it had explored the location and size of the veins of gold and silver through an underground shaft, but finding the cost of mining through that shaft to be excessive, had stripped off the rock above the veins containing precious metal, and was recovering ore by use of power shovels. It had limited its operations exclusively to open-pit mining sometime prior to the middle of 1942 when the underground mining was discontinued.

154. Prior to the issuance of Order L–208, from about March 1942 until such issuance, it had been apparent to this plaintiff's officers that the pit operations of stripping off the surface rock, or overburden, preliminary to mining the gold and silver ore, were becoming prohibitively curtailed because of the shortage of rubber essential to the trucking of waste

from the stripping operations. For several months prior to October 30, 1942, in anticipation of that point when the development of new ore would no longer be practicable, Consolidated Chollar's management had been making preparations to conduct operations which would consist of the rehandling of previously mined and processed ore. Machinery was installed for this purpose.

The record does not show the extent of the open-pit operations which had been conducted by this firm.

155. On October 30, 1942, Consolidated Chollar requested of the WPB permission to conduct operations which would consist of the rehandling of previously mined and processed ore called tailings. It stated that the operations would require a crew of only six men and that they would be available from the local community and were of advanced age so they were precluded from employment in copper mines or defense plants. It also stated that the planned operations would require no steel consumption and that the supplies on hand and available from mines already closed down would enable the operations to be carried to completion.

On November 25, 1942, Consolidated Chollar was notified by the WPB that it was authorized to conduct the rehandling operations desired, and on February 26, 1943, this authority was extended to June 30, 1943.

156. Consolidated Chollar's operations involving the rehandling of previously processed ore turned out to be unsuccessful and resulted in financial loss. On April 28, 1943, it advised WPB of this and requested permission to resume its normal operations consisting of open-pit mining. It informed the WPB that a resumption of such operations had been impossible three to six months previously because of the lack of adequate equipment but that it then anticipated equipment would be available for a resumption of normal operation as a result of the completion of defense projects in the area of its operations.

Consolidated Chollar anticipated that its return to open-pit operations would require not to exceed 20 men from the locality whose ages averaged over 50 years. This plaintiff also anticipated that steel consumption in the open-pit operations would be extremely low and estimated that there were sufficient steel-contained materials on hand to last about six

months. Necessary operating supplies and fabricated repair parts were expected to amount to about $6,000 per month.

On June 19, 1943, the WPB refused to transfer the application of serial number 36–209, which had authorized Consolidated Chollar's rehandling operations, to the resumption of open-pit mining, and thereby refused it permission to resume open-pit operations.

157. On June 23, 1943, in furtherance of its attempts to obtain permission to conduct open-pit operations, Consolidated Chollar advised the WPB by letter that there were 15 men not suitable for work in war industries available in the locality and that there were sufficient operating supplies and fabricated repair parts on hand, with the exception of sodium cyanide, for the conduct of operations for six months. It stated in this letter that if such operations were authorized, priority assistance for supplies and equipment would not be required for six months except in the event of unexpected equipment breakdown.

158. On August 28, 1943, the WPB issued Serial No. 36–26–T under Preference Rating Order P–56 which had the result of removing Consolidated Chollar from the restrictions of Order L–208. It was permitted to conduct open-pit operations as a result of the issuance of this serial number. Also, it was authorized by the serial number the use of a priority rating under P–56 for the obtaining of maintenance, repair, and operating supplies. The rating was extended at least through the first and second quarters of 1944.

By letter dated December 10, 1943, Consolidated Chollar reported to the WPB in respect to its operations under the serial number for the previous ninety days, as follows:

> Owing to inefficiency of available labor and lack of adequate equipment in the form of power shovels and trucks for the pit operation we have as yet been unable to bring the operation up to capacity. As time goes on we hope this condition will improve.

The letter also stated that up to and including November 30, 1943, it employed 23 men and that the average daily tonnage of ore produced was 320 tons. These figures compared with the 1942 operations which resulted in a total

tonnage of 144,192 tons, or roughly 400 tons per day, with about 23 or 24 employees.

The record does not disclose how long this plaintiff continued operations under the aforementioned serial number or its reasons for discontinuing its operations, if it did.

159. After the war when Consolidated Chollar resumed operations, it conducted open-pit operations. At that time this plaintiff found it necessary to first remove overburden from above the ore vein because no ore was clear for breaking. The reason for this was that during the effective period of Order L–208, it had been able to process all of the ore which it had stripped of overburden prior to the close of 1942.

160. From the issuance of L–208 to August 28, 1943, Consolidated Chollar was permitted to carry on the rehandling of previously mined and processed ore in accordance with plans the company had made early in 1942. From August 28, 1943, to the end of the war, Consolidated was in possession of a serial number which permitted it to carry on open-pit mining operations and to use a priority rating under P–56 to obtain maintenance, repair and operating supplies. Consolidated Chollar was never required to close its mine under L–208.

FINDINGS RELATING TO PLAINTIFF ERMONT MINES, INC.

161. Ermont Mines, Inc. (hereinafter referred to as Ermont), is a corporation organized under the laws of the State of Oregon.

162. On October 8, 1942, Ermont was the owner of a compact block and contiguous Quartz Lode Mining Claim, designated Nos. 1 through 34 inclusive, located in Montana unorganized Mining District, County of Beaverhead, State of Montana.

163. In October 1942, Ermont was working claims numbered 1 (with drifts on claims numbered 2, 3 and 4), 2 (working over into claim No. 6), 7, 9, 19, 20, 23, 24, 28, and 32. After receiving WPB order to close down in October 1942, Ermont continued taking out the ore already mined during the latter part of October and into November, ran it through the mill and the refinery and shipped it to the mint.

Thereafter the mine and buildings were closed and a watchman was employed to look after the property.

164. On October 8, 1942, Ermont employed a crew of men, number not established, adequate to work the above claims. The men had their homes in the vicinity of the mine. The mine had sufficient supplies, machinery and equipment, in good working order to continue operations for at least a year from October 8, 1942, if the owner had not closed down in compliance with L–208. Mining operations were resumed at Ermont at some time subsequent to the revocation of L–208 in 1945.

174. By reason of the issuance of L–208 Ermont was deprived of the use and benefit of its ownership of its gold mining properties, i. e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

175. No compensation has been paid to Ermont by defendant for the closing of its mine as hereinbefore described.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgments herein, the court concludes that as a matter of law plaintiffs Homestake Mining Company, No. 50195; Idaho Maryland Mines Corporation, No. 50182; Central Eureka Mining Company, No. 49468; Alaska-Pacific Consolidated Mining Company, No. 49693; Bald Mountain Mining Company, No. 50214, and Ermont Mines, Inc., No. 50214, are entitled to recover, the amounts to be determined in further proceedings under Rule 38 (c) before a commissioner of the court.

The court further concludes that as a matter of law plaintiffs Oro Fino Consolidated Mines, Inc., No. 49486; Alabama-California Gold Mines Co., No. 50214, and Consolidated Chollar Gould & Savage Mining Company, No. 50214, are not entitled to recover and their petitions are therefore dismissed.

In the United States Court of Claims

(Decided July 12, 1956)

No. 49468

CENTRAL EUREKA MINING COMPANY (A CORPORATION)

v.

THE UNITED STATES

No. 49693

ALASKA-PACIFIC CONSOLIDATED MINING COMPANY

v.

THE UNITED STATES

No. 50182

IDAHO MARYLAND MINES CORPORATION

v.

THE UNITED STATES

No. 50195

HOMESTAKE MINING COMPANY

v.

THE UNITED STATES

No. 50214

(1) BALD MOUNTAIN MINING COMPANY,
(7) ERMONT MINES, INC.

v.

THE UNITED STATES

Mr. Phillip Barnett for Plaintiff Central Eureka Mining Company. *Messrs. Ralph D. Pittman* and *Rodney H. Robertson* were on the brief.

Mr. John Ward Cutler for Plaintiffs, Bald Mountain Mining Company, and Ermont Mines, Inc.

Mr. O. R. McGuire, Jr., for Plaintiff Alaska-Pacific Consolidated Mining Company. *Messrs. Hogan & Hartson* and *V. A. Montgomery* were on the brief.

Mr. George Herrington for Plaintiff Idaho Maryland Mines Corporation. *Messrs. Orrick, Dahlquist, Herrington & Sutcliffe* were on the briefs.

Mr. Edward W. Bourne for Plaintiff Homestake Mining Company. *Messrs. James D. Ewing, Eugene Z. Du Bose, Edward E. Rigney, J. Kenneth Campbell* and *James W. Misslbeck* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant.

ON DEFENDANT'S MOTION FOR NEW TRIAL

LITTLETON, *Judge*, delivered the opinion of the court:

In support of its motion for a rehearing in the above cases, the Government says that the court erred in holding that the issuance of War Production Board Limitation Order L-208 amounted to an exercise of the Government's wartime power of requisitioning or eminent domain because (1) in issuing L-208 the Government did not expressly intend or purport to exercise such requisitioning powers and (2) if L-208 was an "invalid" order, as defendant insists the court held it was, it conferred no right on the plaintiffs to just compensation. On the whole record the court is of the opinion that defendant's motion should be denied.

Defendant attempts to create the impression that this court held that the War Production Board purported to act under a single act, i. e., the Act of October 16, 1941, 55 Stat. 742, containing certain requisitioning powers, when it issued L-208, whereas, defendant says, the record in these cases will not support such a conclusion.

The court did not hold that WPB purported or intended to exercise any of its several requisitioning powers when it issued L-208. The court noted the various authorities actually cited at the conclusion of L-208 including Executive Order 9024 which contained a delegation of the President's requisitioning authority conferred by section 120 of the National Defense Act of 1916 (39 Stat. 312). Beyond that, the court merely noted the various statutes in effect on the date of the issuance of L-208 which gave the Government wide powers to take private property needed by the Government to carry on the defense of the country in wartime, and held that under such a statutory scheme the Government appeared to have had adequate power to take what it in fact took from the plaintiff gold mine owners and operators.

On the matter of whether WPB "intended" or "purported" to act under any of the statutes giving the Government the power to take or requisition private property for war purposes, the court held that WPB purported to issue a priorities and allocation regulation; that to the extent that L-208 prevented the gold mine owners and operators from acquiring new equipment, material and facilities, L-208 was a proper priorities and allocation order, but that to the extent that L-208 denied those owners the right and clear authority which they and every other citizen have to make use of the materials, facilities and equipment which they owned and had on hand, in the operation of their legitimate and legal mining enterprises, L-208 had the effect of completely depriving them of a valuable property right. The court then held that because the Government had the authority to exercise the power of eminent domain and thus to deprive the gold mine owners of that property right, the Government must pay just compensation therefor whether this was done by the WPB in one form or another.

The court did not hold, as counsel for the defendant says it did, that L-208 was an invalid order. The court held that to the extent that L-208 actually allocated scarce materials away from the gold mine owners and operators it was a valid allocation order but that to the extent that it deprived the gold mine owners of the right to use their mining properties by "immobilizing" the materials, equipment and facilities owned by them and which they had on hand and needed to use to operate their mines, the order amounted to a temporary taking of their right and authority to profitably operate their mines.

The court expressly stated that an unauthorized taking is not compensable. It also stated that where there exists authority for a taking of a type of property and the Government, as it did here, takes that property, the use by the Government of a means of acquiring that property, which means was not specifically spelled out by some specific statute, does not relieve the Government of the obligation of paying just compensation, citing, among others, the case of *Edward P. Stahel & Co., Inc., et al.* v. *United States*, 111 C. Cls. 682, cert. den. 336 U. S. 951. Where there is authority to take and a taking is accomplished it is compensable. In the *Stahel* silk cases the Government had the statutory authority to take the plaintiffs' silk; the Government did not "purport" to exercise that power but rather it purported to exercise a regulatory power by issuing Order M-251 freezing or immobilizing the silk in the hands of the owners themselves until the Government should place mandatory orders requisitioning the silk. This freezing order was held to be a taking and, because the Government had the necessary power and statutory authority to "take" the silk, the court held that it must pay just compensation for it and it did so.

Defendant next attempts to analyze some of the requi-

sitioning statutes noted by the court, in order to indicate that WPB did not in fact invoke any of those statutes when it issued L-208. This court did not hold that WPB invoked those statutes any more than it held that the Government invoked the requisitioning statutes available to it in the *Stahel* silk cases. In fact, this court noted that WPB issued L-208 with the express (see preamble to the order) intention of exercising only its priority and allocation powers. The court held that what WPB said it was doing and what it in fact and law did, were two different things and that the Government could not escape the obligation of paying just compensation for what it had the authority to take and in fact took, simply by calling its action of taking a "priorities order" or an "allocation order."

Defendant's counsel also says that the expression used by the court, "war necessity," does not appear in the "taking statute" of October 16, 1941, *supra*. In using that expression the court was merely paraphrasing, as it had a right to do, the statutory language concerning the basis for the President's determination that the property proposed to be taken was necessary to the prosecution of the war; that the property was needed for the defense of the United States; that the need was immediate and impending and that all other means of getting the property had been exhausted. Inasmuch as that statute and other requisitioning statutes then in existence required no particular procedure to be followed in the making of those determinations and provided no appeals therefrom, the court held such determinations were within the discretion of the President or his delegees.

The main complaint of defendant's counsel seems to be that this court held that the Government had the necessary authority to take plaintiffs' property whereas the question of "authority" was not exhaustively briefed by the parties to the court.

It should be noted that this is the *first* occasion in this lengthy litigation on which the Government has taken the position that it lacked authority to take plaintiffs' property. No such contention has heretofore been made. Up to this point, defendant has contended that it did not take the property but merely "regulated" it. It would seem that as a defense "lack of authority to take", if there was any such lack of authority, which we think there was not, should have been raised and supported at an earlier stage. However, both parties may have felt that authority to take this property in wartime was perfectly clear, or they may have felt the point was decided in the court's decision in *Oro Fino Consolidated Mines, Inc.* v. *United States,* 118 C. Cls. 18, in which the court held that if the Government took anything from the gold mine owners when it issued L-208, "it cannot escape liability by pleading that it lacked authority to take what it did in fact take and retain," citing *International Paper Co.* v. *United States,* 282 U. S. 399. The court in the *Oro Fino* case even went so far as to say that if L-208 resulted in an *unauthorized* taking, "it was a taking of which the Government retained the benefit and for which it would therefore be obligated to pay."

In the *Central Eureka* opinion, the court did not go as far as suggested in the *Oro Fino* decision because the court found that the existing statutory scheme at the time of the issuance of L-208 contained sufficient authority to cover the taking complained of and thus avoided that twilight area involving the right to just compensation where authority to take the property involved is not clear. On that point, in the recent decision of the Supreme Court in *Bill Hatahley et al.* v. *United States,* No. 231, decided May 7, 1956, the Court stated:

> * * * The fact that the agents [of the Government] did not have actual authority for the pro-

> cedure they employed does not affect liability. There is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment. * * *

The point involved in the *Central Eureka* opinion was not the lack of authority to take, but rather the use by the Government of an *unauthorized means* of accomplishing an *authorized* taking. The court held that the use of an unauthorized means of taking what the Government had the authority to take, did not relieve the Government of the obligation to pay just compensation for what it took, citing *Edward P. Stahel, supra,* (silk cases), and *Hurley* v. *Kincaid,* 285 U. S. 95, (in which the Government took by *flooding* what the statute said it must take by *condemnation proceedings*).

The final position of defendant's counsel seems to be that the only cases in which the Government may be required to pay just compensation for property which it is authorized to take and does take, are those cases in which the Government has expressly invoked a particular taking or requisitioning statute, has used the precise means of taking provided for in that statute, and has then refused to pay for what it has taken. This theory, if adopted, would rule out many taking cases among which are cases such as the silk cases, the set-aside order cases, the flooding cases, the Causby chicken farm case, and, in fact, most of the "taking" cases.

In these cases the court held simply that what the War Production Board did through the issuance of L-208 amounted to and constituted a taking through the placing of a servitude upon the use by plaintiffs of their property and plaintiffs were accordingly held entitled to recover. From this it seems clear, under the decisions, that there was a temporary taking under the Fifth Amendment. The court did not hold that there

was anything illegal about the issuance of L-208 so far as its provisions were concerned. It merely held that when a Government agency has the power to take private property, as the War Production Board did, it does not have to act in some particular formal way in order that its action shall amount to a taking.

In view of the fact that defendant's allegations of error are based on a demonstrably mistaken understanding of the court's opinion and upon conclusions clearly not warranted by that opinion, inasmuch as the court did not hold that L-208 was an invalid order and did not hold that the War Production Board purported to act under or invoke the requisitioning powers contained in any particular statute, defendant's motion for a new trial is overruled.

MADDEN, *Judge*, and WHITAKER, *Judge*, concur.

LARAMORE, *Judge*, and JONES, *Chief Judge*, dissent.

SUPREME COURT OF THE UNITED STATES

No. 1, October Term, 1956

THE UNITED STATES, PETITIONER

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 24th, 1956.

(S.) EARL WARREN,
Chief Justice of the United States.

Dated this 9th day of October, 1956.

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BRIEF FOR THE UNITED STATES

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No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE UNITED STATES, PETITIONER

v.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 29

THE UNITED STATES; PETITIONER

v.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original opinions of the Court of Claims (R. 11–62) are reported at 134 C. Cls. 1 and 138 F. Supp. 281. The opinion denying the Government's motion for a new trial (R. 142–147) is reported at 134 C. Cls. 130 and 146 F. Supp. 476.[1]

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[1] Related opinions of the Court of Claims, on the Government's demurrer to the petitions, are as follows: *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, certiorari denied, 341 U. S. 948; *Alaska-Pacific Consolidated Mining Co.* v. *United States*, 120 C. Cls. 307; *Idaho Maryland*

JURISDICTION

The judgment of the Court of Claims was entered on February 20, 1956 (R. 58). A motion by the United States for a new trial, seasonably filed, was denied July 12, 1956 (R. 147). By order of the Chief Justice, dated October 9, 1956, the time for filing a petition for a writ of certiorari was extended to and including October 24, 1956. The petition for a writ of certiorari was filed on October 24, 1956 and was granted on January 14, 1957. 352 U. S. 964. The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTION PRESENTED

In order to conserve scarce war materials, to divert mining machinery and equipment to essential wartime enterprises, and to bring about the voluntary relocation of manpower to vital mining activities and essential war work, the War Production Board on October 8, 1942, issued Limitation Order L–208. This order, as amended, required gold mines deemed nonessential to this country's war effort to be closed in the shortest possible time; prohibited operators of nonessential gold mines from acquiring or using any material, facility or equipment for mining purposes except the minimum amounts necessary for adequate maintenance; and prohibited the sale or disposition of mining machinery and equipment without the permission of the War Production Board. Without reference to the requirement as to the closing of the gold mines,

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Mines Corp. v. *United States*, 122 C. Cls. 670; *Homestake Mining Co.* v. *United States*, 122 C. Cls. 690; and *Central Eureka Mining Co.* v. *United States*, 122 C. Cls. 691.

the other restrictions had the inevitable effect of precluding the further mining of gold by the corporations affected. The Government did not otherwise interfere with respondents' exclusive possession and control of the mines.

The question is whether Limitation Order L–208 should be deemed a temporary restriction upon the use and enjoyment of private property in the interest of the national defense, or an authorized temporary taking of private property for public use under the Fifth Amendment.

STATUTES AND REGULATIONS INVOLVED

1. Section 301 of the Second War Powers Act, 56 Stat. 176, 177 amending Section 2 (a) (2) of the Act of June 28, 1940, 54 Stat. 676 (50 U. S. C. App. (1946 ed.) 633) provides, in material part, as follows:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

2. The Act of July 14, 1952, 66 Stat. 605, provides as follows:

> That the United States Court of Claims be, and hereby is, given jurisdiction to hear, determine, and render judgment, notwithstanding any statute of limitations, laches, or lapse of time, on the claim of any owner or operator of a

gold mine or gold placer operation for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions imposed by War Production Board Limitation Order L–208 during the effective life thereof: *Provided,* That actions on such claims shall be brought within one year from the date this Act becomes effective.

3. Orders and Regulations of the War Production Board, so far as pertinent, are set out in Appendix B, *infra,* pp. 111–125.

STATEMENT

Respondents are owners and operators of gold mining properties who at varying points of time in the course of World War II suspended gold mining operations pursuant to War Production Board Limitation Order L–208. By these actions, consolidated by the Court of Claims for trial on the issue of liability, each respondent seeks compensation under the Fifth Amendment for the alleged temporary "taking" of its mines or rights therein[2] effected by Limitation Order L–208. The Court of Claims (R. 11–58), two judges dissenting (R. 58–62), held that L–208 amounted to a temporary taking of the profitable use of mining property for which the United States was,

[2] Each respondent is, in whole or in part, the owner of mining property affected by L–208. Alaska-Pacific, in addition to outright ownership of mine properties, holds mining rights in two groups of claims, one by virtue of a lease and royalty agreement coupled with a purchase option expiring in 1961, and the others held by virtue of location notices.

under the Fifth Amendment, obliged to pay just compensation.[3]

In Appendix A (*infra*, pp. 73–110), we set out in detail the somewhat lengthy history and background of Limitation Order L–208. A brief summary of this history and background follows:

1. *Regulations Adversely Affecting the Gold Industry Prior to Limitation Order L–208.*—As early as May 1941, requirements for strategic and critical metals and the machinery to produce these metals began to outdistance supply and productive capacity. In recognition of the importance of the mining machinery and equipment industry to the defense preparedness requirements of the United States and the lend lease requirements of the Allies, the Office of Production Management (OPM), predecessor of the War Production Board (WPB), on July 29, 1941, issued its Preference Rating Order P–23. This order permitted producers of mining machinery and equipment to use a priority rating of A–3 in acquiring materials to be used in the production of mining machinery and equipment.[4]

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[3] While sustaining the claims of the present respondents, the Court of Claims at the same time dismissed, on independent grounds, the complaints of Oro Fino Consolidated Mines, Inc., Alabama-California Gold Mining Co., and Consolidated Chollar Gould & Savage Mining Co. (R. 141). Approximately 150 claims predicated upon Limitation Order L–208 remain pending in the Court of Claims.

[4] Priority ratings assigned to various industries by OPM, and subsequently by WPB, ranged from A–1 to A–10, with further breakdowns in the forms of A–1–a, A–1–b, A–1–c, etc.

Further, to assure the continuous operation of the nation's mining industry, OPM recognized the industry's need not only for new equipment but also for maintenance and repair equipment. On September 17, 1941, OPM issued Preference Rating Order P–56 (R. 1255). Under this order, which applied to approximately 15,000 mines, a mine operator whose operations were "important from the standpoint of defense or essential civilian needs" (R. 1167) was granted a serial number and could then apply for a priority rating entitling him to priority in the delivery of mine supplies and maintenance and repair parts.

Gold placer operations were expressly excepted from the priority benefits of P–56 (R. 1256), thus marking the first instance in which gold mining operations were singled out for special governmental treatment. In the fall of 1941, the shortage of critical mining material and supplies became increasingly acute. Since the gold mining industry was competing with essential nonferrous metal mines for the available machinery, equipment and material, the need for an overall governmental policy with respect to gold production was recognized. After obtaining the views and recommendations of various departments of the Government (R. 69–71), the Supplies, Priorities and Allocation Board adopted the policy with respect to domestic gold mining that "materials should not be allowed for expansion of production although minimum amounts for maintenance and repair may be provided" (R. 72). On December 18, 1941, OPM issued Preference Rating Order P–100

under which gold mines were entitled to the lowest priority, an A–10 priority rating, in acquiring maintenance, repair and operating supplies (R. 1369).

On December 31, 1941, P–56–a was issued, superseding P–23 and continuing the A–3 priority rating for manufacturers of mining machinery and equipment (R. 1260). On March 2, 1942, the War Production Board, successor to OPM, amended P–56 by uprating the priorities on mining machinery for essential mines and denying priority ratings to all mines whose production in dollar value consisted of 30 percent or more of gold and/or silver (R. 1268). Though the 30 percent exclusion clause was eliminated from P–56 on May 15, 1942 (R. 74), WPB in practice denied priority ratings to over 200 mines, including respondents' mines, not producing substantial quantities of materials critical to the war effort or to the civilian economy (R. 74–75).

Thus, as of March 2, 1942, by a series of OPM and WPB orders, respondents were operating, under the then scheme of wartime industry regulation, as one of the least essential industries. They were precluded from obtaining critical materials which might be needed in the operation of a mine producing material essential to the war effort and, while it was possible for gold mines excluded from the priority benefits of P–56 to apply for equipment, repair parts and operating supplies under Preference Rating Order, P–100 (the general repair order), with the very low A–10 priority rating, the wartime demands for such material so far exceeded supply that the possibility of gold mines obtaining material was remote (R. 75).

2. *Issuance of Limitation Order L–208.*—As of the spring of 1942, the progressively stringent restrictions upon the gold mining industry were deemed necessary because of the inadequate production, and increasingly acute shortage, of nonferrous metals—copper, lead, zinc, etc. (R. 74–75); a shortage of mining equipment and machinery—new and used (R. 73–74); and a shortage of equipment and materials used to manufacture mining equipment and machinery (R. 73–74). The gold industry was singled out for particularly restrictive treatment because gold was not of importance to the war effort, yet its production consumed material in short supply, badly needed by essential nonferrous metal mines (R. 69).

In the summer of 1942, an additional factor became apparent that was to precipitate the more drastic restriction of the gold industry in the form of Order L–208, in October 1942. In July, August, and September, 1942, the shortage of labor in nonferrous metal mines reached such a point that inadequate production of essential metals became a threat to the entire armaments program (R. 75–76). When the concerted efforts of the WPB, the War Manpower Commission, the United States Employment Service and the Army and Navy (R. 76–77) failed appreciably to alleviate this labor shortage, the attention of WPB and other agencies of government turned to the gold mining industry since, in the words of the Chief of the Mining Branch, WPB, "[t]he gold and silver miners constitute the last reservoir of the skilled mining labor" (R. 79, 492–493). Upon the expectation that a sizable number of the laborers re-

leased by a further restriction of the gold industry would be diverted to the nonferrous metal mines as well as other essential industries (R. 86–87, 92), the WPB on October 6 agreed that an order should be issued suspending all nonessential gold mining operations within 60 days (R. 101).

On October 8, 1942, the WPB issued its Limitation Order L–208. Addressed exclusively to the gold mining industry, L–208, as originally promulgated, directed each operator of a nonessential mine[5] immediately to take steps to close down operations and, after seven days, not to acquire, consume or use any material, facility or equipment to break new ore or to proceed with development work or any new operations in or about the mine. The order further directed that, after sixty days, material, facilities, or equipment should not be acquired, consumed, or used to remove ore or waste from the mine or to conduct operations in or about the mine except to the minimum amount necessary to maintain buildings, machinery and equipment in repair and to keep access and development workings safe and accessible. Preference ratings were not to be applied to acquire any equipment or material for consumption or use in the

[5] Specifically, the order applied to all gold mine operators not holding serial numbers under Preference Rating Order P–56. P–56, as of October 8, 1942, was addressed to the mining industry generally and provided for the assignment of serial numbers to mines whose production included significant quantities of material important to national defense (R. 102). Gold mines, including respondents' mines, not producing substantial quantities of critical materials, were, as noted above, denied P–56 serial numbers.

operation, maintenance or repair of a nonessential mine except with the express permission of the Director General of Operations, WPB, after application made to the Mining Branch, WPB. Lode mines which produced 1,200 tons or less ore and placer mines which treated less than 1,000 cubic yards of material in 1941, were, with limitations, excepted from the operation of the order. Provision was made for appeal to the WPB by any person affected by the order who considered that compliance would work an exceptional and unreasonable hardship (R. 104).

On November 19, 1942, L–208 was amended (R. 1574 C–D, 7 Fed. Reg. 9613, App., B, *infra*, pp. 114–115) to prohibit the sale or other disposition, or acceptance of delivery, of any mining machinery or equipment of the type listed in Schedule A to Preference Rating Order P–56 (R. 1276–1277), except with the express permission of the Director General of Operations, WBP, and each operator was required to submit to WPB an itemized list of Schedule A equipment and machinery indicating each item available for sale or rental.

On August 31, 1943,[6] L–208 was further amended (8 Fed. Reg. 12007, App., B, *infra*, pp. 118–123) by adding a Schedule A listing 74 items of mining equipment and machinery (App., B, *infra*, pp. 123–125) and prohibiting the sale, transfer or disposition of this equipment and machinery except (1) with the express permission of WPB or (2) to a producer holding a

[6] The amendment to L–208 of November 25, 1942 (7 Fed. Reg. 9810) merely changed the time within which the inventory of equipment and machinery was to be submitted to WPB.

serial number under Preference Rating Orders P–56, P–58, P–73.[7] As thus amended, L–208 further required that after August 31, 1943, the sale or transfer of equipment and machinery to holders of P–56, P–58, or P–73 serial numbers was to be immediately reported to the WPB mining division.

L–208, as amended, remained in effect until revoked by WPB on June 30, 1945 (10 Fed. Reg. 8110).

While a dominant consideration underlying its issuance was the release and expected diversion of labor from the gold mines to nonferrous metal mines (*supra,* pp. 8–9), L–208, as issued, was by its terms designed to conserve the critical material and equipment normally consumed in gold mining operations, and, as amended, to allocate to essential enterprises the substantial reservoir of mining equipment and machinery rendered idle by the suspension of gold mining operations. None of the respondents, by legal proceeding, questioned the validity of L–208 or the authority of WPB to issue the order.

3. *The Closing of Respondents' Mines.*—Respondent Homestake Mining Company discontinued breaking new ore on October 15, 1942. On November 25, 1942, the WPB, on Homestake's appeal, denied permission to break any new ore or to proceed with development work or new operations but authorized, for a period of six months commencing December 8, 1942, the removal of broken ore from underground and the re-

[7] Preference Rating Order P–58 applied to South American copper mines and P–73 (8 Fed. Reg. 3667) applied to smelters and refiners of thirteen critical metals.

filling of stopes with suitable material. After June 1, 1943, the Homestake mine was closed down for all purposes except necessary maintenance. Operations were resumed on July 1, 1945 (R. 111–116).

On October 8, 1942, respondent Central Eureka Mining Company employed 117 men. Immediately following the issuance of L–208 all but 64 employees left the mine. The balance were retained by the Company to maintain the mine until January 1943, when the National War Labor Board ordered that no more than 42 employees be permitted to maintain the mine. Central Eureka resumed operations in 1947 or 1948 (R. 116–120).

Respondent Idaho Maryland Mine Corporation completely closed down the operation of its gold mining properties on October 15, 1942. However, in the period between December, 1941 and October 8, 1942, the Idaho Maryland payroll had been reduced from 800 employees to 212 and only curtailed operations were being conducted at the time L–208 was issued. On May 3, 1944, after appeal to WPB, Idaho Maryland was permited to resume operations on a limited basis (R. 120–124).

Respondent Alaska-Pacific Consolidated Mining Company closed its mines on August 8, 1943 (R. 134);[8] respondent Bald Mountain Mining Company, with permission of WPB, removed broken ore from the mine and operated its mill up to June, 1943, when mining operations ceased. Operations were resumed shortly after June 30, 1945 (R. 135–136).

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[8] The court made no finding as to the date Alaska-Pacific resumed gold mining operations.

Ermont Mines, Inc. removed broken ore during October and into November, 1942, ran it through the mill and the refinery, and shipped it to the mint. Thereafter, the mine and buildings were closed and a watchman employed to look after the properties. Mining operations were resumed sometime subsequent to June 30, 1945 (R. 140).

4. *The Decision of the Court of Claims.*—In holding that L–208 amounted to a temporary compensable taking of the profitable use of respondents' mining properties, the Court of Claims acknowledged that a nonessential industry such as the gold industry could be strictly regulated in wartime and that losses resulting from such regulation are not ordinarily compensable (R. 43). Order No. L–208, however, in the court's opinion, exceeded the permissible bounds of regulation because, as an order allocating machinery, equipment and material, no provision was made whereby the machinery, equipment and material made idle by the order would be held for the use of the Government or some essential user designated by the Government (R. 31–32); nor, the court said, did L–208 require that the owners deliver material to essential users but rather "left them free to dispose of the critical materials in any way or to anyone they pleased" (R. 40). "The [respondents] might have sold their inventories of machinery, supplies and equipment to any user whether or not that user was conducting a business which was essential to the defense effort" (R. 27). In the court's view, the respondents' loss of their right to mine gold was not a

consequential loss because "L–208 neither allocated nor took [respondents'] inventory and supply of critical materials, equipment and facilities" (R. 31) but was, instead, an authorized (R. 41–42) taking of the profitable use of their mining properties (R. 45).[9]

Chief Judge Jones dissented (R. 58–61) on the ground that the provisions of L–208 which forbade the use and acquisition of critical materials in gold mining operations were valid wartime allocations of critical materials, that the closing of the mines was incident to such allocations, and the closings thus within the court's ruling in *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815. Judge Larramore's dissent (R. 61–62) was grounded on the premise that L–208 was not an allocation order; that the closing of the mines was unauthorized, therefore not compensable and should have been enjoined.

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[9] The Court of Claims in effect reasoned, *not* that L–208 went too far in the exercise of the nation's wartime powers, but that it did not go far enough, because the order did not explicitly require that the machinery, equipment, and material of the affected mines be held for the use of the Government or essential users designated by the Government. The decision implies that, if L–208 had contained such a provision, the resulting losses would not be compensable. In this connection, it is appropriate to note that, although the record discloses references to the November 19 amendment to L–208 (R. 479–482; 1574C–D, 1575), neither the findings of the Court of Claims nor its opinions make any reference to the November 19 and 25, 1942 and August 31, 1943 amendments to L–208 (*infra*, pp. 111–125). See the discussion, *infra*, pp. 50–52.

SUMMARY OF ARGUMENT

In World War II, the task of converting the economy of the United States from a peace to a war basis, and the task of mobilizing and directing the economy to meet the exigencies of total war fell primarily to the War Production Board (WPB). To discharge its responsibilities, the WPB, by delegation from the President, was armed with (among other things) the statutory war power of the President to allocate material and facilities "in such manner, upon such conditions and to such extent" as "necessary or appropriate in the public interest and to promote the national defense." Section 301 of the Second War Powers Act, *supra*, p. 3. Under these powers, WPB regulated the nation's economy on an unprecedented scale with the objective that all of our resources be utilized with maximum efficiency to produce the munitions and implements necessary to the successful prosecution of the war.

Regulation by the War Production Board assumed a variety of forms but it was primarily through thousands of priorities orders, material conservation orders, and orders limiting, curtailing, or prohibiting production of nonessential products, or prohibiting and restricting the use of critical war materials, that industry was converted to, and mobilized for, war production. Through WPB regulation, raw materials, machine tools, machinery and equipment were channeled from nonessential users to enterprises essential to the war effort and manpower was made

available to the mines, factories, shipyards, aircraft plants, and other industries engaged in production vital to the war economy.

Limitation Order L–208, involved in this case, was but one instance of WPB's wartime regulation of American industry. By this order, WPB dealt with the problems of the mining industry which, in the fall of 1942, were so acute that the inadequate production of nonferrous metals—copper, lead, zinc, tungsten, etc.—posed a grave threat to the war program. L–208 directed gold mines not producing substantial quantities of critical materials to close down, and the order also prohibited, within certain time limits, the acquisition or use of any material, facility, or equipment for mining purposes except for restricted uses. By WPB Priorities Regulation 13 and Order L–208, as amended on November 19, 1942, the material, machinery, and equipment thus rendered idle were subject to being channelized to essential users and only to them. Order L–208 was issued because WPB reasonably believed (on the basis of repeated and careful studies, and after other expedients had been tried and had failed) that it was necessary to forbid the operation of nonessential gold-mining so as to channel and force mining equipment, material, and personnel into nonferrous mining which was then vital to the developing war effort.

I

In these circumstances, Order L–208 was a valid wartime regulation under the Executive's power of allocation of the nation's resources, and did not con-

stitute a taking of private property for public use compensable under the Fifth Amendment. While as a result of its restrictions the owners of mines suffered financial loss, a similar hardship was sustained by their employees and the mining communities dependent, in whole or in part, upon the operation of the mines. It does not follow, however, that the losses sustained by operators of mines who, by reason of L–208, were required until June 30, 1945, to suspend gold mining operations, are constitutionally compensable.

A. 1. The necessary elements of all constitutional takings are (1) an authorized intention on the part of the Government officials to take a recognized property interest from the owner and transfer it to the United States (as in the normal condemnation or requisition case), *or* (2) in the absence of such intent, an invasion into the possession of private property, of such character and magnitude that it cannot be accomplished without compensation under the Government's regulatory and non-eminent domain powers (as in the flooding cases). An actual invasion of property by the United States is required, as is *use by the Government.* We show in Point II that WPB had no intention or authority to take respondents' property; in this Point I, we show that Order L–208 did not result in an unintended taking.

2. In time of war, when national survival is at issue, the government's demands upon its citizens become most exacting; property rights cease to be inviolate, liberty is subject to restriction, and life itself is subject to sacrifice. Economic hardship, loss

of profits, inconvenience, and personal sacrifice, though far removed from the field of battle, are concomitants of present day warfare, as this Court has repeatedly recognized in the past. Most recently, the Court has held that the Fifth Amendment is "no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war." *United States* v. *Caltex,* 344 U. S. 149, 155. And the Court has held that restrictions placed upon the use and disposition of private property, in time of war and in the interest of national defense, impose no obligation upon the United States to compensate for losses or hardship which inevitably follow such restrictions. For example, within this sound rule fell the adverse economic consequences of wartime price and rent control restrictions imposed by the federal government in World War II.

3. In the same category are the losses and the economic hardships attributable to the allocation of material and facilities by the WPB pursuant to the Second War Powers Act. Such orders have been upheld as valid wartime regulations. And the Court of Claims has, prior to the present cases, correctly held that the exercise of this power to allocate material and facilities is not a "taking" of private property and gives rise to no constitutional claim to compensation for losses attributable thereto. *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815; *Oro Fino Consolidated Mines, Inc.* v. *United States,* 118 C. Cls. 18, certiorari denied, 341 U. S. 948.

A rigid constitutional doctrine which would require the United States to assume such indirect costs of war could well result in a prohibitive financial burden. The claims arising out of L–208 alone are estimated to exceed forty million dollars. And the gold mining industry is but one of any number of other industries and businesses which sustained severe economic hardship in consequence of WPB orders and regulations curtailing or stopping production of nonessential products or prohibiting or restricting the use, acquisition, and disposition of personal property.[10] Congress, of course, may as a matter of grace award compensation for such losses. To hold, however, that an industry is entitled to such compensation as a matter of constitutional right, is to impose a serious limitation upon the war power of the federal government.

B. 1. Limitation Order L–208 deprived respondents of no gold. The United States did not seize, condemn or take respondents' gold and as much gold remained for extraction when the restrictions of L–208 were lifted as when they were imposed. The United States made no public use of respondents' property; neither did the Government seize or occupy any part of the realty nor dispossess respondents of

[10] In the spring of 1942, WPB predicted that, as a result of its orders, about 25,000 manufacturing establishments would be compelled to shut down and it was estimated about 80,000 establishments would not be needed in war production. From 1942 through 1944, about 200,000 business concerns went out of existence; and since only a small percentage of these were "business failures," it is plain that World War II had a widespread and substantial adverse economic impact upon American business.

title or possession. Similarly, the United States did not requisition or take any material or equipment of the mines nor otherwise disturb respondents' title to or possession of personal property. Order L–208 merely required the temporary suspension of mining operations by respondents during the period of the war emergency in the interest of the nation's defense and should have been treated by the court below in the same way as other allocation orders—as valid wartime regulation. The legal right claimed to be invaded is the right to mine gold for private profit during the wartime emergency, regardless of the exigencies of the nation's safety, immune from governmental regulation of the character involved unless accompanied by legal liability of the Government. But such a claim clearly does not stand upon any different constitutional footing than other hardships and losses sustained by individuals and businesses in World War II.

2. The decision of the Court of Claims that L–208 results in a "taking" rests largely upon the mistaken belief that L–208 placed no restriction upon the disposition of idle material and equipment by operators of nonessential mines subject to L–208. WPB Priorities Regulation No. 13 (7 Fed. Reg. 5167) was in effect throughout the period L–208 was operative and restricted the sale of "war material" idled by action of the WPB. Moreover, by L–208, as amended on November 19, 1942 (App. B, infra, pp. 114–118), operators of L–208 mines were required to submit to WPB inventories of machinery and equipment indicating which, if any, was available for sale or rental.

The sale or disposition of such material was therafter prohibited except with the express permission of WPB. These provisions show the error in the court's conclusion that there were deficiencies in L–208 depriving it of its allocation and regulatory character.

3. The uncalled-for expressions by the Court of Claims that Order L–208 was unnecessary, unjustified and unsuccessful are equally unsound. While it is doubtful that the courts may properly inquire into the motivation underlying otherwise valid executive action, there can be no serious question that L–208 was both necessary and justified. L–208 was issued upon the unanimous recommendation of the War Production Board, with the approval and at the urging of the War Department, and was approved by the President. While recognizing that hardships would result, the WPB, the War Department, and the President were satisfied that L–208 was essential to the defense effort. Their judgment was, of course, without the aid of hindsight but was based upon a knowledge of the strategic and logistical problems of a world at war which a court record, fifteen years later, cannot possible reflect. The exigencies of the world situation in 1942 are matters of public knowledge, well known to this Court. The necessity for L–208 is traceable to these exigencies and its justification lies in the critical production problems which plagued the nonferrous metal mines in 1942 and which posed a threat to the entire war production program.

Similarly, the court's conclusion that L–208 was not devised nor intended as an allocation order is belied

not only by the terms of the order but by its accomplishments. Apart from its preamble, L–208, by its terms, prohibited the acquisition of materials essential to maintenance and operation of gold mines. And L–208 prohibited the consumption of material, facilities, and equipment by nonessential mines. By these devices, demand upon manufacturers and suppliers of mining supplies was thereby reduced; demand was thus brought more nearly in line with supply and facilities, manpower and equipment were released for the production of products essential to the war effort. In these respects, L–208 was a typical exercise of the allocation authority of WPB. By prohibiting the use or consumption of material by nonessential gold mines, the material and equipment inventories were conserved, thereby assuring its availability if the demands of a war of uncertain duration required. Through Priorities Regulation No. 13, and Order L–208, as amended on November 19, 1942, WPB retained ultimate control over idle inventories of material, machinery and equipment, and the prohibitions placed upon the sale or other disposition of such material assured that transfers of war material and equipment would be made only to enterprises with some degree of essentiality to the war effort.

Moreover, as a result of L–208, a reservoir of used mining equipment and machinery estimated to exceed $75,000,000 became available for transfer to other mining activities and other enterprises of wartime value. Within seven months of its issuance and while many nonessential mines still operated, WPB issued

a substantial number of releases of used mining equipment, which moved in increasing amounts to essential users. In addition, by reducing the load upon manufacturers of mining machinery and equipment, L–208 permitted these concerns to concentrate on essential war production. L–208 also alleviated in some measure the burden upon an over-loaded transportation system and reduced power consumption. Of particular significance is the fact that L–208 freed the manpower theretofore employed by nonessential gold mines for transfer and employment in essential activities, including nonferrous metal mines where it was most urgently needed.

II

There was no intention, or authority, on the part of WPB, to take respondents' property or business. Such a "taking" clearly did not fall under any power of requisitioning exercised by Congress or delegated to WPB, and in addition it is undisputed that that agency did not intend to exercise any power of eminent domain. It was functioning solely as a regulatory agency.

ARGUMENT

INTRODUCTION

In World War II, the task of converting the economy of the United States from a peace to a war basis, and the task of mobilizing and directing the economy to meet the exigencies of total war fell primarily to the War Production Board (WPB). To discharge its responsibilities, the WPB, by delegation from the President, was armed with (among other

things) the statutory war power of the President to allocate material and facilities "in such manner, upon such conditions and to such extent" as "necessary or appropriate in the public interest and to promote the national defense." Section 301 of the Second War Powers Act, *supra,* p. 3. Under these powers, WPB regulated the nation's economy on an unprecedented scale with the objective that all of our resources be utilized with maximum efficiency to produce the munitions and implements necessary to the successful prosecution of the war.

Regulation by the War Production Board assumed a variety of forms but it was primarily through thousands of priorities orders, material conservation orders, and orders limiting, curtailing, or prohibiting production of nonessential products, or prohibiting and restricting the use of critical war materials, that industry was converted to, and mobilized for, war production. Through WPB regulation, raw materials, machine tools, machinery and equipment were channeled from nonessential users to enterprises essential to the war effort and manpower was made available to the mines, factories, shipyards, aircraft plants, and other industries engaged in production vital to the war economy.

Limitation Order L–208, involved in this case, was but one instance of WPB's wartime regulation of American industry. By this order, WPB dealt with the problems of the mining industry which, in the fall of 1942, were so acute that the inadequate production of nonferrous metals—copper, lead, zinc, tungsten, etc.—posed a grave threat to the war program.

L–208 directed gold mines not producing substantial quantities of critical materials to close down and the order also prohibited, within certain time limits, the acquisition or use of any material, facility, or equipment for mining purposes except for restricted uses. By WPB Priorities Regulation 13 and Order L–208, as amended on November 19, 1942, the material, machinery, and equipment thus rendered idle were subject to being channelized to essential users and only to them.

In the Statement, *supra*, pp. 4–14, we have summarized the reasons for, and the necessity of, the issuance of Order L–208. We also set forth in Appendix A, *infra*, pp. 73–110, a detailed history and description of the War Production Board—its creation, its objectives, its powers, and its procedures—as well as a similarly detailed survey of the regulations adversely affecting the gold-mining industry prior to Limitation Order L–208, and a step-by-step study of the evolution of that particular regulation.[11]

The gist of this historical material is, first, that WPB reasonably believed (on the basis of repeated and careful studies, and after other expedients had been tried and had failed) that it was necessary to forbid the operation of nonessential gold-mining so as to channel and force essential mining equipment, material, and personnel into the nonferrous mining which was then vital to the developing war effort; and, second, that Order L–208 did not materially differ from the thousands of other allocation orders

[11] See also the discussion in the Argument, *infra*, pp. 50–69.

issued by WPB to all segments of the economy. It is against this background that the question whether the Fifth Amendment requires the payment of just compensation for the economic hardship sustained by the gold mining industry as a result of this World War II regulation by WPB must be considered.

I

WARTIME RESTRICTIONS ON THE OPERATION OF THE NATION'S GOLD MINES TO PROMOTE THE NATIONAL DEFENSE DID NOT CONSTITUTE A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE COMPENSABLE UNDER THE FIFTH AMENDMENT

A. THE GENERAL PRINCIPLES APPLICABLE TO ALLOCATION AND LIMITATION ORDERS

1. The elements of a constitutional taking

Federal eminent domain law recognizes two general classes of constitutional takings. The *first* is the traditional exercise of the eminent domain power, in which Government officials (*a*) intend to take private property for public purposes, under definite and valid statutory authority, and (*b*) carry out the prescribed formal steps, such as the issuance of a requisition declaration or the filing of a court petition and completion of the judicial condemnation process. Frequently, the Government also takes immediate possession of, and dominion over, the property,[12] but there are

[12] Examples are condemnations of interests in land under the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257, requisitions of war materials under the wartime requisitioning statute (Act of October 16, 1941, 55 Stat. 742, as amended, 50 U. S. C. App., 1940 ed., Supp. V, 721), and requisitions of merchant vessels under Section 902 of the Merchant Marine Act, 1936, as amended, 46 U. S. C. 1242.

occasions in which dispossession of the owner is unnecessary to consummate the taking, as under the Declaration of Taking Act, 46 Stat. 1421, 40 U. S. C. 258a–f, providing for irrevocable vesting of title in the United States upon the filing of a declaration of taking and deposit of the estimated award, even though possession has not yet been surrendered. See the Brief for the United States in *United States* v. *Dow*, No. 102, this Term, at pp. 13–18, 27 *et seq.* In both instances, however, it is the admitted purpose of the Government officials to divest the owner of some legally recognized property interest and to transfer that interest to the United States.

The *second* class, on the other hand, does not depend upon the intention of the Government officials. Whatever the official intention may be, certain governmental actions may entail such an actual invasion of property rights that a constitutional taking may be implied, if the actions are not to be held invalid. See *Penna. Coal Co.* v. *Mahon*, 260 U. S. 393, 413; *Block* v. *Hirsh*, 256 U. S. 135, 155–6; *United States* v. *General Motors Corp.*, 323 U. S. 373, 378; *United States* v. *Dickinson*, 331 U. S. 745, 748; *United States* v. *Pewee Coal Co.*, 341 U. S. 114.[13] But though subjective purpose to "take" is unnecessary in this class, it is an essential prerequisite that the governmental invasion affect a

[13] The prime instance, in federal eminent domain, is the destruction of privately owned land by flooding. *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, 809–810. See also *United States* v. *Causby*, 328 U. S. 256 (taking by flights of governmental aircraft) and *Portsmouth Co.* v. *United States*, 260 U. S. 327 (repeated firings of projectiles over owner's land).

legally recognized "property right", and not merely some other economic interest of the plaintiff's (*United States* v. *Willow River Co.*, 324 U. S. 499, 502; *Bowles* v. *Willingham*, 321 U. S. 503, 517–519), and also that the interference with use or possession be so extensive and of such a character that it cannot be done without compensation under the Federal Government's regulatory powers. *Penna. Coal Co.* v. *Mahon*, *supra*; *United States* v. *General Motors Corp.*, *supra*; *United States* v. *Causby*, 328 U. S. 256, 261–3, 264; *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, 804–808. In such cases in which an unintended taking is found to result from federal interference with property interests there must generally be (a) an actual invasion by the Federal Government of private property, (b) some public *use* of that property, and (c) that *use* must be *by* the United States. Perhaps, there are rare instances (hardly likely in wartime) in which mere regulation (without affirmative invasion of property interests) may go so far that it can only be upheld as a taking. But in those cases it must first be determined that the regulation would be unlawful if supported only by the Government's various powers of regulation; the requirement of "just compensation" may then be used in such circumstances to save the Government's action from being stricken as unlawful.[14]

[14] Where a constitutional taking is implied, it is assumed that the United States has acquired a definite interest in the property, permanent or temporary, such as title, an easement, a servitude, or a leasehold, *United States* v. *Causby*, *supra*; *United States* v. *Dickinson*, 331 U. S. 745, 748, 751; *United States* v. *Lynah*, 188 U. S. 445, 470–1.

Limitation Order L–208 falls into neither of these two categories. We show below (Point II, *infra,* pp. 69–71) that WPB did not *intend* to requisition or "take" respondents' gold mines, either permanently or temporarily, and that in any event that agency would not have had the power to make such a requisition or "taking". In this point, we show that Order L–208 did not come under the second class of "taking"—that it did not exceed the limits of valid regulation and did not amount to a "taking" of possession or of a property right.

2. Limitations upon the acquisition, use and disposition of private property pursuant to regulatory war powers of the Federal Government do not involve a taking

This Court long has recognized that the Fifth Amendment is not a comprehensive promise to pay for every impairment of use of private property, or for every diminishment in its value, which may be attributable to the exercise of governmental powers. Instances abound in which, under the constitutional powers of the national government, private property is subject to governmental regulation and restriction substantially affecting its use and disposition, and hence its utility and value, but for which there is no constitutional obligation to compensate. This subserviency of private interests to the paramount national welfare is most pointedly demonstrated in time of war when national survival is at stake and the government's demands on its citizens become exacting to the point that, with a common high purpose, private property rights cease to be inviolate, liberty

is restricted, and life itself is subject to sacrifice. Cf. *United States* v. *Macintosh*, 283 U. S. 605, 622; *Legal Tender Cases*, 12 Wall. 457, 461. As the Court said in *Lichter* v. *United States*, 334 U. S. 742, 754:

> In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself. * * *

It is settled, for instance, that under the war powers the Government may confiscate the property of alien enemies in the United States. *Miller* v. *United States*, 11 Wall. 268; *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 11; cf. *Johnson v Eisentrager*, 339 U. S. 763. In World War II, even citizens were compulsorily relocated, and restrictions on their personal freedom in the form of curfews and of exclusion from designated areas were imposed and sanctioned by this Court. *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214. And, of course, in World War II, millions of citizens were conscripted for military service, divorced from normal pursuits, and exposed to the hardships and hazards of combat, including possible injury and loss of life.

Recently, the Court, in *United States* v. *Caltex*, 344 U. S. 149, held that the destruction of private property by the military to prevent its falling into the hands of the advancing enemy was not a "taking" compensable under the Fifth Amendment. The Court thus affirmed a principle first announced in 1887 in *United States* v. *Pacific R. Co.*, 120 U. S. 227, arising

out of the Civil War, and later the basis for the holding in *Juragua Iron Co.* v. *United States,* 212 U. S. 297, involving the destruction of property by American soldiers in Cuba because the property was thought to house germs of a contagious disease.[15] In *Caltex,* the Court said (344 U. S. at 155):

> The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign. * * *

The era when loss of and damage to property and personal inconvenience in wartime were primarily confined to the immediate battlefield has long since passed. The power to "wage war successfully"[16] in the present age is "not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war." *Hirabayashi* v. *United States,* 320 U. S. 81, 93. The power to wage war successfully "permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation" (*ibid.*). Losses incidental to restric-

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[15] See also, *Respublica* v. *Sparhawk,* 1 Dall. (Pa.) 357.

[16] Charles Evans Hughes, *War Powers Under the Constitution,* 42 A. B. A. Rep. 232, 238; *Home Bldg. & L. Ass'n.* v. *Blaisdell,* 290 U. S. 398, 426.

tive governmental measures adapted to these ends are, though remote from the field of battle, nonetheless attributable to "the fortunes of war" and must rest where they fall.

In this category belong the losses and economic hardships stemming from price and rent control measures of World Wars I and II, sustained by this Court as valid wartime restrictions upon private property free of the "just compensation" provision of the Fifth Amendment. *Bowles* v. *Willingham*, 321 U. S. 503, and *Yakus* v. *United States*, 321 U. S. 414. In *Bowles* v. *Willingham*, the Court recognized that it is the nature of regulation to reduce the value of the property regulated and that a member of a regulated class may suffer economic losses not shared by others; a landlord's property "may lose utility and depreciate in value as a consequence of [rental] regulation." And even though rent restrictions were claimed to deprive the landlord of a fair return on his property, the Court said (321 U. S. at 519):

> A nation which can demand the lives of its men and women in the waging of * * * war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property.[17]

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[17] See, also, *Block* v. *Hirsh*, 256 U. S. 135; *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188; *Highland* v. *Russell Car Co.*, 279 U. S. 253; *Wilson* v. *Brown*, 137 F. 2d 348 (Em. Ct. App.); *Taylor* v. *Brown*, 137 F. 2d 654 (Em. Ct. App.), certiorari denied, 320 U. S. 787; cf. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 569–570; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 392–396.

The Court has also held it not to be a taking for the Government to restrict the right to earn profits in wartime, by the recouping of excessive profits. *Lichter* v. *United States*, 334 U. S. 742, 787.

In World War I, Congress, "for the purpose of conserving the man power of the nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy" (40 Stat. 1046), declared it unlawful to sell for beverage purposes distilled spirits and prohibited the removal of spirits in bond for beverage purposes for the duration of the war. This Act was sustained by the Court as a valid war measure, and, although substantial damage to the distilleries from the restrictions thus placed on their property was apparent, it was held that the restrictions upon the sale of distillers' property could not be regarded as a "taking" in the constitutional sense. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156–158. See, also, *Mugler* v. *Kansas*, 123 U. S. 623; *Kidd* v. *Pearson*, 128 U. S. 1.

In *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, also arising out of the World War I prohibition acts, the Court sustained a prohibition upon the manufacture and sale of beer which became effective immediately upon passage of the Volstead Act (41 Stat. 305). *Inter alia*, the petitioner contended that, because of the loss resulting from the inability to use its property for brewery purposes, the prohibition could be legally effected only provided compensation was made (251 U. S. at 302). The Court rejected the argument. Petitioner's loss "is an incident of the peculiar nature of the property and of the war need which, we must

assume, demanded that the discontinuance of use be immediate" (251 U. S. at 302). "Here, as in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.* [251 U. S. 146], there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use" (251 U. S. at 303).[18]

In the *Hamilton* and *Ruppert* cases, *supra*, Mr. Justice Brandeis analogized the regulative-restrictive, but noncompensatory, powers of the federal government over private property to the regulative-restrictive powers of state governments under the police power.[19] The latter, without any constitutional necessity of compensation, embraces, of course, not only the power to prohibit the manufacture and sale of an otherwise lawful commodity (*Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678) but, in its extreme, the power to destroy in the pub-

[18] See also, *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, where it was held that a frustration of a purchaser's rights under a private contract because of government requisition of the seller's product was not a taking compensable under the Fifth Amendment: "That provision has always been understood as referring to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts." *Ibid.*, at p. 510, quoting 12 Wall. 457 at 551 and *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467 at 484.

[19] To the same effect, see *Bowles* v. *Willingham*, 321 U. S. 503, 518; *Block* v. *Hirsh*, 256 U. S. 135.

lic interest private property without state liability (*Miller* v. *Schoene*, 276 U. S. 272; *North American Storage Co.* v. *Chicago*, 211 U. S. 306; *Lawton* v. *Steele*, 152 U. S. 133).[20] In *Mugler* v. *Kansas*, 123 U. S. 623, involving a state prohibition statute, the Court said (123 U. S. at 668–669):

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.

And again (123 U. S. at 669):

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of

[20] In some circumstances, private property may be destroyed even to promote the public convenience or the general prosperity of the state. *Miller* v. *Schoene*, 276 U. S. 272; *C. B. & Q. Railway* v. *Drainage Comm'rs.*, 200 U. S. 561. And it is settled that the destruction of private property in the path of a conflagration to prevent the spread of the fire is not a "taking". *Bowditch* v. *Boston*, 101 U. S. 16; *Field* v. *City of Des Moines*, 39 Iowa 575; *American Print Works* v. *Lawrence*, 23 N. J. L. 590, 605–607, 615; *McDonald* v. *City of Red Wing*, 13 Minn. 38.

> property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is thus clear that there is no inherent right to use property in a way that is detrimental to the public interest. The *Hamilton* and *Ruppert* cases and other decisions of this Court attest that—where the public interest is involved, and particularly in wartime—to restrict and even to destroy is not to "take" in a constitutional sense, and that the power of a nation at war to restrict or to prohibit the use of property because, in the judgment of those whose responsibility it is to determine, the use impairs or its non-use contributes to the war effort, is no less extensive than the power of the state to impose similar restrictions upon property in the name of the health, morals, or safety of the community.[21]

To be sharply contrasted with these principles and these decisions are the cases, relied upon by respondents, in which a taking was found. *E. g., United States* v. *Pewee Coal Co., Inc.*, 341 U. S. 114; *International Paper Co.* v. *United States*, 282 U. S. 399;[22]

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[21] See also *Marion & Rye Valley Railway* v. *United States*, 270 U. S. 280; *Morrisdale Coal Co.* v. *United States*, 55 C. Cls. 310, affirmed, 259 U. S. 272; 19 Geo. Wash. L. Rev. 184.

[22] In *International Paper Co.* v. *United States*, 282 U. S. 399, the Court held that, by requisitioning the entire power potential of the Niagara Falls Power Co., the United States was obliged

Portsmouth Co. v. *United States*, 260 U. S. 327; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1; *United States* v. *Causby*, 328 U. S. 256; *United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Welch*, 217 U. S. 333. In each of these cases where compensation was allowed, there was actual dispossession of the owner, physical invasion, occupation or use of the property by the United States. See *supra*, pp. 26–29. Short of such actual appropriation, however, the decisions of the Court make it clear that temporary wartime restrictions upon the use or disposition of private property, such as were imposed by L–208, are not "takings" in the constitutional sense but are valid as wartime economic regulations.[23]

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to compensate the International Paper Co., which by lease and conveyance from the Power Co. was entitled to a fixed proportion of the power potential. The lease and conveyance under New York law was a corporeal hereditament and real estate. In holding that the Government had taken the Paper Company's right for public use, the Court said: "Our conclusion upon the whole matter is that the Government intended to take and did take the use of all the water power in the canal; that it relied upon and exercised its power of eminent domain to that end; that, purporting to act under that power and no other, it promised to pay the owners of that power * * *." *Ibid.*, at 408.

[23] In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, at 415, the Court, as an aside, said that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The question in that case arose against a peacetime background, the extent of public interest involved was limited, and the restriction was permanent and for the particular benefit of a single private house. We think the statement has little applicability in time of war when the national interest is supreme and the restriction upon private

3. In particular, wartime allocation, limitation, and priority orders do not result in a taking

(*a*) Economic hardships or losses, such as underlie respondents' claims, attributable to wartime allocation of materials and facilities have been specifically upheld as not constituting a taking; and such allocation orders have been sustained as valid regulation. *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815; see *Steuart & Bro.* v. *Bowles,* 322 U. S. 398; *Brown* v. *Wilemon,* 139 F. 2d 730 (C. A. 5), certiorari denied, 322 U. S. 748; *Gallagher's Steak House* v. *Bowles,* 142 F. 2d 530 (C. A. 2), certiorari denied, 322 U. S. 764; *Shreveport Engraving Co.* v. *United States,* 143 F. 2d 222 (C. A. 5), certiorari denied, 323 U. S. 749; *Henderson* v. *Bryan,* 46 F. Supp. 682 (S. D. Cal.).

The economic hardship resulting from such allocations and its non-compensatory character was recognized in *Steuart & Bro.* v. *Bowles, supra,* where the Court said (322 U. S. at 405):

> * * * Certainly, we could not say that the President would lack the power under this Act [the Second War Powers Act] to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. That power of allocation or rationing might indeed be the only way of getting the right equipment to our

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property, addressed to an industry, is only for the temporary period of hostilities. "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Block* v. *Hirsh,* 256 U. S. 135, 157.

> armed forces in time. From the point of view of the factory owner from whom the materials were diverted the action would be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business.

The loss due to the wartime allocation of materials, foreseen in *Steuart & Bro.* v. *Bowles, supra,* came to light in *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815. The WPB had ordered that no plant in a defined area should, after October 28, 1942, consume, process, or deliver soft pulpwood except with the specific authorization of WPB.[24] This order, as it affected St. Regis, required that its plant remain closed from November 1, 1942 to April 1, 1944. St. Regis brought suit in the Court of Claims, claiming damages of over 3¼ million dollars as a result of the WPB orders and directives, which, it was alleged, amounted to a Fifth Amendment taking of its property requiring just compensation. On demurrer to the petition, the court phrased the issue before it in the following terms (110 C. Cls. at 274):

> * * * [W]hether the exercise of the President's war powers through general orders and directives of the War Production Board allocating and controlling the consumption of pulpwood as a defense measure constituted taking by the Government of plaintiff's property

[24] WPB Order M-251 (7 Fed. Reg. 8424), Schedule I (7 Fed. Reg. 8686).

> for public use within the meaning of the Fifth Amendment to the Constitution..

The petition was dismissed, the court stating: "This is a case of actual hardship. The damages are both real and substantial" (*id.*, at 279). But the "action was taken [by WPB] as a defense measure" and (*id.* at 274 and 275):

> It is not sufficient that damages have resulted or that hardships have occurred. War inevitably produces hardships, suffering and losses, some of which cannot be measured in money. Legitimate war powers must be exercised, whatever the cost. Otherwise everything is lost. * * *

(*b*) With our complex society, the United States cannot assume a rigid and unlimited liability for the adverse economic consequences of such wartime allocations (and similar) orders. The claims of respondents and approximately 150 other claimants based on L–208 have an aggregate value estimated to exceed forty millions of dollars. L–208 is but one of approximately 350 similar L orders and one of thousands of L, M, P and other type orders issued by the WPB and the OPM (Office of Production Management) during the course of the war, resulting in severe financial losses to innumerable businesses. It is difficult to distinguish between the legal effect of these orders and L–208. If the economic consequences of L–208 and similar orders were to be assumed by the Government, serious financial burdens upon the public treasury would result.

Forty-eight curtailment or shut-down orders were issued by WPB prior to March 14, 1942, and in the same period a total of 91 conservation orders effecting curtailment or prohibiting the use of critical or scarce materials, or controlling their distribution, were issued. Between March 16 and April 9, 1942, 25 "L" orders were issued by WPB stopping or curtailing the manufacture of such products as passenger automobiles, stoves, refrigerators, office equipment, domestic laundry equipment, automatic phonographs, metal windows, metal toys and games, metal signs, domestic vacuum cleaners, vending machines, metal household furniture, metal caskets and vaults, and lawnmowers.[25] In addition, as the Truman Committee was advised in April, 1942:[26] "Many industries are shut down or drastically curtailed today because required materials have been cut off by conservation orders although no shut-down or curtailment order addressed to the specific industry has been issued."

Each of the allocation orders issued by WPB, in varying degree, had serious economic repercussions, sometimes on an industry-wide basis, more often perhaps on an individual basis. Thus, as a result of a survey conducted in May of 1942, WPB predicted that 24,308 manufacturing establishments, out of a total of 183,241, would be forced to shut down before October 1, 1942, as a result of more than 250 "L" and "M" orders then issued by the Board. The net sales

[25] 77th Cong., 1st Sess., Special Committee Investigating the National Defense Program, U. S. Senate, *Hearings*, Pt. XII, Exh. No. 497, p. 5341.

[26] *Ibid.*, p. 4993.

of these manufacturers in 1939 accounted for approximately 8 per cent or $4,127,000,000 of total net sales of all manufacturers. Altogether, it was estimated that some 78,695 establishments would not be needed in war production.[27]

The accuracy of WPB's 1942 prediction as to business shut-downs as a result of its regulation is unknown. The decline in the number of business concerns, however, indicates that the adverse economic consequences of World War II upon American business were widespread and substantial. In the years 1942, 1943, and 1944, the total concerns in business in the United States, exclusive of finance, insurance, real estate, transportation, and amusement enterprises, declined by 201,417. Of this total, only 13,848 were "business failures." *Statistical Abstract of the United States,* 1956: United States Department of Commerce, p. 501. It is fair to assume that a large part of this decline was due to the demands of the wartime economy, and the interacting effects of wartime regulation.

To hold the United States liable for "just compensation" for these losses would impose an incalculable and staggering financial burden on the nation, and at the same time would discriminate against those who suffered monetary loss, of one kind or another, by being drafted into the armed forces or who vol-

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[27] Industrial Mobilization For War, *History of the War Production Board and Predecessor Agencies, 1940–1945,* Vol. I, p. 322; cf., 77th Cong., 1st Sess., Special Committee Investigating the National Defense Program, U. S. Senate, *Hearings,* Pt. XII, pp. 5283–5341.

unteered their services for military or civilian work. And to single out the gold industry for full compensation would be an even grosser discrimination.

In light of the experience of World War II and more recently the Korean conflict, it may be reasonably assumed that a preponderant majority of people and business concerns will continue to accept in the spirit of patriotism the hardships, inconveniences, and economic sacrifices required by present day warfare in the same fashion that they are accepted by military personnel who must do the actual fighting. If the World War II hardship to the gold mining industry merits redress by the Government—which we do not believe—Congress is the appropriate organ of Government to make a voluntary grant of compensation, just as Congress has done in certain instances of particular hardship.[28] That Congress has never made such a grant emphasizes the lack of equity in respondents' position and the similarity of the losses of the gold mining industry to those of innumerable other busi-

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[28] *E. g.*, the Act of July 2, 1948, 62 Stat. 1231, 50 U. S. C. App. 1981 *et seq.*, which, with limitations, provides a system for compensating persons of Japanese ancestry for damage to or loss of real or personal property resulting from the World War II evacuation and exclusion order.

And see the Philippine Rehabilitation Act of 1946, 60 Stat. 128, 50 U. S. C. App. (1946 ed.) 1751 *et seq.*, which provides a scheme for compensation of losses attributable to military action by enemy and friendly forces on the Philippines in World War II. See, Schein, *War Damage Compensation Through Rehabilitation: The Philippine War Damage Commission*, 16 Law & Contemp. Prob. 519.

nesses prejudiced by wartime measures.[29] To compensate as a matter of legislative grace is one thing; it is, however, a far different matter to formulate a rigid constitutional doctrine which would require the United States to bear the indirect costs of war such as are typified by respondents' claims. To impose this indirect limitation upon the war power of the federal government is, apart from the possibly prohibitive cost, a step of the gravest sort, in view of the demands of modern war for the full mobilization of the nation's resources.

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[29] Congress has been unwilling to go further (see Appendix A, *infra*, p. 107, n. 20) than to authorize the Court of Claims to hear and render judgment on the claims of gold mine operators without regard to any statute of limitations, laches, or lapse of time. Act of July 14, 1952, 66 Stat. 605, *supra*, pp. 3–4. Respondents unsuccessfully urged in the Court of Claims that this Act was a mandate from Congress to the court to award compensation wherever it was proved that losses were incurred as a result of L–208. The Act, passed more than six years after any claim based upon L–208 could have accrued, shows on its face that it is nothing more than a Congressional waiver of the statute of limitations or the defense of laches which would otherwise be applicable to many if not all of the L–208 claims filed in the Court of Claims after the decision in *Idaho Maryland Mines Corp.* v. *United States*, 122 C. Cls. 670. See S. Rept. No. 1605, 82d Cong., 2d Sess.; H. Rept. No. 2220, 82d Cong., 2d Sess. (R. 1559–1572). "At the present time many other claimants who may have as good a right for an adudication of their claims as does the Idaho Maryland Mines Corp. may not prosecute such claims due to the running of the statute of limitations. Many of the claimants after the ruling of the Oro Fina case undoubtedly felt that to file in the Court of Claims would be useless and, therefore, allowed the statute to run against them * * *" (R. 1561).

B. LIMITATION ORDER L–208 WAS A RATIONAL AND VALID EXERCISE OF THE ALLOCATION AUTHORITY, WAS IN THE PUBLIC INTEREST, AND WAS DESIGNED TO AND DID PROMOTE THE NATIONAL DEFENSE

1. (*a*) It is indisputable, in the first place, that Limitation Order L–208 took absolutely nothing for the Government in the physical sense. In nonessential gold mines, the order prohibited the acquisition and use of critical materials; as amended on November 19, 1942, the disposition of vital mining machinery and equipment was subjected to WPB control and provision was made for channeling this material to essential enterprises. But the operators of nonessential mines were not required to sell or otherwise dispose of any material or equipment (*Bowles* v. *Willingham*, 321 U. S. 503, 517); the title and possession of personal property was not disturbed, nor was there dispossession or occupation of any part of the realty. The United States took no gold; as much gold remained for extraction when the restrictions of L–208 were lifted as when they were imposed. *Or Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, 29–30, certiorari denied, 341 U. S. 948. There was no public *use* of respondents' property *by the Government.*

(*b*) Likewise, the case presents no question as to the power of Congress as a war measure to allocate material and facilities, no question as to the validity of its delegation of that power to the President, and no issue as to the validity of the President's delegation

to the WPB.[30] It is, moreover, common ground that respondents' mines, pursuant to this power, were subject to regulation. As said by the Court of Claims (R. 43): "That such an industry could be regulated, and strictly regulated in wartime, is unquestioned, and resulting losses are not compensable if the action taken is truly regulatory in nature."

(*c*) The most casual consideration of the losses sustained by innumerable other businesses as a consequence of the impact of government wartime regulations suggests that, if respondents' contentions were successful, the result would be to create a unique privileged class of corporations mining gold immune from the common burdens and sacrifice of war. The fact is, however, that one producing and dealing in gold would appear to have less standing for a claim to a constitutional grievance than other businesses affected. This Court pointed out in *Norman v. Baltimore & Ohio Railroad Co.* (the Gold Clause Cases), 294 U. S. 240, 304, that by virtue of the national power over the coinage of money, there attaches to the ownership of gold special limitations which public policy may require. The Court pointed out that those limitations arise from the fact that the law gives to gold "a value which does not attach as a

[30] The Court of Claims expressly disclaimed that it was holding L–208 to be an invalid order. In denying the Government's motion for a new trial, the court stated: "The court did not hold, as counsel for defendant says it did, that L–208 was an invalid order. [R. 144.] * * * The court did not hold that there was anything illegal about the issuance of L–208 so far as its provisions were concerned." (R. 147.)

mere consequence of intrinsic value," and the power to coin money includes the power to forbid the exportation of gold to prevent its outflow from the country of its origin.

As Attorney General Homer Cummings said in his oral argument to the Court in that case (p. 257):

> Those who insist upon the strict letter of the bond are insisting upon it in a matter dealing with gold, and gold lies at the basis of our financial structure. Gold is the subject of national legislation. Gold is the subject of international concern. Gold is not an ordinary commodity. It is a thing apart, and upon it rests, under our form of civilization, the whole structure of our finance and the welfare of our people. Gold is affected with a public interest. These gold contracts, therefore, deal with the very essence of sovereignty, for they require that the Government must surrender a portion of that sovereignty. To put it another way, these gold contracts have invaded the federal field. It is not a case of federal activity reaching out into a private area. So obsessed are our opponents by the idea of the sanctity of contracts that they are even prepared to assert their validity when they preempt the federal field. To me this seems a monstrous doctrine. These claimants are upon federal territory. They are squatters in the public domain, and when the Government needs the territory they must move on.

Whether the national power under the coinage authority of the Constitution extends to the suspension of gold production, in addition to its exportation, is

not at issue because there was no purported exercise of that power. Reference to the power merely emphasizes that those engaging in gold production have no special immunities from the hardships of war.

2. In these circumstances, this case would seem plainly controlled by the prior decision of the court below in *St. Regis* (discussed *supra*, pp. 39–40), with respect to a wartime pulpwood allocation order. And the Court of Claims held in its earlier gold-mining decision, *Oro Fino, supra,* that L–208 was no different in effect from Order M–251, involved in *St. Regis,* and differed in form only in that, in recognition of the lack of adaptability of nonessential mines to a war economy, it directed that operators of nonessential mines close down. This distinction, the Court of Claims correctly held in *Oro Fino* to be without relevance (118 C. Cls. at 29) for the obvious reason that the closing would in any event have been an inevitable consequence of the prohibitions imposed upon the use and acquisition of material and machinery essential to any mining operation. As stated by a unanimous court (*ibid.* at 29): "We decline to hold that the government may not do directly what we have already held [in the *St. Regis* case] it may do indirectly."[31] The prohibitions in L–208 upon the acquisition, use and disposition of material and

[31] While the United States does not agree with the Court of Claims' decision in *Edward P. Stahel & Co., Inc.*, v. *United States*, 111 C. Cls. 682, certiorari denied, 336 U. S. 951 (see, Cross-petition for a Writ of Certiorari, No. 623, Oct. T., 1948), it is clear that that case is presently inapposite since respondents do not seek compensation for their inventories of material, equipment and machinery immobilized by L–208.

equipment necessarily resulted in the suspension of gold mining operations independently of paragraph (b) (1) of the order directing the closing of the mines. As Chief Judge Jones of the Court of Claims pointed out in dissenting in this case (R. 58–59):

> * * * paragraphs (b) (2) and (3) of the same order, which forbade the use of critical materials in nonessential industry, were valid exercises of the President's power under the allocation statute and they would have produced the closing down of the mines whether or not paragraph (b) (1) had been included. * * * Since the valid portions of the order would have produced the closing of the mines, the added part of the order becomes immaterial.

Doubtless, Order L–208 resulted in hardship to respondents, but, as we have pointed out (*supra*, pp. 40–44), that hardship was by no means unique. The gold-mining industry would appear to have been treated no differently and no more harshly than numerous other industries and business concerns. The burden placed upon nonessential industries by various WPB orders was a heavy one even if insignificant when compared to the hardship and sacrifice of those who manned the battlefields. And if the economic burden was onerous in the case of the gold-mining industry it was because there was no role for it to play in the war economy. But Congress, in authorizing the wartime allocation of materials and facilities, made no provision for the compensation of losses attributable to the exercise of this broad and essential power.

3. When it came to the present cases, the Court of Claims declined to follow the *St. Regis* case because L–208 did not in its view:

> * * * require the gold mine owners to hold for the use or disposition of the Government their inventories and supplies of the personal property covered by the order but left the owners free to use that personal property in any way they wished except in the mining of gold. The plaintiffs might have sold their inventories of machinery, supplies and equipment to any user whether or not that user was conducting a business which was essential to the defense effort [R. 27]. * * * [and because L–208] distributed nothing because the order contained nothing which required the gold mine owners to sell those items to the more essential users [R. 32].

These assertions, and others by the court to the same effect,[32] are demonstrably inaccurate.

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[32] "* * * Despite numerous appeals and a desire on the part of WPB officials to modify the order to permit the gold mines to operate at least on a break-even basis, the order was continued in effect and unchanged until the summer of 1945 [R. 19].

"* * * In L–208 WPB did not even attempt to assure that those critical materials, equipment and facilities would be held for possible future requisition or order, but left the owners free to sell them to anyone they pleased, whether the prospective purchaser was engaged in essential defense work or not [R. 19].

* * * * * * * * *

"* * * If L–208 had not only denied the gold mines the right to acquire materials, equipment and facilities but had ordered the mine owners to cease using what they had on hand, to hold them for the possible use of the Government, and not to dispose of them to anyone but the Government or its designees, such an order would have amounted to a taking by the Gov-

Section (k) of L–208 provided as follows (R. 104):

> This order and all transactions affected thereby are subject to all applicable provisions of the Priorities Regulations of the War Production Board, as amended from time to time.

Priorities Regulation No. 13 was issued by WBP on July 7, 1942 (7 Fed. Reg. 5167) and was in effect throughout the period L–208 was in effect. See 8 Fed. Reg. 4502, 32 C. F. R. Cum. Supp. 944.34. Priorities Regulation No. 13 set out rules governing sales of "idle or excess materials * * * by persons who, by reason of the effect of priority orders or for other reasons, cannot use such materials in the regular course of their business" (7 Fed. Reg. 5167). In general, this regulation permitted the sale of any material *other than a war material* without restriction. War material was defined to mean "any material consisting in whole or in substantial part of one or more materials listed in Schedule 'A'." *Ibid.* Schedule "A" (7 Fed. Reg. 5169–5173) enumerated approximately 160 metals, chemicals, and miscellaneous items, including steel, copper, lead, zinc, tin, glycerine, cyan-

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ernment of those materials, facilities and equipment, whether the Government or its designees ever actually took physical possession of them or not, and the loss of the gold mine owners' ability to carry on their business would have been consequential to the taking of the materials, equipment and facilities and would not have been compensable under the Fifth Amendment.

"L–208 did not do any of the above things except to deny the gold mine owners and operators the right to acquire additional materials, facilities and equipment. * * *" (R. 44).

amid, rubber, to name but a few.[33] Sales of "war material" were authorized only to designated defense agencies of the Government or only with the specific authorization of WPB or only to buyers within the classes described in Schedule "A." 7 Fed. Reg. 5167–5168. Thus, it is clear that only as to material other than war material were the mine operators free to do as they liked with material and equipment idled by L–208; on the other hand, war material was subject to rigid WPB control.

Moreover, the amended form of L–208 (R. 1574C–D), issued November 19, 1942 (7 Fed. Reg. 9613, App. B, *infra,* pp. 114–118), prohibited the sale or other disposition or acceptance of delivery of machinery or equipment except with the express permission of the WPB. See, also, L–208, as amended August 31, 1943 (8 Fed. Reg. 12007–12008, App. B, *infra,* pp. 118–125). In the light of Priorities Regulation No. 13 and the amendments to L–208, it is clear, we submit, that the court's conclusion that there were deficiencies in L–208, depriving it of its allocation character, is entirely without foundation.[34]

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[33] A rough tabulation of Homestake's "net requirements" for 1942, submitted by Homestake on January 13, 1942 (R. 1586–1587), includes the following critical items (R. 1588): 43 tons "straight" iron and steel, 8,453 tons fabricated iron and steel; 46 tons machined iron and steel; 135 tons manganese steel; 12 tons of copper; 13 tons of lead; 0.50 ton of tin; 28 tons of zinc; 0.14 ton aluminum; 0.75 ton asbestos; 80 (*sic*) tons mercury; and 11.75 tons of rubber.

[34] These inaccuracies in the court's opinion, critical to its decision, indicate a lack of awareness of the existence of these amendments to L–208.

4. While the ruling of the court below that L–208 was a taking, rather than a noncompensable regulation of the use and disposition of respondents' property, is unsound because of the court's apparent oversight with respect to Priorities Regulation No. 13 and the amendments to L–208, other statements in the court's opinion also require consideration. These are the conclusions that (*a*) L–208 "was not in fact necessary to the successful prosecution of the war" (R. 43); (*b*) that L–208 was not devised for the purpose of conserving or allocating materials and, with a particularly myopic appraisal of the results of L–208, that it did not in fact do so; and (*c*) that the issuance of L–208 in order to divert manpower to essential nonferrous mines was, in effect, ill conceived, unwise, and unsuccessful. We now show that each of these other conclusions by the Court of Claims cannot be sustained.

(*a*) *Necessity.*—In *Hirabayashi* v. *United States,* 320 U. S. 81, at 93, the Court, in passing upon the validity of the World War II curfew order, said:

> Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

Again, in *Block* v. *Hirsh,* 256 U. S. 135, at 158, with respect to World War I rental restrictions applicable to the District of Columbia:

> * * * we have no concern of course with the question whether those means [of Congress] were the wisest, whether they may not cost more than they come to, or will effect the result desired.

In *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, at 161, Mr. Justice Brandeis said:

> No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of Congress. [Citations omitted.] Nor may the court enquire into the wisdom of the legislation. [Citations omitted.] Nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of a power is not an argument against its existence. [Citation omitted.]

We submit that these principles, delineating the limits of judicial inquiry into legislative and executive action in time of war, are fully applicable in the present circumstances.

L–208 was issued by the WPB as an exercise of the allocation powers delegated by Congress to the President in the Second War Powers Act, and, in turn, delegated by the President to WPB (*infra*, pp. 76–77). The necessity for the exercise of the delegated power, the "manner" in which it was to be exercised, the "conditions" upon and the "extent" to which it was to be exercised, were validly entrusted to the WPB. It cannot be denied that these were matters which required the exercise of judgment and discretion in the plainest sense. In the considered and deliberative judgment of the WPB, there was ne-

cessity and justification for prohibiting the use and acquisition of materials to stop gold production in mines not producing substantial quantities of critical materials. See Appendix A, *infra*, pp. 86–108. We doubt that it is wise or proper for a court now to sit in judgment on the wisdom or necessity of the Board's action.

The decision to issue L–208 was made upon the unanimous recommendation of the WPB (R. 101) and with the approval and at the urging of the War Department (R. 99, 101). Upon its issuance, L–208 was, in effect, approved by the President (R. 107). It hardly needs saying that these were responsible men, selflessly dedicated to winning the war in the shortest possible time. Though fully aware that hardships would follow, they were satisfied with the necessity of the order and it is not unfair to say that, with their intimate knowledge of the world situation and of the strategic and logistical problems of a nation and world at war, they were in a better position to judge the necessity of L–208 than others far removed from the stress of the emergency conditions which prevailed in 1942.

And the judgment of these men is not the less sound nor the less entitled to respect because the Chief of the WPB Mining Branch, Dr. Nelson, opposed the order.[35] The WPB was purposely staffed

[35] Dr. Nelson's opposition to the order appears to have been based, not upon its necessity, but upon the fear that the mine labor released from the gold mines could not effectively be diverted to the nonferrous metal mines (R. 78–79, 488–494).

by its Chairman, Donald M. Nelson, so as to include all shades of opinion within the Board. In addition to men from big business, there were brought into WPB men from small business, men from trade unions, economists from within and without the Government, university professors, and government career administrators.[36] Unanimity of opinion within such a heterogeneous staff could hardly be expected. Few major policy decisions were made without dissenters, if not on the Board itself, then from within the ranks.[37] The issuance of L–208 was no exception. But it was the responsibility of the Board and its Chairman to resolve differences of opinion and this they did when it became necessary to make a policy decision with respect to nonessential gold mines. Their decision had to be made without benefit of hindsight; L–208 was deemed necessary to the national defense and to the public interest in 1942; it must be accepted as such in 1957.

Viewed, as it must, in a wartime context, there can be small room for doubt as to the necessity and justification for L–208. The exigencies of the world situation in 1942 are matters of public notoriety (Appendix A, *infra*, pp. 73–75, 108), well known to this Court. *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214; *Bowles* v. *Willingham*, 321 U. S. 503; *Yakus* v. *United States*, 321 U. S. 414; *Steuart & Bro.* v. *Bowles*, 322 U. S. 398;

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[36] *Industrial Mobilization for War, History of the War Production Board and Predecessor Agencies, 1940–1945*, pp. 231–236.

[37] 77th Cong., 1st Sess., Special Senate Committee Investigating the National Defense Program, *Hearings*, pp. 4957 *ff.*

Lichter v. *United States*, 334 U. S. 742. The necessity for L–208 was born of these wartime exigencies; the lack of adaptability of the gold mining industry to the economy of a nation geared and mobilized for total war provided the justification.

The short of it is that the United States was engaged in a global war that, on an ever increasing scale, was, in October 1942, already taxing national resources to the utmost. It was a war of uncertain duration and, as later events proved, was only in its infancy in October 1942. The drain of offensive warfare on manpower and material had yet to be experienced when the WPB formulated its policy with respect to non-essential gold mines.

In October 1942, inadequate production of nonferrous metals was imperiling the entire war production program which was already falling far short of the production objectives fixed by the President in January 1942.[38] The acute shortage of vital nonferrous metals—copper, lead, tungsten, etc.—was traceable to the tremendous demands of the munitions program and lagging production was attributable primarily to a shortage of mining labor and also to shortages of mining equipment and machinery and a host of other materials essential to the maintenance and operation of mines. WPB sought to remedy these problems and to do so logically directed its attention to the gold mining industry which was utilizing and consuming manpower, machinery and equipment and other material but, with the exception of gold mines producing

[38] *Industrial Mobilization for War*, *op. cit.*, p. 507.

substantial quantities of critical materials, was making no contribution to the war program. We show below (pp. 61–69) that L–208, in varying degree, effectively accomplished its objectives (R. 8). But whether it did or did not, or whether it cost more than its accomplishments were worth, it cannot be said even at this late date that L–208 was unnecessary or unjustified or had no reasonable relation to its legitimate end, much less that it was arbitrary as respondents would have it.[39]

(*b*) *Purpose.*—Neither can it be said that L–208 was not devised nor intended to conserve and allocate critical material, equipment or supplies (R. 19). The preamble to the order was as follows (R. 102):

> The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.

[39] The fact that mining equipment and machinery was shipped abroad in limited quantities for use in gold mines in South Africa and Canada, at the same time such material was being denied to domestic gold mines, affords no ground for argument against the necessity or justification for L–208. The continued shipment of such material to foreign countries was a policy decision made at the highest level of government and was based upon economic, political and monetary considerations of broad international implication (R. 100–101, 1170–1171, 1173, 1174, 1175, 1179, 1607). These considerations were, of course, utterly foreign to the domestic production of gold and to the domestic gold mining industry.

By its terms, L–208 prohibited the acquisition of new material essential to maintenance and operation. The demand for such material was thereby reduced, thus bringing demand more nearly in line with supply.[40] L–208 prohibited the use or consumption of any material, facility, or equipment, and thus the inventories of nonessential mines were conserved, thereby assuring their future availability if the demands of a war of uncertain duration required. L–208 prohibited the use or consumption of material and facilities on hand and such items thereby became available for sale, rental, lease or exchange to essential enterprises. Through Priorities Regulation No. 13, and the amendments to L–208 (*supra*, pp. 50–52), WPB retained ultimate control over inventories; this assured that "war material" and vital mining machinery and equipment idled by the order would be disposed of only where its disposition would contribute to the war effort.[41]

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[40] "* * * Through the L orders the Board took direct action to cut down on the authorized demand for materials for the purpose of bringing that demand somewhere near the available supply of materials. And this was precisely what had to be done, for to make it possible for a system of materials allocation to work it was essential to lop off the excess demand for materials. This the Board did by banning the manufacture of nonessential products. * * *" *Industrial Mobilization For War*, *op. cit.*, p. 309.

[41] The technique employed by WPB in L–208 was typical of that used in any number of "L" orders as can be seen from the description of "L" orders given the Truman Committee in 1942 by the Director of Industry Operations, WPB (77th

To deny that L–208 was an allocation order or that it was not intended as an allocation order is to deny what is apparent from the face of the order, its amendments, and Priorities Regulation No. 13, to which it was subject. Nor is it any the less an allocation order because, as a necessary consequence of the order, manpower theretofore employed by nonessential mines would become available for employment in essential enterprises. Concededly, the diversion of manpower to essential mines was a motivating factor in the issuance of L–208. But neither respondents

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Cong., 1st Sess., Special Senate Committee Investigating the National Defense Program, *op. cit.*, p. 5058):

> * * * our first step is basically to put industry on notice that they are in jeopardy; to make, so far as we can, a quick study of the inventory situation, the amount of material in process, the amount of the end production which is necessary for war purposes or minimum civilian economy, and then to decide upon the nearest date when a prohibition or limitation should, in the light of all these factors, be made effective. An order is then issued which, in the usual case, prohibits as of the date of issuance the purchase and receipt of any further critical materials except insofar as they may be necessary in small quantities to complete partly fabricated articles, and also provides a final cut-off date for production, generally 30 or 60 days from the date of issuance of the order.
>
> During this interim period, operations are permitted at a reduced rate based upon the extent to which it is deemed advisable to permit the use of the inventory, and the desirability of keeping the management and key personnel of the plant together during the conversion period. The orders generally provide for permission to fabricate repair parts to the extent possible without the use of scarce materials. The orders require reports on inventories of scarce material on hand at the date of issuance and an estimated inventory at the cut-off date.

nor the Court of Claims have suggested that manpower considerations were not a legitimate subject of WPB concern or that this motive on the part of WPB was ulterior or evilly-inspired; rather, the most that can be said is that L–208, considered as an instrument for diverting manpower to nonferrous metal mines, was not as effective as it was expected to be. Cf. *infra,* pp. 65–69. Disregarding the hindsight inherent in this attack upon L–208, it is settled that if executive action is justified by a lawful purpose, it is not rendered unlawful by the motive of those responsible for the action even if that motive were otherwise illegal. *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 145, and cases cited; *United States* v. *Rock Royal Co-operative,* 307 U. S. 533, 559–560. L–208 was a rational and reasonable exercise of the allocation authority of WPB; the motives of WPB in issuing the order were proper ones and the fact that its objectives may not have been fully achieved did not deprive it of its allocation character nor convert the order, regulatory in purpose and terms, into a "taking" within the meaning of the Fifth Amendment.

(*c*) *Results.*—The positive accomplishments of L–208 further belie the contention that it was not an allocation order. As a result of L–208, a reservoir of used mining equipment and machinery estimated to exceed $75,000,000 in value was created (R. 1232). This material was "pitifully short of requirements" (R. 1777) and, as of November 19, 1942, when L–208 was first amended, this material was moving into channels leading to essential work at the rate of $82,600 per week. In April and May 1943 this transfer

of material accelerated to the rate of $100,000 per week (R. 1232). By May 24, 1943, WPB had issued 171 releases of equipment under L–208, releasing equipment with an estimated used value of $2,147,480.[42] Sixty-five releases were made to metallic mining operations, 17 to non-metallic mining operations, 26 to construction, 18 to the military, 20 to used equipment dealers for release to holders of serial numbers under Orders P–56, P–58, and P–73,[43] and 25 to "all others", principally agriculture (R. 1250).

This data was compiled at a time when many gold mines, including two of the present respondents, were still in operation (albeit curtailed) under the appeals provisions of L–208. While exact data on equipment releases subsequent to May 1943 is not available, if the $100,000 per week figure compiled on May 24, 1943 is projected over the balance of the life of the order, it is a fair approximation that equipment of over $12,000,000 in used value ultimately found its way from the nonessential gold mines into essential operations.

The diversion of used equipment to essential enterprises was of immediate and direct benefit to the war effort. And not only did this diversion serve to alleviate the shortage in such equipment by partially satisfying the requirements of essential industry, it correspondingly reduced the demand upon manufacturers for such machinery. The significance of this

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[42] These facts were brought to the attention of the WPB at its meeting of June 15, 1943, at which time the Board determined that L–208 should not be rescinded (R. 1605–1607).

[43] *Supra*, p. 11, n. 7.

factor to the war program is demonstrated by Dr. Wilbur Nelson's statement in March 1942 (R. 1183):

> * * * The makers of mining machinery have the finest machine shops in the United States, and every one of them has been in part, you might say, taken over by the Army and Navy. The capacity of every mining machinery plant in the United States is taken up in part in making munitions and machine tools or parts of machine tools.

The reduced demand effected by L–208 thus reduced the load upon manufacturers (R. 1610)[*] and in turn released machinery, manpower and material for other war purposes. And to these less direct beneficial achievements of L–208 may be added such incalculable accomplishments as the reduction in power consumption (R. 1610) and the easing of the burden on an

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[*] "A summary of the critical situation in mining machinery and equipment was given by A. I. Henderson on July 31, 1942. 'The mining machinery companies are already behind on deliveries. Shipments of mining equipment and supplies from certain of the largest mining machinery companies have declined as much as 35% in July below June shipments. Most of them have mining machinery orders booked for nine months or more in advance. This makes it imperative that these plants produce more machines and repair parts in the future than they are now making if mine production is to be maintained, much less increased.

"'Many makers of mining machinery operating under Processing Directive PRD 39 are fulfilling Army and Navy orders carrying AAA and AA–1 ratings on direct ordnance contracts calling for full production for several quarters ahead. These ratings are making it increasingly difficult and in many cases impossible to obtain materials and fabricating components from suppliers for mining equipment which the Mining Branch is directing them to produce in order to maintain mining production.' Memorandum, A. I. Henderson to J. A. Krug and C. H. Matthiessen, July 31, 1942." (R. 1197.)

overburdened transportation system which necessarily followed from the suspension of mining operations by over 150 nonessential gold mines.[45]

It is obvious that none of these accomplishments would have been possible under the limited restrictions in effect and applicable to nonessential gold mines prior to L–208 (R. 1505, 1595). The restrictions imposed on the gold mining industry by denying them serial numbers under Preference Order P–56 related to the acquisition of material for maintenance and operation. Operations were restricted only by the loss of manpower due to the Selective Service System and the migration of workers and the inability to acquire materials necessary to operation because of low priority ratings. Since respondents now claim that they could have operated indefinitely on their inventories, it is plain that the conservation of war material effected by L–208 would not have been possible under P–56 or other WPB orders. (R. 1505, 1595.)[46] And we take it that "to conserve" does not,

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[45] Neither the record nor the history of L–208 reflects data on the quantum or value of war material other than machinery and equipment which may have been channeled from idle inventories of L–208 mines into essential war enterprises. We think, however, that there can be little quarrel with Chief Judge Jones' dissenting statement that (R. 59): "If indeed these materials were critical, then it is natural to expect that, under the operation of supply and demand, such materials would find their way into essential uses. In fact it would have been wholly impracticable in a great national emergency for any agency of government to allocate and assign every bolt, nut, and piece of critical materials. * * *"

[46] See, *e. g.*, Homestakes "rough tabulation" of net operating requirements for 1942 (R. 1586, 1588), *supra*, p. 52, n. 33.

as the court below would have it, require that the material be put "to some more important use" (R. 33). The purpose of conservation, as is clear from the dictionary definition, [47] is to preserve, guard or protect, and this L–208 did with respect to respondent's material inventories. If the war proved of such duration that it was not necessary to requisition the idle inventories, that is all to the good but hardly a legitimate or appealing point of complaint.

Respondents, of course, belittle the constructive accomplishments of L–208 and emphasize that, as an instrument for diverting manpower to nonferrous metal mines, L–208 failed of its purpose. The gold mining industry as a whole, as could be expected, concurs in this view (R. 1547) as do the political representatives of gold mining states (R. 1524–1534). Aside from the irrelevancy of the criticism, the success or failure of L–208, as an instrument for the diversion of manpower, remains a debatable question, difficult to resolve because of the understandably inconclusive information available with respect to the post-L–208 migrations of gold mine workers. However this may be, it is safe to say that no one was more concerned than WPB with the effect of L–208 as a possible solution to the critical manpower problem which prevailed in the nonferrous metal mines and with the smelters and refiners of metals.

On November 5, 1942, the United States Employment Service, (USES), pursuant to a request of Donald M. Nelson, advised that, on the basis of Octo-

[47] Webster's *New International Dictionary (unabridged)*.

ber 30 reports from 40 USES local offices, 642 gold mine workers were known to have been released. Of these 642, 281 registered with the USES for new employment and 206 were placed, with 188 going to nonferrous metal mines (R. 1495). At Homestake Mining Company, as of October 21, 1942, 334 workers had been released, 309 of which were from its mining department. Other mines in the South Dakota area released 91 workers. Employment contracts were signed by 121 men, 81 with the Anaconda Copper Mining Company and 40 with the Climax Molybdenum Company (R. 1495–1496). This data was, of course, assembled before the 60 day cut-off date for operations under L–208 had expired.

On April 22, 1943, the Vice-Chairman of WPB was advised (R. 1503) that L–208 was responsible for the transfer of over 2,000 miners to war industries; 1,156 were placed in nonferrous mines, 515 in other essential industries, and 500 in other war industries and copper mines (R. 1504). As a result of labor transferred from gold mines, the Vice-Chairman was advised, 11,000 tons of copper, 4,000 tons of zinc, 2,400 tons of lead, 13,000 units of tungsten, and 6,000,000 pounds of molybdenum were added to the annual production of these metals (R. 1504).[48] On May 26, 1943, Mr. Knoizen, the Director, Mining Division, WPB, and Administrator of L–208, was advised (R. 1292) that of 3,217 employees displaced by L–208, 2,564 registered with the USES; of 1,571 referred to

[48] From a sample study of 1,000 gold miners displaced. Report of the Labor Production Division, WPB (R. 1504).

metal mines, 1,156 were placed; and of 894 referred to other industries, 515 were placed (R. 1299).

The accuracy of this data and the effectiveness of L–208 as a manpower measure were disputed, within the WPB, by Dr. Wilbur Nelson (1351–1358; 1504–1506) who, as we have pointed out, was convinced before it was issued that L–208 would be ineffective to divert manpower to essential mines (R. 1311, 1319). Dr. Nelson's disagreement with the statistical data (R. 1352–1358), furnished WPB by the USES and the War Manpower Commission (WMC), appears to have been based upon his own data compiled at an unspecified date by personal inquiries to a limited number of nonferrous metal mining companies (R. 1353). The disparity between Dr. Nelson's figures and those of WMC is further explained by the fact that his inquiries were apparently confined to "underground miners and muckers" (R. 1353) whereas the WMC figures relate to "gold miners" generally (R. 1228, 1229, 1353). The Court of Claims did not resolve this statistical conflict other than to state (R. 106) that "approximately 100 hardrock miners are known to have gone to work in the nonferrous metal mines and to have remained there for a year." If L–208 is to be judged by the number of gold miners transferred to essential mines and other enterprises, the court's finding, confined as it is to "hardrock miners" who remained in the nonferrous metal mines for a year, is arbitrary on its face (R. 994–995) and affords no sound basis for a conclusion as to the effectiveness of L–208 as a meas-

ure for diverting manpower to essential wartime enterprises.

But we think the controversy over the number of miners who may have migrated to essential mines and other wartime activities need not be resolved. No matter how much the WMC data may be discounted, or whether Dr. Nelson's figures are accepted, or whether the limited finding of the Court of Claims is accepted, the incontrovertible fact is that the manpower displaced by L–208 did not disappear from the face of the earth, but in part moved to essential nonferrous mines, as WPB hoped, and to essential enterprises (R. 1230–1231) just as WPB anticipated.[49] These facts, of course, belie any contention that L–208 was a total failure as a manpower measure and that WPB's expectation that partial relief to nonferrous mines would follow L–208 was unfounded. And, insofar as L–208 is to be judged by its contribution to the nation's war effort, it would seem immaterial whether manpower displaced by the order moved to nonferrous metal mines, to west

[49] By the war's end, manpower was generally accepted as the primary production problem. While the problem was the primary concern of the War Manpower Commission, it was of concern to the Army, the Navy and the WPB. Army and Navy procurement policies were revised so as to avoid placing contracts for production of items and use of materials in labor shortage areas whenever it was practicable to procure the needed items elsewhere. In 1944, WPB revised a number of limitation and conservation orders to include labor clauses, in effect, permitting production only if labor were available and if the production would in no way interfere with existing and potential war contracts. *Industrial Mobilization For War*, *op. cit.*, pp. 837–854.

coast aircraft plants,[50] shipyards and other war plants where the labor problem was as acute as in the nonferrous metal mines.

II

THERE WAS NO INTENTION, OR AUTHORITY, ON THE PART OF WPB TO TAKE RESPONDENTS' PROPERTY OR BUSINESS

It is clear from the evolution of Order L–208 that WPB never had any intention to "take" respondents' property or business for public use. See *supra*, pp. 29–40, and Appendix A, *infra*, pp. 73–110. WPB was acting solely under the allocation authority it possessed, by delegation from the President, under the Second War Powers Act. It was functioning solely in the field of regulation, not of eminent domain. The Court of Claims so recognized in its opinion on rehearing (R. 143).

Nor would WPB have had any authority to "take" respondents' right to mine gold. Section 9 of the Selective Service and Training Act of September 16, 1940, 54 Stat. 885, authorized only the placing of mandatory orders with firms "for such product or material as may be required, and which is of the na-

[50] In 1943, a critical shortage in manpower threatened aircraft production goals on the west coast and led to the inauguration of the "West Coast Manpower Program" by James F. Byrnes, Director of the Office of War Mobilization. This plan was a frontal attack upon the manpower problem on the west coast and included, *inter alia*, direction to cancel contracts on the west coast whenever a national program was to be reduced, shifting contracts to areas where the labor supply was more adequate, requiring sub-contracts to be placed outside critical labor areas, and curtailing less essential production in critical labor areas, including production of civilian goods and services. *Ibid.*, pp. 707–710.

ture and kind usually produced or capable of being produced by such" firm. The Act of October 10, 1940, 54 Stat. 1090, authorized the requisition of "military or naval equipment or munitions, or component parts thereof, or machinery, tools or materials, or supplies necessary for the manufacture, servicing, or operation thereof * * *" held for export. And the Act of October 16, 1941, 55 Stat. 742, authorized the requisition of military or naval equipment, supplies, or munitions, or component parts thereof, etc., when needed for the defense of the United States, when such need "is immediate and impending and such as will not admit of delay or resort to any other source of supply" and when all other means of obtaining the property upon fair and reasonable terms have been exhausted. Broad though this authority was, it is apparent that the particular property that respondents claim has been taken—*viz.*, the right to mine gold—does not fall within the terms of these acts. In absence of the legal authority to take or requisition, it is clear that the Government may not be held liable if a taking occurs. *United States* v. *Goltra*, 312 U. S. 203; *United States* v. *North American Co.*, 253 U. S. 330; *Hooe* v. *United States*, 218 U. S. 322; cf. *Mitchell* v. *Harmony*, 13 How. 115; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

The Court of Claims attempted to by-pass this established principle by holding that the WPB had merely used "an *unauthorized* means of accomplishing an *authorized* taking" (emphasis in original) (R. 146). But, as we have just pointed out, WPB—the agency which issued Order L-208—had not been given

any power at all to take this kind of property. There could be no *authorized* taking by WPB, whatever means it sought to use. Unless the principle that the Government may not be held responsible in damages for an unauthorized taking is to be jettisoned (and the Court of Claims did not purport to abandon it), there must be, at the least, some authority in the agency to seize or requisition the particular property. The authority to requisition or condemn property has been granted only with great care and its use has been carefully controlled to prevent abuse. The ruling of the court below runs directly counter to these established principles.[51]

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[51] The Court of Claims relies on *Hatahley* v. *United States*, 351 U. S. 173 (R. 146), but that decision has no bearing on the present problem. That case arose under the Federal Tort Claims Act, which imposes liability upon the Government for the torts of its employees "while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act * * * occurred." 28 U. S. C. 1346 (b). The Court held the Government liable since "[u]nder the law of Utah, an employer is liable to third persons for the willful torts of his employees if the acts are committed in furtherance of the employer's interests or if the use of force could have been contemplated in the employment." 351 U. S. at 180. In contrast to this principle, which is generally applied in tort law and is necessary if the doctrine of *respondeat superior* is to be effective, no such rule has ever been followed in the field of eminent domain. On the contrary, the Government has been held liable only for those takings for which the requisite general authority has been granted. See the cases cited, *supra*, p. 70.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Court of Claims should be reversed with directions to dismiss respondents' petitions in that court.

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APPENDIX A

History and Background of Limitation Order L–208

A. *The War Production Board—Its Creation, Powers, and Procedures.*—(1) The military peril with which the United States was confronted in late 1941 and in the early months of 1942 has not yet receded into history. The existence of the United States as a sovereign nation was in jeopardy. The devastating attack upon Pearl Harbor on December 7, 1941 was followed in quick succession by a series of allied military reverses marked by the Japanese conquest of the Philippines, the Dutch East Indies, Java, Singapore and a host of island outposts in the South Pacific. The threat of actual invasion of the west coast of the United States was real. To the east, at the same time, most of Europe was under Axis domination. In January 1942, the British advance along the Mediterranean coast was in check and the long retreat of the British Army to Egypt began. Moscow was under siege and the Battle of the Atlantic was only in its beginning.

Such was the critical world situation when on January 6, 1942, the President called for the total mobilization of every American resource and outlined a production program in terms of airplanes, tanks, guns and ships [1] with which the enemy might be repulsed

[1] The production program was, in part:

1. To increase our production rate of airplanes so rapidly that in this year, 1942, we shall produce 60,000 planes, 10,000 more than the goal set a year and a half ago. This

and swiftly and overwhelmingly defeated. The immensity of the task which lay ahead and the measures required for its fulfillment were fully realized. In the President's words:

> Our task is hard—our task is unprecedented—and the time is short. We must strain every existing armament-producing facility to the utmost. We must convert every available plant and tool to war production. That goes all the way from the greatest plants to the smallest—from the huge automobile industry to the village machine shop.
>
> Production for war is based on men and women—the human hands and brains which collectively we call labor.
>
> * * * * *
>
> Production for war is based on metals and raw materials—steel, copper, rubber, aluminum, zinc, tin. Greater and greater quantities of them will have to be diverted to war purposes. Civilian use of them will have to be

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includes 45,000 combat planes—bombers, dive bombers, pursuit planes. The rate of increase will be continued, so that next year, 1943, we shall produce 125,000 airplanes, including 100,000 combat planes.

2. To increase our production rate of tanks so rapidly that in this year, 1942, we shall produce 45,000 tanks; and to continue that increase so that next year, 1943, we shall produce 75,000 tanks.

3. To increase our production rate of antiaircraft guns so rapidly that in this year, 1942, we shall produce 20,000 of them; and to continue that increase so that next year, 1943, we shall produce 35,000 antiaircraft guns.

4. To increase our production rate of merchant ships so rapidly that in this year, 1942, we shall build 8,000,000 deadweight tons as compared with a 1941 production of 1,100,000. We shall continue that increase so that next year, 1943, we shall build 10,000,000 tons. 88 Cong. Rec. 32, 34.

> cut further and still further—and, in many cases, completely eliminated.
>
> War costs money. * * * It means cutting luxuries and other nonessentials. In a word, it means an all-out war by individual effort and family effort in a united country.[2]

The task of converting, mobilizing and directing the entire economy to meet the astronomical production demands of total war and the civilian economy fell, primarily, to the War Production Board. Created by Executive Order on January 16, 1942,[3] the Board was originally composed of a Chairman, Donald M. Nelson, Secretary of War Stimson, Secretary of Navy Knox, Federal Loan Administrator Jesse Jones, the Director General and the Associate Director General of the Office of Production Management, William S. Knudsen and Sidney Hillman, respectively, the Administrator of the Office of Price Administration (Leon Henderson), the Chairman of the Board of Economic Warfare (Vice President Wallace), and Special Assistant to the President, Harry L. Hopkins. By the terms of Executive Order 9024, the Chairman, with the advice and assistance of Board members, was charged with the general direction over the war procurement and production program and was directed to:

> Determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production, including purchasing, contracting, specifications, and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect

[2] Message on the State of the Union, January 6, 1942, 88 Cong. Rec. 32, 33–34.

[3] Executive Order No. 9024 (7 Fed. Reg. 329).

thereto as he may deem necessary or appropriate.[4]

By Executive Order No. 9024 and a series of subsequent Orders,[5] the Board, in April 1942, became the super-governmental agency responsible for industrial mobilization and production and for this purpose, by direct delegation and by succession to the functions and powers of predecessor defense agencies, the Board was ultimately vested with the full wartime statutory powers of the President with respect to production.

Principal among the Board's delegated power was the power granted the President by Section 2 (a) of the Act of June 28, 1940, 54 Stat. 676, which, as amended on May 31, 1941, 55 Stat. 236, and as amended and incorporated in Section 301 of the Second War Powers Act (56 Stat. 176, 177; 50 U. S. C. App. (1946 ed.) 633) provided, in material part, as follows:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem

[4] *Ibid.*

[5] By Executive Order No. 9024, the Board succeeded to the functions and powers vested in the Supply Priorities and Allocation Board by Executive Order 8875, August 28, 1941 (6 Fed. Reg. 4483). Executive Order No. 9040, January 24, 1942 (7 Fed. Reg. 527), abolished the SPAB and the Office of Production Management, established by Executive Order No. 8629, January 7, 1941 (6 Fed. Reg. 191). By Executive Order No. 9040, *supra*, the functions and powers of OPM, as derived from Executive Orders No. 8629, *supra*, and No. 8875, *supra*, were transferred to the Board. By Executive Order 9125, April 7, 1942 (7 Fed. Reg. 2719) the WPB was delegated the powers conferred upon the President by Title III of the Second War Powers Act, *supra*, p. 3.

necessary or appropriate in the public interest and to promote the national defense.

It was through this grant of authority, together with the authority to assign priority to deliveries of material for military contracts,[6] that substantially all controls and restrictions upon industry were imposed prior to and throughout World War II. And it was pursuant to this authority that, between December 7, 1941 and August 13, 1945, when victory on all fronts was finally achieved, every segment of the industrial economy was regulated "on a scale and of an intensity unprecedented in the annals of our nation."[7]

(2) While the regulation of industry by the Board assumed a variety of forms, it was largely through a series of "P", "M" and "L" orders that industry was mobilized and all the resources necessary for war and essential to the civilian economy were produced, processed, allocated, conserved, fabricated and manufactured.

The "P" (preference) orders, first in point of time, were generally addressed to buyers of materials and had the effect of authorizing the holder to attach to a purchase order a letter or symbol entitling that order to preference in delivery (R. 63). The "P" orders were originated by the OPM in the pre-Pearl Harbor preparedness period and under these orders preference ratings ranging from A–1 to A–10 were assigned (R. 64). These "A" ratings generally reflected the relative importance of a buyer's product to the defense and war program or to the civilian economy.

"M" orders made their appearance in the fall of 1941, following the Act of May 31, 1941, 55 Stat. 236.

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[6] Section 2 (a) of the Act of June 28, 1940, 54 Stat. 676.

[7] O'Brian and Fleischmann, *The War Production Board Administrative Policies and Procedures*, 13 Geo. Wash. L. Rev. 1, 4.

which gave the President authority to allocate materials. "M" orders were usually directed to the manufacturers or distributors of particular materials. These orders served several ends: They frequently prohibited a producer from selling to a buyer unless the buyer had some preference rating (R. 63) or prohibited a producer from delivering a particular material except upon specific authorization from the OPM, before its abolition, and WPB thereafter (R. 311). In addition, "M" orders were employed to prohibit the use of particular materials in designated end or component products. The aluminum order of August 18, 1942 (M–1–i, 7 Fed. Reg. 6519), for example, prohibited the use of aluminum except in specified items. And the copper order of October 21, 1941 (M–9–c, 6 Fed. Reg. 5394) prohibited the use of copper in a long list of materials and products.

"L" orders, generally, were used to limit, curtail or prohibit the manufacture or production of end-products containing critical material (R. 63), or requiring the use of facilities or equipment adaptable to war production. Through these orders, demand for critical materials was reduced, materials were conserved, and plant facilities, equipment, and manpower became available for war production purposes. Illustrative "L" orders are L–6 as amended October 13, 1943 (8 Fed Reg. 14003), prohibiting the production of domestic laundry equipment; L–2–g (7 Fed. Reg. 473), issued January 21, 1942, prohibiting, after February 1, 1942, producers of passenger automobiles from manufacturing passenger cars for civilian or military use; L–52 (7 Fed. Reg. 5509), issued July 17, 1942, prohibiting, after September 1, 1942, bicycle manufacturers from processing, fabricating or assembling any material for use in the production of bicycles and prohibiting the manufacture or assembling of bicycles

after that date; L–18–b (7 Fed. Reg. 2462), issued March 30, 1942, prohibiting the manufacture or production of domestic vacuum cleaners after April 30, 1942; L–5–c (7 Fed. Reg. 1493), prohibiting, after April 30, 1942, the production of domestic mechanical refrigerators; and, of course, L–208 (R. 102–105), issued October 8, 1942, which prohibited gold production by mines within the terms of the order.

B. *Regulations Adversely Affecting the Gold Mining Industry Prior to Limitation Order L–208.*—As early as May 1941, requirements for strategic and critical metals and the machinery to produce these metals began to outdistance supply and productive capacity. Shortages of both raw materials and facilities threatened to hold production under the level required for our own expanding military needs and the imperative lend-lease requirements of the Allies. In recognition of the priority requirements of the mining machinery and equipment industry, on July 29, 1941, OPM issued Preference Rating Order P–23. This order permitted producers of mining machinery and equipment to use a preference rating of A–3 for the acquisition of materials to be used in the manufacture of mining machinery and equipment (R. 1250–1254).

By September 1941, the necessity for assuring the availability of maintenance and repair equipment and operating supplies for the nation's mines was also apparent. On September 17, OPM issued Preference Rating Order P–56 (R. 1255–1260).[8] This or-

[8] On September 9, 1941, OPM had issued Preference Rating Order P–22, known as the General Repair Order (R. 1364–1369). It authorized a broad variety of industries, including mines and quarries, to use an A–10 rating for the acquisition of material needed for the repair of their property or equipment.

der covered approximately 15,000 mines and was intended to facilitate the uninterrupted flow of equipment and material to mines whose production was essential to the defense effort. Under this order, a mine operator whose operations were "important from the standpoint of defense or essential civilian needs" (R. 1167) was granted a serial number and could then apply for a priority rating under the order. In order to minimize the delay in the resumption of production, a priority rating of A–1–a was assigned to deliveries of repair material to a mine in the event of an actual breakdown. Mine supplies and repair parts in general were assigned an A–8 rating.

Gold placer mines were expressly excepted from the priority benefits of Order P–56[9] (R. 1278, 1430), thus marking the first instance in which gold mining as opposed to other mining enterprises received special treatment.[10] The exceptive treatment of gold placer

[9] Gold placer mining consists of the derivation of gold from gravels or other stream-borne material that have been displaced or carried away from the original ore bodies. The principal type of modern placer operations consists in the handling of these gravels by connected-bucket floating dredges. Other methods of placer mining include operation of dragline and power-shovel excavators in connection with dry-land and hand washing, hydraulicing, drift mining (in frozen ground or ancient buried river channels), sluicing and rocking (R. 1282, 1284).

Lode mining is the underground working of auriferous quartz veins in hard rock (R. 65; *Minerals Yearbook*, 1941, United States Bureau of Mines, pp. 69–77).

[10] Out of a total of 7,891 gold and silver producing mines in United States and Alaska in 1941, 3,349 were placer operations. In Alaska alone, out of a total of 855 gold and silver producing mines, 799 were placer operations. *Minerals Yearbook*, 1941, United States Bureau of Mines, p. 67. The number of placer operations declined from a total of 3,349 in 1941 to 1,758 in 1942. *Minerals Yearbook*, 1942, United States Bureau of Mines, p. 95.

operations was justified by Dr. Wilbur A. Nelson, the administrator of Order P–56, on the ground that "we felt that we must start restricting mining activities where they were not essential to the production of materials needed in a defense effort" (R. 1168). This comment was a reference to the fact that placer mines produced only gold while many lode mines produced other metals. A further reason for exclusion of the placer gold mines was that placer operations could be discontinued without deterioration of equipment. In contrast, as stated by Donald Nelson, then Director of the Supply Priorities and Allocation Board (R. 65–66):

> * * * Most lode mines are underground, and consequently subject to the hazards of rapid depreciation if they are shut down. Flooding by water is the chief hazard. Though not all lode-mining is deep enough to suffer seriously if a shutdown occurs, continuity of operation is clearly desirable to prevent depreciation of installed equipment and structures. On the other hand, placer operations can be discontinued (and often are, seasonally) without injury to equipment * * *

Because of the similarity of most metal mining operations in the underground drilling and blasting, in the loading and transporting, and in the crushing and elevation of ores, the same industrial concerns that supplied machinery and equipment to the essential nonferrous metal mines also supplied the nonessential gold mines (R. 1283). In the fall of 1941, the shortage of critical mining material and supplies continued to become increasingly acute. Since the gold mining industry was consuming critical materials and utilizing mining equipment in short supply, an overall governmental policy determination with respect to gold mining was recognized as necessary and was the subject

of active consideration by the SPAB and at Cabinet level (R. 69–71).

In a memorandum submitted to SPAB on November 18, 1941, Donald A. Nelson reviewed the problems relating to furnishing mining materials both to gold mines in the United States and to gold mines in foreign countries, principally Canada and South Africa. In his report to SPAB, Mr. Nelson pointed to the necessity of obtaining a formal opinion from the Treasury Department on the importance of gold production to monetary policy. In this respect, he said (R. 66):

> * * * It is to be emphasized that from a consumption of scarce materials standpoint, this whole issue is a minor one. Only about $7,000,000 of equipment, not including a lesser amount for repairs and maintenance, is involved annually at a maximum. Such importance as the issue possesses is largely political. It is political from two opposing standpoints—that of popular reaction to the continuation of an industry widely regarded as unnecessary (to the point of jocularity), and contrariwise, that of the regional interests delineated in the report.

Mr. Nelson posed several alternative methods of varying stringency for dealing with the material and equipment requirements of domestic mines and suggested that all foreign mine needs be reviewed continuously with the Economic Defense Board so that consideration of inter-American and British American policy could be consistently applied to decisions authorizing or forbidding shipments of gold-mining machinery and repair parts to foreign countries (R. 67).

On November 24, 1941, a meeting concerned with priorities and export licenses for gold mining machinery was called by A. A. Berle, Jr., then Assistant

Secretary of State. This meeting was attended by representatives of the Treasury Department, the Federal Reserve Board, and OPM, as well as the State Department. The consensus of opinion at this meeting, as reported (R. 68–69), was that:

> * * * preference ratings for gold mining equipment should be granted only after careful scrutiny with a view to maintaining, at the very most, existing rates of output and to refusing equipment for any expansion of output; subject to exceptions in cases where extraordinary hardship might result—as in the case of isolated communities having no alternative forms of employment—preference ratings for exports of gold mining equipment should be made to depend on a showing that the maintenance of the present level of gold production is necessary (*a*) to supply dollars for an otherwise deficit dollar position in the balance of payments of the country (or in the case of South Africa, for the dollar position of the sterling area), or (*b*) for special political reasons; whenever the current gold mining is maintained mainly to prevent a dollar deficit and especially where the labor could be used for more direct contribution to defense production, this Government should endeavor to find other means of meeting this deficit such as lend-lease activities, purchase of gold "in the ground" for postwar delivery, and the like. To give effect to the foregoing conclusions, no general priority ratings for gold mining equipment, including repair and replacement parts, should be granted but individual consideration should be given to each application on its merits unless adequate periodic compliance investigations can be made (particularly in Canada) as is done in the United States.

On December 2, 1941, SPAB directed Mr. Nelson to obtain the official opinions of the State Department,

Treasury Department, Federal Reserve Board and the Board of Economic Warfare on "supplying gold mining equipment abroad and on other possibilities of providing dollars to offset probable dollar deficit positions" (R. 69). In response to Mr. Nelson's request, the Secretary of Treasury stated, in part, as follows (R. 69):

> * * * Domestic gold production in wartime serves no military purpose, but does consume labor and materials that have usefulness in military production, particularly in the mining of scarce metals. We do not believe, therefore, that domestic gold mines should receive any preference rating for machinery unless the gold is produced with a substantial amount of much needed by-product metals or ores, or unless it is produced in a mine so peculiarly situated that serious and sustained unemployment of men not eligible for defense jobs would result from its shutdown.

The Secretary of State's reply was confined to the question of supplying gold mining equipment abroad. It stated, in pertinent part, as follows (R. 69):

> It is the Department's opinion that preference ratings for gold mining equipment should be granted only after careful scrutiny with a view to maintaining, at the very most, existing rates of output, and to refusing equipment for any expansion of output. * * *

The Chairman of the Board of Governors of the Federal Reserve System stated, in part, that:

> Priority measures tending to reduce new gold production under present circumstances are, in my judgment, highly desirable. The United States stock of gold is already redundant. Its dollar value is more than five times as great as in the 1920's. From the standpoint of credit control in this country further additions to gold

stock are not only unnecessary; they are harmful. By swelling excess bank reserves, they add to inflationary dangers and make the maintenance of a stable and productive economy more difficult. From the standpoint of war output of the allied countries, the materials, machinery, and labor devoted to gold production are largely wasted.

* * * * *

Since new gold output is largely unnecessary and diverts materials, machinery, and labor from production of war supplies, I strongly favor curtailing it so far as is practicable through the priorities system. I would suggest that no machinery be allowed to foreign mines for the expansion of gold output; and that machinery and supplies for the maintenance and repair of gold mines should be restricted to the minimum consonant with the principles adopted by the Supply Priorities and Allocation Board for other nondefense industries (R. 70).

Based upon these reports, it "was the judgment of the [SPAB] that in view of the military program only limited priorities and export licenses should be granted to the gold mining industry" and it was agreed "that in granting priorities and export licenses for gold mining machinery, materials should not be allowed for expansion of production although minimum amounts for maintenance and repair may be provided" (R. 72). This policy-determination by SPAB was reflected in Preference Rating Order P–100 (R. 1369), issued by OPM on December 18, 1941, and Preference Rating P–56–a (R. 1260), issued on December 31, 1941. P–100 revoked Preference Rating Order P–22 (R. 1364) (the General Repair Order). Thereafter, industries within the terms of P–100, including gold mines, were entitled only to an A–10 priority rating for their maintenance, repair and

operating supplies. The A–10 rating was the lowest preference rating used (R. 73). P–56–a superseded P–23 (*supra*, p. 79) and continued to authorize the manufacturers of mining machinery to use an A–3 priority rating to acquire material entering into the production of machinery and equipment ordinarily used in the mining industry, including the gold-mining industry (R. 73).

C. *The Evolution of Limitation Order L–208.*—(1) After Pearl Harbor and the declaration of war by the United States against the Axis, the whole metals and mining machinery problem became acute. Sources of large supplies of alloying materials, especially chrome and manganese, were cut off by enemy action at a time when demands for steel, copper, zinc and lead for war production were soaring. An all-out expansion of domestic production of these metals in the early months of 1942 came at a time when the metals and fabricating equipment necessary to produce mining machinery were at a premium and used mining equipment was pitifully short of requirements (R. 1177). In these critical circumstances, the further restriction of the gold mining industry, because of nonessentiality to the war program, was an increasingly prominent subject of discussion by those responsible for the war production program.

On January 20, 1942, Wilbur Nelson, by then Administrator of the Mining Branch of WPB, requested authority from the Chairman of the Board to make final decisions in the sale of mining machinery for use both in domestic and foreign mines. He said:

> * * * We must have this power if we are to divert the limited supply of mining machinery into the most important channels, both domestic and foreign. There are other types of min-

ing besides gold which may also have to be given harsh treatment in future months (R. 1178).

By letter of February 11, 1942, to the Chairman of the WPB, E. R. Stettinius, Jr., Administrator of the Office of Lend-Lease Administration, wrote, in part, as follows (R. 1179):

> Originally the British asked us for 100,000 tons of steel to increase their South African gold production. Naturally, in view of the steel and shipping shortage here, we turned them down. However, one of the most acute shortages in this country is nitroglycerin which is used extensively in gold mining. In addition, gold mining requires large amounts of hardened steel and the use of a considerable body of capable mining labor which might well be used in other fields.
>
> In order to divert this extremely valuable stockpile of men and material we would like to suggest that both nitro-glycerin and hardened steel be denied the gold mining companies for the duration of the war. If we could set this example in the United States it might be possible to speed up the whole British war effort by getting the British to concentrate on the production of war materials rather than on the production of dollars as exemplified by their request for 100,000 tons of steel for gold mining in South Africa.
>
> In order to allay their fears of a shortage of dollars for exchange it might be possible to make them a loan based on future gold production, or better still, to buy their normal production for the next two years in the ground, said production to be delivered to us when the war is over. The important thing is to put to war uses the men and labor supply that are now being consumed in gold mining.

In reply to this letter, Donald Nelson stated, in part, as follows (R. 1179–1180):

> * * * The decision on the large volume of requests for material and equipment on the part of South African gold mine operators will have important economic and political implications. Under these circumstances and in view of several communications received from General Smuts in the last few months, the Board of Economic Warfare is now in the process of preparing an agenda of specific subjects to be investigated by a commission which it is contemplated will be sent to South Africa and which General Smuts has indicated would be most welcome. I understand that one of the principal subjects for investigation will comprise the possibilities and requirements for the development and operation of mines both in the Union itself and in Rhodesia for the production of copper, chrome, asbestos, manganese and other available materials required for the war effort.
>
> Pending a final decision on a general policy, together with the receipt of further information from the South African gold mines concerning the circumstances surrounding their requirements, little or no equipment or materials including nitro-glycerin are being exported to South African or other foreign mines.

On February 18, 1942, John P. Gregg, Assistant Chief of the Bureau of Priorities, proposed to C. H. Matthiessen, Jr., Chief of the Bureau, that gold and silver mines be closed forthwith in order to conserve materials. The letter stated in pertinent part (R. 1181):

> The Committee is of the view that the restrictions with respect to materials to be used in the mining of gold and silver are not sufficiently restrictive and that a limitation order

> should be drafted forthwith to stop production of gold and silver in the United States, appropriate consideration being given to the continuance of such production in Canada, Mexico, South Africa, and other areas now permitted to obtain materials and equipment from this country under Lend-Lease or direct purchase.

The proposed closing of the gold mines was rejected. Instead, on March 2, 1942, WPB amended Preference Rating Order P–56 which had the effect of uprating the priorities on mining machinery for essential mines and depriving mines of all preference ratings whose production, in dollar value, consisted of more than 30 per cent gold and/or silver (R. 1181–82; 1268).

The "30 percent exclusion clause", in amended P–56, resulted in the revocation of 373 P–56 serial numbers held by mines producing gold. Although, in practice, serial numbers were eventually restored to mines whose production included significant quantities of materials important to national defense, over 200 mines, including respondents' mines, never again received serial numbers under P–56 (R. 74). These mines thus were reduced to the same priority position as the least essential industries. They were precluded from obtaining any critical materials which might be needed by a nonferrous metal mine essential to the war effort. While it was possible for gold mines excluded from the benefits of P–56 to apply for equipment and repair parts under the general repair order P–100 with an A–10 rating,[11]

[11] Preference Rating Order P–100 was revoked on April 2, 1943 (8 Fed. Reg. 4242). The A–10 priority rating for nonessential gold mines was, however, in effect, continued under Controlled Materials Plan Regulation 5, issued February 9, 1943 (8 Fed. Reg. 1793).

the demand for such material was so far above available supply that the possibility of gold mines obtaining material was remote. Thus, by March 2, 1942, a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment necessary to maintenance and operation (R. 75).

The "30 percent exclusion clause" evoked a wave of protest from mining districts, and public meetings in protest against the clause were held in Reno and Denver. These meetings were attended by the Governors of five mining states, Congressional representatives, and Wilbur Nelson of the WPB. At the Nevada meeting, Nelson explained the WPB policy with respect to gold and silver mines and, in part, said as follows:

> I know you are all wondering why all of the mines cannot have what they need. The answer is the mining machinery situation. The makers of mining machinery have the finest machine shops in the United States, and everyone of them has been in part, you might say, taken over by the Army and Navy. The capacity of every mining machinery plant in the United States is taken up in part in making munitions and machine tools or parts of machine tools (R. 1183).

The exclusion clause in P–56 was the subject of extensive hearings by a Subcommittee of the Special Committee on the Investigation of Silver in May 1942. (R. 1184). On May 15, 1942, WPB amended P–56 so as to eliminate the exclusion clause (R. 1278). However, this amendment effected no practical change since the ratings assigned by P–56 could be used only if WPB granted a serial number and after March 2, 1942, serial numbers were not granted or restored to

gold and silver mines not producing substantial quantities of critical materials (R. 1188).

The predicate for restrictive treatment by the OPM and WPB of the gold mines was, of course, that with a gold reserve of $22,737,000,000 at the end of 1941,[12] gold was of no importance to the United States as a monetary standard (R. 1090, 1285) [13] and, as a commodity, had no significant role to play in the war production program.[14] In contrast to the nonessential character of gold, all agencies of the Government were in agreement that the success of the country's armament program was basically dependent on the increased production of basic raw materials such as copper, lead, zinc, and other nonferrous metals. As of May 1942, the progressively stringent restrictions upon the gold mining industry had been necessary because of the increasingly acute shortage of nonferrous metals, a shortage of mining equipment and machinery, and a shortage of equipment and materials used to manufacture equipment and machinery. In the spring and summer of 1942, an additional problem became apparent which, together with these factors, brought about the complete curtailment of operations in gold mines not producing substantial quantities of strategic materials.

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[12] *Minerals Yearbook*, 1942, United States Bureau of Mines, p. 80.

[13] In contrast to the nonessentiality of gold production to the economy of the United States, the economy of South Africa was based almost exclusively upon gold production and, in both Canada and South Africa, gold was essential to supply dollars for an otherwise deficit dollar position and to sustain the dollar position of the sterling area (R. 1170–71, 1173, 1174, 1175).

[14] As to the limited industrial use of gold, see *Minerals Yearbook*, 1942, United States Bureau of Mines, p. 88.

(2) By July 1942, the Labor Division of the War Production Board, the War Department, and the War Manpower Commission were all concerned that the production of nonferrous metals in the United States, particularly copper, would not be adequate to meet current and anticipated demands for war production (R. 1191–1193). The conditions contributing to unsatisfactory production records in the nonferrous mines were (1) the migration of workers from nonferrous mines to other war industries offering higher wages and better working conditions; (2) the drafting of workers for the armed services; (3) excessive labor turnover; (4) low morale of the workers; (5) the short workweek in the mines; and (6) the lack of organized and effective program of recruitment of workers for mining industry (R. 75).

To remedy these conditions, the War Department submitted a report on July 8, 1942, recommending that the War Manpower Commission formulate a program for the recruitment of mine labor and suggested "a program for the orderly transfer of workers in gold mines and other nonessential industries to the nonferrous mines" (R. 76), as well as assistance in securing Selective Service deferments for mining occupations. To the WPB, the War Department recommended a Labor-Management Production Drive Committee to secure increased production through improved morale and greater efficiency; the report then recommended that:

> Production of gold, with the exception of required amounts of essential silicious gold ores, should be curtailed by an order of the War Production Board to free labor which is urgently needed in the nonferrous mines which are essential to the war effort. * * * [R. 76].

The report also recommended that the War Labor Board give careful consideration to the wage dif-

ferential problem in cases before it involving about one-half of the copper mining industry. The recommendations for the Army and Navy were that they were to establish morale building programs for the miners and that they exert influence on Army-Navy contractors to prevent the further recruitment of labor from the nonferrous mines (R. 76).

The manpower shortage was also a subject of independent study and recommendation by the Labor Production Division of WPB. In a memorandum to the Director of Operations of the War Manpower Commission on July 4, 1942 (R. 76–77), it was observed that the 15 largest producers of gold in 7 Western States had some 6,700 employees; that the gold mines of these producers were sometimes located in the vicinity of nonferrous metal mines; and that in some cases one company would own both a gold mine and a nonferrous metal mine in the same area.[15] The memorandum concluded as follows:

> Steps should be taken to remedy the critical labor situation in nonferrous metal mining, including arrangements for the transfer of miners from gold and silver mining to copper, lead, zinc, tungsten, chrome, and molybdenum mining. This can be done through curtailment of gold and silver production, but it would be necessary to make sure that the workers released went into nonferrous metal mining and did not go into war plants in the vicinity or on the West Coast. It has been customary for

[15] The 6,700 figure appearing in the memorandum represented employees of all kinds and no figure was given as to the number of hard-rock miners—the type of employees most needed in the nonferrous metal mines. The statistics quoted in the memorandum were based on the year 1941 and were later found not to represent the situation in the summer of 1942 because the gold mines as well as the nonferrous metal mines had been losing workers to the war industries and to the draft.

metal miners in the mountain states to move considerable distances with the opening and closing of mines and ordinary turnover (R. 77–78).

On July 9, 1942, the General Counsel of the War Manpower Commission sent to a member of his staff a memorandum concerning the possibility of transferring gold miners to nonferrous mines. The memorandum stated (R. 78):

> At a meeting of the War Manpower Commission yesterday, the following problem was referred to this office.
>
> General McSherry [Director of Operations of WMC] wishes to secure the release of men employed in the gold mining industry for transfer to the copper mining industry. Concededly the War Manpower Commission cannot accomplish this result directly. May the result be accomplished (1) by the War Production Board refusing to the gold mine operators critical materials used in their operations thus compelling the closing of the mines; (2) may the Chairman of the War Manpower Commission direct the War Production Board to take that action?
>
> The specific situation suggested is simply illustrative of the general problem in this field.

By August 1942, the proposed curtailment of nonessential gold mines was gaining momentum, although the proposal was not without opposition. The Chief of the Mining Branch, WPB, Wilbur Nelson, expressed his opposition to the proposal for the reason that gold and silver miners were the last reservoir of skilled mining labor. It was his fear that such miners could not be effectively diverted from the gold mines into the critical nonferrous metal mines (R. 78–79).

Later in August, the General Manager of the Homestake Mining Company conferred with several

officials of the WPB and expressed his opposition to the closing of the mines, basically for the same reason as that given by Wilbur Nelson. Senator McCarran, similarly, in a letter to Donald Nelson, set forth his reasons why the curtailment of gold mining operations would not be effective for the purpose of obtaining any considerable number of miners for the nonferrous mines (R. 80).

The minutes of the meeting of the War Production Board held September 1, 1942 (R. 81–84), reveal that the labor supply problem for copper, lead, and zinc industries was the subject of extensive consideration and discussion by the Board. The minutes reflect that (R. 81–82):

> Mr. King [Chief, Copper Branch, WPB] reported that 6,000 miners have been lost by the copper, lead, and zinc mines to other industries during the past several months and that the shortage of labor will become increasingly acute next year when new facilities will require 2,000 additional miners. Preliminary reports indicate a shortage of 2,100 workers in smelters and refineries. Mr. King pointed out that the loss of 5 or 6 thousand workers at the copper mines might so influence the subsequent fabricating processes that 100 thousand workers in war plants at the end product state would be affected. Although monthly production of copper increased steadily from early 1941 to a peak of 95,000 tons in May and June 1942, output in July dropped 5,000 tons to 90,000. The copper outlook is even more critical than shown by the drop in production, since at many mines labor is being transferred from developmental and stripping operations, necessary to provide for future production, to current ore extraction. The position of the smelters and refineries is exemplified by a smelter at Tacoma where output of 2,000 tons

of copper per month is being lost for lack of only 300 unskilled common laborers. Mr. King emphasized that production at the mines, smelters and refineries will continue to fall unless the exodus of labor is checked and the supply of workers augmented. Output of lead and zinc likewise declined in July, and the labor-production situation in these metals is similar to that in the copper industry.

The steps which had been taken or were under consideration to remedy the labor problem in nonferrous mines were detailed (R. 82–83):

Mr. King reported that following a resolution of the War Production Board (See WPB Minutes, March 3, 1942, Item 7), labor-management committees were established in the metal mining areas and the importance of having mine workers stay at their jobs was publicized. On June 13, 1942 the Chairman of the War Production Board formally launched the War Production Drive in the nonferrous metals industries by a radio address to the miners at Butte, Montana.

As further steps in halting out-migration, the Inter-Departmental Committee on Nonferrous Metals was established on August 11 and various letters and literature had been prepared for distribution to mine operators and labor unions; an order has been prepared to prohibit the use of materials in nonessential gold mines, which may free about 8,000 workers; plans to prevent employment of miners on Army and Navy construction projects are being considered; and training programs are being introduced into mining properties. To increase the efficiency of present working forces, mine equipment is being accorded high priority ratings, and labor is being trained and upgraded by improving working and living conditions, and by lowering age and other restrictions on hiring. Mr. Lund observed that in many cases

labor standards have shown no change from those existing in normal times when a surplus of labor is available. He suggested that the pooled employment interviews which the War Manpower Commission is now conducting in some parts of the country should be pursued with increasing vigor.

Mr. Lubin [acting for Harry L. Hopkins] inquired if the order to prohibit the use of materials in nonessential gold mines had actually been issued and, if not, what steps are being taken toward its issuance. Mr. King, replied that a first problem is to define a nonessential gold mine since gold is frequently found in association with other metals and it is necessary to avoid denying materials to mines that produce important quantities of critical metals jointly with gold. It is hoped that an appropriate definition can be developed very shortly and an order issued promptly thereafter.

After further discussion, the Board agreed that (R. 84):

Inadequate production of copper, lead, and zinc will result inevitably in reduced output of munitions, including small arms ammunition needed by the fighting forces. The output of these metals is now being reduced by a shortage of manpower in mines, smelters and refineries.

The War Production Board is charged with the primary responsibility for providing the maximum possible production of critical metals, but the solution of the problem of assuring a sufficient supply of labor involves the responsibilities of other agencies of the Government as well. The coordination of the efforts and activities of other agencies of the Government with those of the War Production Board is needed; therefore, to ensure an adequate supply of critical metals.

The War Production Board urges all agencies involved to promote and support such ac-

> tions as may be necessary to provide to nonferrous mines, smelters, and refineries a supply of labor adequate for the maximum possible output of such metals. It is especially important that the facilities of the United States Employment Service be expanded and strengthened to meet this particular need.

The first draft of an order which would stop production in mines primarily or exclusively producing gold was submitted, on September 9, 1942, to the Deputy Director General for Industry Operations, WPB, by the Miscellaneous Minerals Branch (R. 85). An accompanying memorandum (R. 85–90) recapitulated all the varying problems involved in a partial cessation of gold mine operations. The memorandum estimated the number of mines to be affected, the labor involved, and gave an estimate that 25 percent of the mine laborers might be diverted to work in other mines (R. 86–87). The memorandum weighed the possible effect of the order on the economy of the states and communities in which mines to be affected were located. As a counterbalance to the anticipated economic hardship of the order upon affected mines and mining communities, the memorandum, besides referring to the labor factor involved, stated that (R. 87):

> Sizable amounts of critical materials will be saved in closing these gold mines. Estimates as to total current consumption of such materials are not available but the general order of magnitude of such consumption is indicated by the fact that in 1939 gold mines in the United States (excluding Alaska) spent about $17,000,000 on supplies and materials, $2,000,000 for fuel and about $5,000,000 for purchased electric energy.

On September 11, 1942, a draft order dealing with gold mines was submitted to Donald Nelson. A

memorandum, which accompanied the draft order, explained (R. 91) that the proposed order would close only those mines already determined to be nonessential to the war effort and that (R. 91):

> The result of closing these nonessential mines will be to conserve all the material which they have been using for operational and development purposes. Heretofore they have merely been denied the right to use the high preference ratings granted by Order P–56, but have been able not only to obtain certain material under P–100, but also to use their own inventories.

The anticipated effect of the order was further summarized in the following terms (R. 92):

> The basic purpose of this curtailment of gold mining is, of course, to free manpower for the mining of essential minerals, particularly nonferrous metals such as copper, zinc and lead. Because many of the gold mines are located much closer to other mines producing such strategic metals as mercury, molybdenum, tungsten, vanadium, chromium, manganese, etc., it is expected that workers will also be made available to these industries.
>
> The War Manpower Commission through the Employment Service is now taking steps to insure orderly recruiting of these gold miners and to provide for a minimum of delay in reemployment as well as to provide transportation expenses. It is expected that this procedure will make possible the maximum diversion of labor to essential mining industries where their skills can be used to best advantage.
>
> Besides diverting manpower to essential industries, this order, when in effect, will also conserve some materials and supplies used in gold mining, such as mercury, drill steel, etc.

The proposed order, which by September 25 had been designated as L–208, was circulated among several interested branches of the WPB throughout the month of September (R. 96) and was the subject of a memorandum to Donald Nelson by Morris Creditor, Special Assistant to Nelson, in which the pros and cons of the order were discussed and suggestions as to form were made (R. 1204–1205).

On September 30, 1942, Senators McCarran and Gurney and Representatives Case and Englebright, at a meeting with WPB officials (R. 97), voiced the hardships that would be imposed on the inhabitants of gold mining communities and the detrimental effect on morale if the order were issued (R. 97). On October 1, a meeting was held attended by WPB officials (R. 1212), representatives of the gold mining industry (R. 1213), the War Department, the War Manpower Commission and Senator Gurney and Representatives Case and Englebright. Arguments for and against the order were advanced, and its possible effectiveness as a partial solution to the manpower problem was questioned.[16]

On October 2, Under Secretary of War Robert P. Patterson wrote the WPB, in part as follows (R. 99):

> I hope that prompt and effective action will be taken with regard to gold mining. I need not call your attention to the urgent need for more miners in the production of copper and other nonferrous metals as you know the situation as well as I do. The longer the delay in shutting down gold mining, the further off will

[16] On October 3, 1942, Wilbur Nelson reported that based on figures supplied by gold mine operators the proposed order would make available "only about 600 miners and muckers [underground workers] for other mining enterprises" (R. 99).

be the relief of the copper shortage. The matter has hung fire for some time, and I trust that there will be no further delay.

If it is thought best to have the order approved by the War Department and the Navy Department, I will be glad to give the War Department's approval, and I believe that Mr. Forrestal will do the same for the Navy.

And on October 5, Under Secretary of War Patterson and Under Secretary of the Navy Forrestal sent the following memandum to Donald Nelson (R. 99–100):

> The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.
>
> There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production. These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.
>
> The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step and others will not give complete relief if nothing is done to transfer gold miners to copper mining.
>
> The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided.

The proposed gold order was presented to the WPB at its meeting of October 6, 1942. The minutes of this meeting, so far as pertinent, are as follows (R. 100–101):

Mr. Batt reported that the matter of shutting down United States gold mines had been receiving detailed attention. On conferring with Brigadier General McSherry of the War Manpower Commission and representatives of the gold mining companies, it had been found that at present the gold mining industry employs 3,270 workers; 750 are engaged in dredging and only 896 are hard-rock miners. Loss of labor to the Services and to war industries, and higher costs have already sharply curtailed operations of all domestic mines except Homestake. Homestake's labor force has dropped from a peak of slightly over 2,000 workers to 1,876, including lumbermen and machine shop workers. If Homestake were shut down except for standby operations, all but 500 of these workers could be released for work elsewhere. Lead and Deadwood, South Dakota, with aggregate populations of 16,000 are totally dependent on the mine's operation.

Although it has recently emphasized other forms of production, the State Department, because of broad international considerations, heretofore has urged that gold mining in South Africa and Honduras be maintained. The South African economy and the stability of the present government are largely dependent on gold mining. The basic industries of Honduras are the cultivation of bananas, of which exportation to the United States has been reduced to 20 percent of normal, and gold mining. Mr. Leon Henderson reported that Canadian gold mining is being curtailed very sharply. The Vice President pointed out that questions pertaining to production of gold abroad should appropriately be discussed with the Board of Economic Warfare.

Mr. Batt stated that after investigation he recommends that: (1) All nonessential domestic mining of gold other than that incident to the mining of critical metals be stopped as soon as

possible and not later than within 60 days; and (2) gold mines not producing critical metals be allowed to continue standby maintenance operations lest it be impossible to reopen them at the close of the war.

General Somervell stated that because of the critical shortage of copper, which is drastically curtailing ammunition production, the Army has taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines and that, under these conditions, failure to stop gold production immediately would be inexcusable.

After further discussion it was agreed that:

> An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within 60 days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition.

Limitation Order L–208 was issued by WPB on October 8, 1942 (7 Fed. Reg. 7992, Appendix B, *infra*, pp. 111–114). As originally issued (R. 102–105), L–208 recited that "The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense" (R. 102). The order required that operators of nonessential mines take steps to close down and prohibited, after seven days, an operator of a nonessential mine from acquiring, consuming, or using any material, facility, or equipment to break new ore or to proceed with any development work or any new operation. Sixty days after the issuance date, material, facilities, and equipment were not to be used to remove ore or waste from a mine except to the minimum amount necessary to main-

tain buildings, machinery, and equipment in repair. The order excepted from its operation, with limitations, mines which produced 1,200 tons or less ore in 1941, and provided that the order did not prohibit the use or operation of a mill, machine shop, or other facilities in the manufacture of articles bearing a preference rating of A–1–k or higher or in milling ores for the holder of a serial number under P–56. Provision was made for appeal where compliance would work "an exceptional and unreasonable hardship" (R. 104).[17]

L–208 was amended (R. 1574 C–D) on November 19, 1942 (7 Fed. Reg. 9613, App. B, *infra,* pp. 114–118) so as to prohibit the sale or other disposition or acceptance of delivery of any machinery or equipment of the types listed in Schedule A to Preference Rating Order P–56 (R. 1276–1277) except with the specific permission of the Director General of Operations, WPB, and each operator was required to submit an itemized list of Schedule A machinery and equipment indicating each item available for sale or rental.[18]

The possible recission of L–208, as then amended, was considered by the WPB at its meeting of June 15, 1943 (R. 1601–1607). The history of L–208 was reviewed by Chairman Donald Nelson, who recalled that L–208 was issued to divert men and materials into essential nonferrous mines, particularly copper mines, to relieve a situation that became particularly acute in the last half of 1942. Referring to L–208 and the fact that the Army in 1942 had furloughed 4,000 hard-rock miners for work in the copper mines, Nelson said that these actions had relieved the situation

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[17] On October 10, 1942, United States Senators from twelve gold-producing states wrote the President requesting that he personally stay WPB Limitation Order L–208 (R. 107–111).

[18] The amendment to L–208 on November 25, 1942 (7 Fed. Reg. 9810) effected no substantive change in the original order.

to some extent—that the net gain in 1943 output of copper, lead, and zinc was estimated at 6,000 tons. Although not all the gold miners displaced by L–208 transferred to other mining operations, many were placed in other war industries. In addition, Nelson said (R. 1606–1607):

> By closing the nonessential gold mines a great deal of equipment was made idle and became available for essential activities. It is estimated that by the middle of May 1943, 2,200,000 dollars of used gold mining equipment had been transferred to essential activities and transfers are continuing at the rate of about 100,000 dollars per week. It is also pointed out that nonessential gold mines normally consume a large quantity of critical materials and their closing may have made as much as 10–20,000,000 dollars of materials available for essential consumption, less a small amount which they continue to absorb for maintenance and standby operations. Rescission would undo these benefits. The Chairman stated that he is unwilling to approve the production of gold at the expense of copper, a most critical material. Mr. Ickes concurred.
>
> The Chairman emphasized that the copper situation is still critical. Requirements for the third quarter this year were 40,000 tons in excess of indicated supply and our stockpile has been seriously depleted. (See WPB Minutes, April 27, 1943, Item 2.) Production has again turned downward. The present labor shortage in the copper mines, mills, smelters, and refineries is estimated at 4,700 workers. This shortage must be corrected and additional 3–4,000 workers supplied to the copper mining industry if the present capacity and projected increased facilities are to be fully utilized during the balance of this year and in 1944. Other non-ferrous mining industries are facing sim-

ilar shortages. The War Production Board has discussed with Army officials the furloughing of 7,000 additional soldiers for work in the copper mining industry. The War Department is reluctant to do this until assured that all other practical solutions have been exhausted, such as diverting all possible miners from gold mines.

The Chairman stated that the principal argument made by the proponents of gold mining is the economic dependence of the various mining communities on continued operation of gold mines. Another argument is that gold mining machinery is being exported to Latin America and South Africa. The Vice President stated that South African economy is vitally dependent on gold mining and its cessation there would have vastly more serious results than in the United States. It may well be true that in order to preserve the economic and political stability of other countries, a smaller quantity of critical materials would have to be exported in the form of gold mining machinery than in other forms if gold mining were discontinued there. Our exports of gold mining machinery have been far less than requested. The Chairman observed that even if materials were saved by prohibiting the export of gold mining machinery, our domestic economy would not benefit from the labor released by closing foreign mines. He stated that he would have a study made of the volume of gold mining machinery exported.

Upon motion by Mr. Lubin [Economic Adviser to the President, acting for Mr. Harry L. Hopkins] and seconded by Mr. Ickes, it was unanimously agreed that:

Limitation Order L–208 shall be continued with exceptions allowed on appeal only if

(a) The critical material output of the individual mine makes an equal or larger contribution to the war effort than the ma-

terials, equipment, and labor used in operating the mine, considering the relative urgencies of the critical materials involved, or

(b) the necessary labor can be obtained without drawing upon any essential war activities, and certification to this effect can be obtained from the War Manpower Commission.

On August 31, 1943, L–208 was again amended (8 Fed. Reg. 12007–12008, App. B, *infra*, pp. 118–123), by adding a Schedule A (App. B, *infra*, pp. 123–125) which enumerated 74 items of mining equipment and machinery and required each operator of a nonessential mine to submit an inventory of such equipment and machinery, and prohibited the owner from selling, transferring, or otherwise disposing of such material except to a producer holding a serial number under Orders P–56, P–58, or P–73 [19] or with the specific permission of the WPB after a request submitted to the Mining Division of the WPB. Each transfer to a P–56, P–58, or P–73 holder was required to be reported to WPB with the name of the transferee and the identity of the items transferred.[20]

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[19] Preference Order P–58 provided for the assignment of preference ratings for material for maintenance and operation of South American copper mines. P–73 as amended, 8 Fed. Reg. 3667, provided for preference ratings for smelters and refiners of thirteen metals ranging from antimony through zinc.

[20] On November 17, 1943, Representative Engle introduced a bill (H. R. 3682) to rescind L–208. The bill, referred to the Committee on the Judiciary (89 Cong. Rec. 9653), was never reported. Other measures providing for varied forms of relief for gold mine operators forced to suspend operations because of wartime restrictions were introduced but uniformly failed of passage. See, *e. g.*, in the 78th Congress, S. 27 (89 Cong. Rec. 34), reported, S. Rep. No. 271, 78th Cong., 1st Sess. (89 Cong. Rec. 5187), amended and passed (89 Cong. Rec. 6094–6095), re-

(3) By the issuance date of L–208, the Allied counter-offensive against the Axis forces had begun. United States forces had landed on Guadalcanal and the Aleutian Islands, and the Allied invasion of North Africa was in the offing. The Germans had been halted at El Alamein, and the retreat to Tunisia was soon to follow. In November 1942, the German defeat at Stalingrad marked the start of the Russian winter offensive. With the Allies assuming the offensive, the necessity for mountains of war material to sustain the offensives underway and those still in the planning stage was imperative and was to continue unabated until August 1945.

The task of producing the hundreds of thousands of varied implements necessary to modern global warfare, of course, rested, primarily, upon the productive might of the United States. That American industry, under the strictest of governmental regulation, was equal to the occasion is attested by the defeat of the Axis powers and confirmed by the production records over the five-year period—July 1940 to August 1945. In this period, 299,300 military and special purpose

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ferred to House Committee on Mines and Mining (89 Cong. Rec. 6180); S. 344 (89 Cong. Rec. 141); H. R. 3009 (89 Cong. Rec. 6181); H. R. 5093 (90 Cong. Rec. 6587); in the 79th Congress, H. R. 4393 (91 Cong. Rec. 9726); in the 80th Congress, H. R. 950 (93 Cong. Rec. 329).

In the 81st Congress, S. 45, introduced by Senator McCarran (95 Cong. Rec. 39), provided that operators of mines affected by L–208 present their claims to the Treasurer of the United States, who would then determine the validity and amount of the claims by use of any government facility (95 Cong. Rec. 2764). Though favorably reported (95 Cong. Rec. 14811) by the Senate Judiciary Committee (S. Rep. No. 79, 81st Cong., 1st Sess.), S. 45 was objected to (95 Cong. Rec. 2764, 13297, 14722; 96 Cong. Rec. 1278, 14691, 16592) and never received floor consideration. See also, H. R. 7851, 81st Congress (96 Cong. Rec. 4066).

aircraft were produced; 72,100 naval ships totalling 8.5 million displacement tons were built; merchant ships built for the Maritime Commission totalled 4,900 with a dead-weight tonnage of 51.4 million; the production of tanks reached 86,700; and the production of planes, ships, and tanks was paralleled by the equally impressive production of other weapons.[21] These achievements are the more remarkable when it is realized that the civilian economy during the same period was provided with a greater total amount of commodities and services than in such prewar years as 1937 or 1939.[22]

The success of the United States in accelerating its output of munitions rested principally upon two major factors: The sharp increase in the nation's total production of goods and services, which, measured in terms of 1939 dollar values, increased 52 per cent and the disproportionately great increase in manufacturing, mining, and construction industries, which doubled production between 1939 and 1944. The manufacturing industries alone trebled their output, and production of raw materials rose by 60 per cent.[23]

Those achievements were possible only through the maximum utilization of plant facilities, machinery, tools, raw materials, and manpower. For this reason, WPB at the height of the war regulated 100,000 transactions a week and controlled the activities of 250,000 manufacturers, wholesalers, and

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[21] *Industrial Mobilization for War. History of the War Production Board and Predecessor Agencies*, 1940–1945, Vol. I, pp. 962–963.

[22] *Wartime Production Achievements and the Reconversion Outlook*. Report of the Chairman, War Production Board, October 9, 1945, pp. 1–3.

[23] *Industrial Mobilization for War*, *op. cit.*, pp. 963–964.

retailers [24] through thousands of regulatory "L", "M", and "P" and other type orders and amendments. WPB regulation, in the course of the war, literally touched upon every segment of the industrial economy—from such basic commodities as steel,[25] and copper [26] to such seeming irrelevancies as corsets [27] and honey [28] and such obscurities as nutgalls [29] and istle.[30]

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[24] O'Brian and Fleischmann, *op. cit.*, p. 5.
[25] M–126 (7 Fed. Reg. 3364).
[26] M–9–c (6 Fed. Reg. 5394).
[27] L–90 (7 Fed. Reg. 3033).
[28] M–118 (7 Fed. Reg. 2388).
[29] M–204 (7 Fed. Reg. 6210).
[30] M–138 (7 Fed. Reg. 3474).

APPENDIX B

War Production Board Orders

1. War Production Board Limitation Order L–208, issued October 8, 1942 (7 Fed. Reg. 7992–7993), provided as follows:

> The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.
>
> § 3093.1 *Limitation Order L–208*—(a) *Definitions.* For the purposes of this order, "nonessential mine" means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P–56.
>
> (b) *Restrictions upon production.* (1) On and after the issuance date of this order, each operator of a nonessential mine shall immediately take all such steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.
>
> (2) In no event on or after 7 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any develop-

ment work or any new operations in or about such mine.

(3) In no event on or after 60 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below ground, or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair, and its access and development workings safe and accessible.

(4) The provisions of this order shall not apply to any lode mine which produced 1200 tons or less of commercial ore in the year 1941, provided the rate of production of such mine, after the issuance date of this order, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1000 cubic yards of material in the year 1941, provided that the rate of treatment of such placer mine, after the issuance date of this order, shall not exceed 100 cubic yards per month.

(5) Nothing contained in this order shall limit or prohibit the use or operation of the mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a preference rating of A–1–k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P–56.

(c) *Restrictions on application of preference ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the Director General for Operations issued after application made to the Mining Branch, War Production Board.

(d) *Assignment of preference ratings.* The Director General for Operations, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in paragraph (b) (3) above.

(e) *Records.* All persons affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore.

(f) *Reports.* All persons affected by this order shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

(g) *Audit and inspection.* All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(h) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to: War Production Board, Mining Branch, Washington, D. C., Ref.: L–208.

(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(j) *Appeal.* Any person affected by this order who considers that compliance therewith

would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting forth the pertinent facts and the reason he considers he is entitled to relief. The Director General for Operations may thereupon take such action as he deems appropriate.

(k) *Applicability of priorities regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the priorities regulations of the War Production Board, as amended from time to time.

(P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 1, 7 F. R. 561; E. O. 9024, 7 F. R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

Issued this 8th day of October 1942.

ERNEST KANZLER,
Director General for Operations.

2. War Production Board Limitation Order L–208, as amended November 19, 1942 (7 Fed. Reg. 9613–9614), provided as follows:

The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense:

§ 3093.1 *Limitation Order L–208*—(a) *Definitions.* For the purposes of this order

(1) "Nonessential mine" means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P–56.

(2) With respect to any nonessential mine, "effective date" means October 8, 1942, or the date of cancellation by the Director General for Operations of the serial number for such mining enterprise, whichever is the later.

(b) *Restrictions upon production.* (1) On and after the effective date, each operator of a nonessential mine shall immediately take all such steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.

(2) In no event on or after seven days from the effective date shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any development work or any new operations in or about such mine.

(3) In no event on or after sixty days from the effective date shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below ground, or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair and its access and development workings safe and accessible.

(4) The provisions of this order shall not apply to any lode mine which produced 1,200 tons or less of commercial ore in the year 1941, provided the rate of production of such mine, after the effective date, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1,000 cubic yards of material in the year 1941, provided that the rate of treatment of such placer mine, after the effective date, shall not exceed 100 cubic yards per month.

(5) Nothing contained in this order shall limit or prohibit the use or operation of the

mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a preference rating of A–1–k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P–56.

(6) Nothing contained in this order shall prohibit any owner of a mining claim from performing not more than the minimum assessment work required by the provisions of section 2324 of the Revised Statutes of the United States and by Public No. 542, 77th Congress, 2d Session.

(c) *Restrictions on application of preference ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the Director General for Operations issued after application made to the Mining Branch, War Production Board.

(d) *Assignment of preference ratings.* The Director General for Operations, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in paragraph (b) (3) above.

(e) *Restrictions on disposition of machinery and equipment.* No person shall sell or otherwise dispose of any machinery or equipment of the types listed in Schedule A to Preference Rating Order P–56, which has been used in a nonessential mine, and no person shall accept delivery thereof, except with specific permission of the Director General for Operations. On or before November 19, 1942, or within sixty days after the effective date, whichever is later, each operator of a nonessential mine shall

file with the War Production Board, Washington, D. C., Reference: L–208, an itemized list of such machinery and equipment, signed by such operator or an authorized official, indicating each item available for sale or rental. Upon receipt of such itemized list, the War Production Board will furnish to the operator appropriate forms to be filled out for each item which the operator desires to dispose of.

(f) *Records and reports.* All persons affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore, and shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

(g) *Audit and inspection.* All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(h) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to: War Production Board, Mining Branch, Washington, D. C., Ref.: L–208.

(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by a fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(j) *Appeal.* Any person affected by this order who considers that compliance therewith

would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting forth the pertinent facts and the reason he considers he is entitled to relief. The Director General for Operations may thereupon take such action as he deems appropriate.

(k) *Applicability of priorities regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the priorities regulations of the War Production Board, as amended from time to time.

(P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 1, 7, F. R. 561; E. O. 9024, 7 F. R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

Issued this 19th day of November 1942.

ERNEST KANZLER,
Director General for Operations.

3. War Production Board Limitation Order L–208, as amended August 31, 1943 (8 Fed. Reg. 12007–12008), provided as follows:

The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense:

§ 3201.6[1] *Limitation Order L–208*—(a) *Definitions.* For the purposes of this order

(1) "Nonessential mine" means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the opera-

[1] Formerly Part 3093, § 3093–1.

tor of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P–56.

(2) With respect to any nonessential mine, "effective date" means October 8, 1942, or the date of cancellation by the War Production Board of the serial number for such mining enterprise, whichever is the later.

(3) "Operation" means any and all work in or about a mining enterprise; and includes not only mining but also treatment of ore or placer material from such enterprise. It also includes all prospecting, exploration work, and development work.

(b) *Restrictions upon production.* (1) On and after the effective date, each operator of a nonessential mine shall immediately take all such steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.

(2) In no event on or after seven days from the effective date shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any development work or any new operations in or about such mine.

(3) In no event on or after sixty days from the effective date shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below ground, or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair and its access and development workings safe and accessible.

(4) The provisions of this order shall not apply to any lode mine which produced 1,200 tons or less of commercial ore in the year 1941,

provided the rate of production of such mine, after the effective date, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1000 cubic yards of material in the year 1941, provided that the rate of treatment of such placer mine, after the effective date, shall not exceed 100 cubic yards per month.

(5) Nothing contained in this order shall limit or prohibit the use or operation of the mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a preference rating of A–1–k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P–56.

(6) Nothing contained in this order shall prohibit any owner of a mining claim from performing not more than the minimum assessment work required by the provisions of section 2324 of the Revised Statutes of the United States and by Public No. 542, 77th Congress, 2d Session.

(c) *Restrictions on application of preference ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the War Production Board issued after application made to the Mining Division, War Production Board.

(d) *Assignment of preference ratings.* The War Production Board, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in paragraph (b) (3) above.

(e) *Restrictions on disposition of machinery and equipment.* (1) On or before October 30,

1943, or within 60 days after the effective date, whichever is later, each operator of a nonessential mine shall file with the Mining Division, War Production Board, Washington, 25, D. C., Reference: L–208, an itemized list of all machinery and equipment of the types listed in Schedule A, which were in use in, or held in connection with, such nonessential mine on such date. Such schedule shall be signed by such operator or an authorized official, giving complete specifications and conditions for each item. This provision, with respect to reporting, applies only to mines for which an itemized list of machinery and equipment has not been filed with the War Production Board as required by this order prior to August 31, 1943. Any operator who so desires may report items which he wishes to sell or rent on WPB Form 2574 in triplicate and transmit to the nearest regional War Production Board office.

(2) On and after August 31, 1943, no person who owns on the effective date machinery or equipment of the types listed in Schedule A, which was in use in, or held in connection with, a nonessential mine on the effective date, shall sell, transfer, or otherwise dispose of any thereof, and no person shall accept delivery thereof, except:

(i) With specific written permission of the War Production Board, issued after request to the Mining Division; or

(ii) To a producer holding a serial number under Orders P–56, P–58, or P–73.

(3) On and after August 31, 1943, any operator who sells, transfers, or otherwise disposes of any item listed in Schedule A to a producer holding a serial number under Orders P–56, P–58, or P–73 shall immediately report such transaction to the Mining Division of the War Production Board, Washington 25, D. C., Reference: L–208, giving the following information:

a. Name of company and mine from which transferred.

b. Identity of items transferred.

c. Name of producer acquiring equipment and serial number of mine for which equipment is acquired.

(f) *Records and reports.* All persons affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore, and shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

(g) *Audit and inspection.* All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(h) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to: War Production Board, Mining Division, Washington 25, D. C., Ref.: L–208.

(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by a fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(j) *Appeal.* Any person affected by this order who considers that compliance therewith would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting

forth the pertinent facts and the reasons he considers he is entitled to relief. The War Production Board may thereupon take such action as it deems appropriate.

(k) *Applicability of priorities regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the priorities regulations of the War Production Board, as amended from time to time.

(P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 1, 7 F. R. 561; E. O. 9024, 7 F. R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

NOTE: The reporting requirements of paragraph (e) have been approved by the Bureau of the Budget, pursuant to the Federal Reports Act of 1942.

Issued this 31st day of August 1943.

WAR PRODUCTION BOARD,
By J. JOSEPH WHELAN,
Recording Secretary.

Schedule A

1. Aerial tramway equipment
2. Agitators
3. Assay and testing laboratory equipment
4. Automatic feeders, ore, reagent
5. Blowers (flotation)
6. Blowers (ventilation)
7. Cable, electrical
8. Cable, steel
9. Cages and skips
10. Chain blocks
11. Churn drills and accessories
12. Classifiers
13. Compressors, vacuum pumps [2]
14. Concentrating tables

[2] Release for transfer of compressors, covered by Limitation Order L–100, must be secured in accordance with the provisions of that order, and should be identified as an L–208 case.

15. Conveyors, belt, chain, or gravity
16. Crushers (stationary types)
17. Draglines [1]
18. Dredges (mining)
19. Drill presses
20. Drill steel
21. Drills (diamond)
22. Drills (rock, except portable mounted)
23. Dump, rotary track, other
24. Dust control equipment
25. Electrical equipment, other than electric motors
26. Electric motors
27. Explosive equipment
28. Filters
29. Filter presses
30. Flotation machines
31. Furnaces, oil fuel, electric
32. Generators and motor generator sets
33. Granulators, ball mills, etc.
34. Grinders (air and electric)
35. Hack saws, power
36. Head frames
37. Hoists (mine)
38. Hydraulic monitors
39. Jacks (roof)
40. Jigs
41. Lamps, ore exploration
42. Lathes
43. Locomotives (mine)
44. Mucking machines
45. Ore bins (steel)
46. Power tools (portable)
47. Power units (Diesel, gasoline accessories)

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[1] Transfer or any change in status of these types of equipment which come under the provisions of Order L–196, Used Construction Equipment, should also be reported on WPB Form 1333 to the Used Construction Equipment Regional Specialist in the War Production Board Regional Office in the region in which such equipment is located, and marked L–208 case.

48. Presses, hydraulic
49. Pumps (dewatering and supply, larger than 90,000 gallons per hour)[1]
50. Pumps (other, deep well, diaphragm, centrifugal, plunger, sand, and vacuum)
51. Rail and track accessories
52. Receivers (air)
53. Rubber hose (air, water)
54. Safety and defense equipment
55. Saws (power (swing) table)
56. Scrapers (slusher type)
57. Scrapers (carrying or hauling, both drawn and self propelled)[1]
58. Screens
59. Sheaves and sheave blocks
60. Sharpeners (steel)
61. Shovels, power[1]
62. Slusher hoists
63. Storage batteries
64. Tanks (steel and wood)
65. Thickeners
66. Tractors and attachments[1]
67. Trailers
68. Transformers
69. Trucks
70. Washing plant (gold placer)
71. Welding machines (electric, gas)
72. Weighing equipment (automatic, other)
73. Winches (tractor mounted)[1]
74. Winches, other

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No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE UNITED STATES, PETITIONER

v.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 29

THE UNITED STATES, PETITIONER

v.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

I

THE GOVERNMENT HAS NOT CHANGED ITS POSITION

A reading of the Government's brief will show respondents' numerous assertions with respect to the factual and record inadequacies allegedly contained in the Government's brief,[1] and the faults respondents

[1] The record reference, "1777", which appears at p. 61 of the Government's brief includes a typographical error. (See Resps. Br., App. A., p. 55). The quoted phrase, preceding the record reference, is taken from Plaintiff's Exhibit 1 and appears at p. 1177 of the printed record.

find with the Government's organization of its brief (Resps. Br., pp. 9–10), to be either unfounded or trivial. We shall not, however, let pass without more detailed comment respondents' charge that the Government in its brief has now reversed "the position which it took in the petition for certiorari" (Br., p. 35) and that its present contentions are inconsistent with and not comprised within the question presented in the petition for a writ of certiorari (Br., pp. 17, 58, 60–62).

The Government's position in these and other L–208 cases has from the very outset been that the limitations imposed upon the gold mining industry in World War II, pursuant to the wartime allocation powers of the Federal Government, did not involve a taking of private property within the meaning of the just compensation clause of the Fifth Amendment. We think the Government's position on this, the principal point in these cases, is accurately and consistently stated in the petition for a writ of certiorari, and in the Government's brief on the merits. There is, moreover, no substantial variation in the "Question Presented" as stated in our petition and brief. Respondents' fault-finding in this respect (Br., pp. 60–62) is captious.

It is true that the Government's brief puts before this Court Priorities Regulation 13 as well as the two amendments to L–208 which apparently were not considered by the Court of Claims and were not referred to in the petition for a writ of certiorari. If, however, this additional regulatory action by the WPB,

taken from the Federal Register and of equal dignity to the original L–208, is material in determining the legal consequences of L–208, there can be no serious question of the propriety or of our responsibility of bringing it to this Court's attention. While our position on the legal merits of respondents' claims would be the same without Priorities Regulation No. 13 and the amendments to L–208, we do not think that, because this material cuts the ground from under the apparent rationale of the Court of Claims' decision in these cases, our partial reliance on that material warrants respondents' charge (Resps. Br., p. 35) that we have reversed the position taken in the petition for a writ of certiorari or (Resps. Br., p. 17) that we are endeavoring to put before this Court questions and argument inconsistent with and not fairly comprised within the question presented in the petition for a writ of certiorari.

Two other facets of respondents' brief warrant reply.

II

LIMITATION ORDER L–208 WAS NOT AN EXERCISE OF CONDEMNATION AUTHORITY UNDER TITLE II OF THE SECOND WAR POWERS ACT

In our main brief (p. 69), we pointed out that in issuing L–208 the WPB acted under the allocation authority coming to it, by delegation from the President, from Title III of the Second War Powers Act. In addition, we demonstrated that WPB had no authority to "take" respondents' right to mine gold. Respondents repeatedly state (Br., pp. 3, 68, 69, 70,

78, 83, 116) that the effect of L–208 was the same as if the Government had taken physical possession of the mines and closed them down until the Order was revoked. The same argument could be made, of course, wherever regulatory action by the state or federal government restricts or limits the profitable use of private property. Cf. *Mugler* v. *Kansas,* 123 U. S. 623; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264.

Respondents now argue (Br., pp. 115–122), however, that specific statutory authority for the "taking" allegedly effected by L–208 is to be found in Title II of the Second War Powers Act, 56 Stat. 177. Title II gave to the Secretaries of War and Navy, or any other officer, board, commission or governmental corporation authorized by the President, the authority to "cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein * * *, that shall be deemed necessary, for military, naval, or other war purposes * * *."

The WPB, by L–208, did not, and did not purport to, acquire respondents' realty or personalty, or any interest therein for a war purpose or otherwise. In addition, the WPB was never authorized by the President to institute the condemnation proceedings prescribed in Title II. It is, therefore, a fiction for respondents now to suggest that L–208, in terms and effect an order allocating material and equipment, was an exercise of the condemnation authority under Title II of the Second War Powers Act.

III

THE ACT OF JULY 14, 1952, IS NOT AN ADMISSION OF GOVERNMENTAL LIABILITY

As an alternative argument in support of the judgment of the Court of Claims, respondents urge in this Court, as they did in the Court of Claims, that the Act of July 14, 1952, 66 Stat. 605, is a mandate from Congress to the Court of Claims to award compensation wherever it is proved that losses were incurred as a result of L–208. We pointed out in our main brief (p. 44, n. 29) that this contention is refuted by the language of the Act as well as by its legislative history. In the light of respondents' extended argument on this point (Resps. Br., pp. 130–146), further elaboration is appropriate.

The 1952 Act is as far as Congress has been willing to go toward granting legislative relief to the mines affected by L–208. The Act is the third of three legislative measures sponsored by Senator McCarran which, in varying degree, were designed to afford relief to mines affected by L–208. S. 27, "a bill to provide for suspending the enforcement of certain obligations against the operators of gold and silver mines" (89 Cong. Rec. 34), introduced in the 78th Congress, was reported by the Senate Judiciary Committee (S. Rep. 271, 78th Cong., 1st Sess., 89 Cong. Rec. 5187), and though, as amended, it passed the Senate (89 Cong. Rec. 6094–6095), it died in the House Committee on Mines and Mining (89 Cong. Rec. 6180). S. 45, a bill designed to compensate extra-judicially mining concerns affected by L–208, introduced by Senator McCarran (95 Cong. Rec. 39)

and favorably reported by the Senate Judiciary Committee (S. Rep. 79, 81st Cong., 1st Sess.), met a similar fate but as the result of action on the floor of the Senate (95 Cong. Rec. 2764, 13297, 14722; 96 Cong. Rec. 1278, 14691, 16592). S. 3195, which became the Act of July 14, 1952, was introduced by Senator McCarran on May 19, 1952 (98 Cong. Rec. 5394), following the Court of Claims' decision in *Idaho Maryland Mines Corporation* v. *United States*, 122 C. Cls. 670, on May 6, 1952, which held that Idaho Maryland was "entitled to a trial on the merits to prove its claim that the action of the War Production Board was far more than a regulation and [that L–208] amounted to a taking of plaintiff's right to mine and sell gold" (122 C. Cls. 670, 689). By the date of the *Idaho Maryland* decision, the six-year limitation period (28 U. S. C. 2501) on L–208 claims had long since expired and thus posed a jurisdictional bar to most claims based upon L–208. As the pertinent congressional reports confirm, it was this impediment that S. 3195 was designed to remove.

The purpose of S. 3195, as stated in the Senate Report submitted by Senator McCarran (S. Rept. No. 1605, 82d Cong., 2d Sess.), was as follows:

> The purpose of the proposed legislation is to authorize the United States Court of Claims to have jurisdiction to hear, determine, and render judgment, *notwithstanding any statute of limitations, laches, or lapse of time* on the claim of any owner or operator of a gold mine or gold placer operation for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions

> imposed by War Production Board Limitation Order L–208 during the effective life thereof. [Emphasis added.]

Identical language appears in the House report (H. Rep. 2220, 82d Cong., 2d Sess., p. 1) and both reports reflect extended reference to the holding in *Idaho Maryland, supra*. Referring to the *Idaho Maryland* decision, the Senate and House Reports, *supra*, state (p. 2):[2] . . .

> At the present time many other claimants who have as good a right for an adjudication of their claims as does the Idaho Maryland Mines Corp. may not prosecute such claims due to the running of the statute of limitations. Many of the claimants after the ruling in the Oro Fina case undoubtedly felt that to file in the Court of Claims would be useless and, therefore, allowed the statute to run against them. It must be noted that the great majority of the mine operators affected by the order were the small operators who were mining in many out-of-way places and did not have the facilities to employ legal staffs to keep them informed of

[2] In support of their argument that the 1952 jurisdictional act was intended as a Congressional admission of liability, respondents rely (Br., p. 144) upon a quotation from a House subcommittee report on H. R. 4393, reproduced *in extenso* in the Senate and House Reports on S. 3195 (pp. 3–7). But respondents' reliance upon language from a subcommittee report on H. R. 4393 is misplaced and, we believe, misleading. H. R. 4393 was introduced in the 79th Congress by Representative Engle (91 Cong. Rec. 9726). Unlike S. 3195, H. R. 4393 was designed to compensate administratively mine operators affected by L–208. Significantly, H. R. 4393 was never reported by the Committee on War Claims to which it was referred (91 Cong. Rec. 9726, Index, p. 913). Language from the subcommittee report on H. R. 4393 hardly affords a reliable guide as to the Congressional purpose underlying S. 3195.

> their possible rights. They accepted the order under duress and then had no facilities with which to overcome the great prestige of Government.
>
> * * * * * *
>
> The Idaho Maryland Mines Corp. decision is ample evidence of the fact that the least that can be done is to allow those persons affected by Order L–208 their day in court for such recompense as may seem justified * * * [p. 7].

S. 3195 passed both the Senate (98 Cong. Rec. 6322) and House (98 Cong. Rec. 8931) without floor debate, an unlikely event if Congress was admitting to a liability running well into the millions of dollars. But we think it clear that the 1952 Act is susceptible of no such meaning. Rather, in accordance with the canon that acts of this character are to be strictly construed,[3] the jurisdictional act should be accepted for what it was obviously intended to be—a waiver of the jurisdictional bar of the statute of limitations which would otherwise stand in the way of a determination on the merits of most of the 150 claims, based upon L–208 which have now been filed with the Court of Claims.[4]

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[3] *United States* v. *Goltra*, 312 U. S. 203, 210, and cases cited, n. 20.

[4] If the Act of July 14, 1952, is, as respondents argue, a Congressional mandate to the Court of Claims to award compensation wherever it is proved that losses were incurred as a result of L–208, there would have been, of course, no necessity for the Court of Claims to decide, as it did, the constitutional question in these cases. In these circumstances, we feel fully justified in saying (Br. p. 44, n. 29) that respondents "unsuccessfully urged" this argument in the Court of Claims. The majority of the Court of Claims considered respondents' contentions "unnecessary to discuss" and the argument must necessarily have been rejected by the two dissenting judges.

CONCLUSION

For these reasons, together with those set forth in our main brief, we respectfully submit that the judgment of the Court of Claims should be reversed with directions to dismiss respondents' petitions in that court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE UNITED STATES,

Petitioner,

vs.

CENTRAL EUREKA MINING COMPANY (a corporation), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD-MOUNTAIN MINING COMPANY, ERMONT MINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF IN OPPOSITION OF RESPONDENTS HOMESTAKE MINING COMPANY, CENTRAL EUREKA MINING COMPANY (a corporation), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY and IDAHO MARYLAND MINES CORPORATION

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Ex. Order 9138, 7 F. R. 2919	4 footnote

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BRIEF IN OPPOSITION OF RESPONDENTS HOMESTAKE MINING COMPANY, CENTRAL EUREKA MINING COMPANY (a corporation), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY and IDAHO MARYLAND MINES CORPORATION

Opinions Below

The original opinion of the Court of Claims is printed at pages 1-50 of the Appendix to the Petition and is reported at 138 F. Supp. 281. The opinion denying the Government's motion for a new trial is printed at pages 123-130 of the Appendix to the Petition.[1]

[1] The Appendix to the Petition will be referred to hereafter as "Pet. App.".

Questions Presented

QUESTION NO. 1:

The first question stated by the Petitioner is whether War Production Board Order L-208 resulted in a temporary taking of the respondents' right to mine gold (Pet. p. 2). The Petitioner prefaces its statement of the question with the assertion that Order L-208 was issued "In order to conserve scarce war materials and to bring about the voluntary relocation of skilled manpower to more vital mining activities" (Pet. p. 2).

The assertion that Order L-208 was issued "in order to conserve scarce war materials" disregards the Findings made by the Court of Claims on the principal issue below. That issue was whether, as contended by the Government, the Order was a regulation of the use of war materials and the shut-down of the mines was a mere consequential result of such a regulation, or whether, as contended by the respondents, Order L-208 was not issued "in order to conserve scarce war materials" but involved a direct, intentional taking of the respondents' rights to mine gold in the unfounded hope that a transfer of manpower would result.

On this principal issue the Court of Claims found in favor of the respondents and against the Government. Specifically, the Court found (1) that orders of the War Production Board (hereinafter called "the WPB") issued many months before Order L-208 "had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment" (Finding 17, Pet. App. p. 62; see also Finding 50, Pet. App. p. 90), (2) that the "dominant consideration" in the issuance of the Order was the transfer of mine labor from the gold mines to mines producing other metals (Finding 46, Pet. App. p. 89) and (3) that, although the preamble to Order L-208

stated that it was issued to conserve critical materials, supplies and equipment, the Order was in fact not adapted to do so (Finding 48, Pet. App. p. 89-90). As the Court's opinion said, "The record establishes that no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines" (Pet. App. p. 8).

The question whether Order L-208 was issued "in order to conserve scarce war materials", as the Government contended below and suggests in the Petition, was predominantly a question of fact. It was decided in favor of the respondents by the Court of Claims, whose conclusion was supported by extensive Findings (see below, p. 12).

The legal conclusion drawn from the facts, that the WPB's direct, intended closing of the respondents' mines constituted a "taking" of the respondents' right to mine and sell their gold, involves no novel concept but, on the contrary, is fully supported by many decisions of this Court.

QUESTION No. 2:

The second question sought to be raised by the Petition is whether the WPB was authorized to effect the taking here involved (Pet. p. 2).

The Government did not attempt to raise this question in the Court of Claims until it made a motion for a new trial after the Court below had decided in the respondents' favor (Pet. App. p. 128).

In now raising the question, the Petition asserts that none of the statutes referred to by the Court below "in its original opinion" authorized a taking (Pet. p. 16, footnote 12). In the Appendix to this brief we quote the relevant portions of the three statutes which are mentioned in the Petition and also quote the other pertinent statutes and

Executive Orders which are listed in a footnote below.[2] These statutes and Executive Orders establish that the WPB had ample authority to take the respondents' property rights.

The Constitutional Provision, Statutes, Executive Orders and Regulations Involved.

The Fifth Amendment to the Constitution provides in part:

> "* * * nor shall private property be taken for public use, without just compensation."

As already stated, the pertinent statutes and Executive Orders dealing with the powers of WPB and other Governmental agencies are set forth in the Appendix hereto.

The Special Jurisdictional Act of July 14, 1952 (66 Stat. 605) provides:

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[2] The statutes are as follows:

§ 120 of the National Defense Act of 1916, 39 Stat. 166, 213;

The Act of March 4, 1917, 39 Stat. 1192;

§ 9 of the Selective Training and Service Act of 1940, 54 Stat. 892;

The Act of October 10, 1940, 54 Stat. 1090;

The Requisitioning Act of October 16, 1941, 55 Stat. 742, as amended 56 Stat. 181;

Title II of the Second War Powers Act, 56 Stat. 177;

Title III of the Second War Powers Act, 56 Stat. 177-178.

The Executive Orders are the following:

Ex. Order 8629, 6 F.R. 191
Ex. Order 8875, 6 F.R. 4483
Ex. Order 8942, 6 F.R. 5909
Ex. Order 9024, 7 F.R. 329
Ex. Order 9040, 7 F.R. 527
Ex. Order 9125, 7 F.R. 2719
Ex. Order 9138, 7 F.R. 2919

"The United States Court of Claims be, and hereby is, given jurisdiction to hear, determine and render judgment, notwithstanding any statute of limitations, laches, or lapse of time, on the claim of any owner or operator of a gold mine or gold placer operation for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions imposed by War Production Board Limitation Order L-208 during the effective life thereof: *Provided,* That actions on such claims shall be brought within one year from the date this Act becomes effective."[3]

The text of Order L-208 is set out in the Findings of Fact (Pet. App. p. 86-88).

STATEMENT

The origin, promulgation and general effect of Order L-208 are the subject of 52 Findings of Fact which will be found at pages 51-94 of the Appendix to the Petition. The other Findings relate severally to the respective plaintiffs below.

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[3] The respondents here had file l their petitions in the Court of Claims prior to the enactment of the quoted statute. However, the respondents argued below that, if for any reason the Court might hold that the issuance of Order L-208 had not amounted to a "taking", the Court was still authorized by the Congress to render a judgment in favor of any gold mine owner which could prove that it had incurred losses because of the closing of its mine as a result of the issuance of Order L-208. The majority opinion adverts to this (Pet. App. p. 2-3) but, since the Court found that the issuance of the Order effected a taking, the Court held that it was unnecessary to determine the effect of the Special Jurisdictional Act (Pet. App. p. 46).

There has been no decision in this or any other case that the Special Jurisdictional Act has the limited effect suggested in footnote 14 to the Petition (p. 18). Indeed, the Court of Appeals for the Ninth Circuit recently held that the Congress, in enacting the Special Jurisdictional Act, elected to compensate operators of the gold mines affected for all losses caused by Order L-208. *Brinker-Johnson Co.* v. *Reconstruction Finance Corporation*, 236 F. 2d 195, 197, 198.

As the Government's Statement explicitly acknowledges (Pet. p. 4-5), seven months before the issuance of Order L-208 "the War Production Board had effectively eliminated the possibility of acquisition by the gold mines of critical materials or supplies" (Findings 17, 48, 50, Pet. App. p. 62, 89, 90).

In the summer of 1942 the WPB, War Manpower Commission and War Department began to be alarmed by the growing exodus of workers from the strategic metal mines, principally copper mines (Findings 18, 19, 20, 21, Pet. App. p. 62-65). Investigation of this loss of miners disclosed (1) that the miners were being attracted by higher wages and better working conditions available in the aircraft and shipbuilding industries and in the Armed Services building construction projects, (2) that many experienced miners were being drafted into the Armed Services instead of being deferred by the Selective Service as essential workers, and (3) that production was also hampered by the low morale of the miners, the short workweek in the mines and the lack of any effective means of recruiting workers (*id.*).

In July, 1942, a War Department Committee suggested that production of gold be curtailed and a program be established for the transfer of gold mine workers to the nonferrous metal mines (Finding 19, Pet. App. p. 63). More or less simultaneously the Labor Production Division of the WPB made a similar suggestion (Finding 20, Pet. App. p. 64, 65).

The proposal to close the gold mines in the hope of diverting hard rock miners to nonferrous mines was the subject of vigorous debate within and without the WPB from early in August, 1942 until Order L-208 was issued on October 8, 1942. Among other things, it was questioned whether a shutdown of the gold mines would be effective to bring about the voluntary transfer of a significant number of hardrock miners to the nonferrous metal mines. Findings 22 to 38, both inclusive, set forth in detail

hat took place between the beginning of August and Octo-
er 2, 1942, when the Under Secretary of War wrote the
ice Chairman of the WPB a letter which is referred to
ter (Pet. App. p. 65-83). Those Findings contain the
xts of several contemporary memoranda and they afford
undant support for the statement in the opinion below
at (Pet. App. p. 8):

> "The record establishes that no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines."

By mid-September, 1942, strong opposition to the issu-
nce of a gold mine closing order was being heard from
nportant voices within the WPB (Findings 31, 36, 38, Pet.
pp. 79, 82, 83). However, at this point the Army started
o bring great pressure to bear on the WPB to close down
he gold mines (Pet. App. p. 7). By September 15 the
War Department was "impatient at the delay" in issuing
closing order (Finding 30, Pet. App. p. 78). At a meeting
f WPB officials and gold mine representatives on October
, when the gold mine owners expressed numerous reasons
hy their mines should not be closed, several WPB officials
n attendance "questioned the possible effectiveness of the
roposed order", but the representative of the Army
spoke strongly in support of a closing order". (Finding
6, Pet. App. p. 82.)

On October 2, 1942, the Under Secretary of War wrote
o the Vice Chairman of the WPB urging immediate issu-
nce of a gold mine closing order and saying "The matter
as hung fire for some time, and I trust that there will be no
urther delay" (Finding 39, Pet. App. p. 83-84). In the
tter he offered to give approval of the Order on behalf
f the War Department and indicated that he could secure
he approval of the Navy Department (*id.*).

The next day, October 3, the Chief of the Mining Branch of the WPB, who had undertaken at the October 1 meeting to "determine how many miners and muckers would actually be released by a closing order" (Finding 36, Pet. App. p. 81-83), reported to the Vice Chairman of the WPB "that if all the gold mines and dredges in the United States were put on a stand-by basis, it would make available only about 600 miners and muckers for other mining enterprises 'provided they [could] all be induced to go into other mines'" (Finding 37, Pet. App. p. 83). The estimated 600 represented only a small fraction of the numbers previously estimated within the WPB (Findings 20, 25, 27, 36, 40, Pet. App. p. 64, 69, 72, 82, 84) and there was no reason to expect that anything like all of the 600 could be induced to go into other mines (Finding 50, Pet. App. p. 90).

This was one of the bases for the Finding made by the Court below that "in issuing L-208 WPB acted without any justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines" (Finding 51, Pet. App. p. 91). This Finding of the Court of Claims was supported by an earlier Finding, setting forth in detail facts known to the WPB which made it unreasonable to expect that the Order would bring about the transfer of a significant number of hardrock miners to the nonferrous metal mines (Finding 50, Pet. App. p. 90).

Nevertheless, the forces which led to the issuance of Order L-208 continued to gather momentum. On October 5 the Under Secretaries of War and the Navy sent a memorandum to the Chairman of the WPB which opened with the statement that "The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production". The memorandum closed with the statement "The matter has

hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided" (Finding 40, Pet. App. p. 84).

On the next day, October 6, 1942, the War Production Board formally met and approved the issuance of Order L-208.[4] The Commanding General of the Services of Supply told the Board that in view of the fact that "the Army has taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines * * * failure to stop gold production immediately would be inexcusable" (Finding 41, Pet. App. p. 85).[5]

On October 8, 1942, the WPB issued Order L-208 "in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines" (Pet. App. p. 8) and "without any justifiable anticipation that the order

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[4] Among the Board and staff members present at this meeting were Chairman Donald Nelson; Vice President Wallace, Chairman, Board of Economic Warfare; Under Secretary of War Patterson "acting for Mr. Henry L. Stimson, Secretary of War", and Vice Admiral Robinson "acting for Mr. Frank Knox, Secretary of the Navy"; Lt. General Knudsen, Director of Production, War Department; Mr. Isador Lubin "acting for Mr. Harry L. Hopkins, Special Assistant to the President supervising the Defense Aid Program"; and Mr. John Lord O'Brian, General Counsel of the Board. Among those present by invitation were Lt. General Somervell, Commanding General, Services of Supply, War Department; Chairman Paul V. McNutt of the War Manpower Commission; and Mr. Robert R. Nathan, Chairman of WPB's Planning Committee (Pltfs. Ex. 92).

[5] In a report which the Policy Analysis and Records Branch of WPB submitted in May, 1944, concerning the history and effect of Order L-208, it was stated that "General Somervell's position * * * amounted almost to an ultimatum which permitted no alternative" (Pltfs. Ex. 1, p. 46).

The Petition states that the Army's decision to furlough 4,000 men for work in the copper mines was "an action the Army had not been willing to institute so long as the gold mines continued in operation" (Pet. p. 6). Actually, the findings show that the Army had determined to furlough these soldiers prior to the WPB's decision to issue Order L-208 (Findings 40, 41, Pet. App. p. 84-85). The Court below characterized the Army's objection to the continued operation of the gold mines as "largely political rather than practical" (Pet. App. p. 7).

would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines" (Finding 51, Pet. App. p. 91).

Paragraph (b)(1) of the Order provided (Pet. App. p. 86):

> "(1) On and after the issuance date of this order, each operator of a nonessential [gold] mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine."

Paragraph (i) of the Order provided (Pet. App. p. 87-88):

> "(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. * * *"

The Order thus deprived the respondents directly of their right to extract gold from their mines and sell it, under penalty of fine or imprisonment.

While the preamble contained a reference to "a shortage in the supply of critical materials for defense" and the Order contained certain provisions relating to "any material, facility or equipment" (Pet. p. 5-6; Pet. App. p. 86), the Court of Claims held (Pet. App. p. 29):

> "Despite its preamble and the authority cited for its issuance, the language of the order itself and the circumstances surrounding its issuance indicate that neither its purpose nor its effect was to conserve or allocate critical materials, equipment and facilities needed for defense, but was rather to deprive the gold mine owners of their right to make profitable use of their gold mines."

This holding in the Court's opinion was based on its Finding 48 (Pet. App. p. 89-90).

On October 10, 1942, two days after the Order was issued, 21 United States Senators wrote the President of the United States urging that the President "stay" Order L-208 (Finding 52, Pet. App. p. 91-93). The President did not stay the Order and it was not rescinded until June 30, 1945 (Finding 90, Pet. App. p. 102).

Following the issuance of the Order only an insignificant number of hardrock miners actually went to work in the nonferrous metal mines (Findings 47, 52; Pet. App. p. 89, 94). The Petition concedes this (p. 6). In March, 1944, officials of the WPB agreed "that the number of gold mine workers who went into other mines and remained there for a year or more was not over 100" (Finding 52, Pet. App. p. 94).

Upon the basis of the facts so found, the Court below determined that Order L-208 was not "a *bona fide* limitation order" (Pet. App. p. 20-23), and held that (Pet. App. p. 23):

> "L-208 was aimed, in all its provisions, directly at the beneficial use of the mining properties of the gold mine owners, and the only intention reasonably inferrible from the language of the order itself and the circumstances surrounding its issuance was an intent to temporarily deprive them of that property right."

In holding that the Order was not in fact a "regulation", the Court said (Pet. App. p. 13):

> "What the order did do, and do directly, was to prohibit the continued operation of the gold mines".

It concluded that the closing of the gold mines was not the incidental or consequential result of a regulation dealing with the allocation or conservation of critical materials but was the direct, intended result of the Order, and that therefore the action constituted a "taking" within the meaning of the Fifth Amendment (Pet. App. p. 23, 32-33).

ARGUMENT

I.

Based on a very full record of the circumstances leading to the issuance of Order L-208 and a careful analysis of the Order itself, the Court of Claims found that the shut-down of the respondents' mines was not a mere incidental result of a bona fide regulation of the use of critical materials and that the Order effected a "taking".

The Court's decision was not inconsistent with its prior decisions in *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, certiorari denied, 341 U. S. 948, and *St. Regis Paper Co.* v. *United States*, 110 C. Cls. 271, certiorari denied, 335 U. S. 815.

The question whether Order L-208 was issued in order to conserve war materials and the shut-down of the respondents' mines was a mere consequential result of a regulation of the use of war materials, as the Government contended, or whether the Order involved a direct taking of the respondents' right to mine gold in the hope that a transfer of manpower would result, as the respondents contended, was predominantly a question of fact.

At extensive hearings a comprehensive record was made of the circumstances leading to the issuance of Order L-208. After considering that record and very full briefs, and after hearing oral argument, the Court below made 52 Findings which set forth the story of Order L-208 in detail; they take up 43½ pages of the Appendix to the Petition (Pet. App. p. 50-94). Those Findings and the Court's analysis of Order L-208 itself (Pet. App. p. 20-23) fully sustained the respondents' contention.

The Court of Claims did not base its holding upon the ground that "Order L-208 went beyond the bounds of permissible regulation", as the Government now contends (Pet. p. 7). Rather the Court held that, "What the order did do, and do directly, was to prohibit continued operation of the

gold mines" (Pet. App. p. 13) and thus constituted a "taking" as distinguished from a regulation (see Pet. App. p. 16-17, 23 and Point II at p. 15-19 below).

The principal ground for the issuance of a writ of certiorari advanced in the Petition (p. 8-12) is that the decision of the Court of Claims is inconsistent with its prior decisions in *Oro Fino Consolidated Mines, Inc.* v. *United States,* 118 C. Cls. 18, certiorari denied, 341 U. S. 948, and *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815.

Even if the asserted inconsistency existed, it would not appear to call for action by this Court under Rule 19. However, we submit that there is no inconsistency.

Oro Fino involved Order L-208 and the Court of Claims dismissed the petition on the Government's demurrer. However, the *Oro Fino* petition did not allege any facts showing that the Order had no relation to the allocation or conservation of critical materials. No "taking" was alleged, the property right involved was not described, and the plaintiff did not seek to recover the value of the property taken (compare *United States* v. *Causby,* 328 U. S. 256, 267). On the meagre allegations of the *Oro Fino* petition the Court of Claims viewed the closing of the *Oro Fino* mine as merely an incidental result of a valid exercise of the WPB's power to allocate critical materials; and in opposing *Oro Fino's* petition for a writ of certiorari the Government described Order L-208 as an exercise of the President's "wartime authority to allocate critical material and facilities" (Brief for the United States in Opposition, No. 667, October Term, 1950, p. 2, 6, 7).

As indicated in the opinion below (Pet. App. p. 14-15), the order in the *St. Regis* case (Order M-251) was of a very different nature. The preamble of the Order stated that there was a shortage of pulpwood needed for defense purposes. Order M-251 provided that the WPB's Director General could declare certain localities to be

shortage areas and could allocate the available supply away from and to specific persons; that he could direct the holders to make their supplies of pulpwood available for disposition; and that no one in that area might acquire or process any pulpwood except as the Director General might order. As a result of the application of the Order to the Puget Sound area where the St. Regis plant was located and the consequent inability of the St. Regis plant to process pulpwood, that plant was compelled to close down. The Court of Claims in effect held that any loss to St. Regis was consequential, and was the indirect result of an order dealing in fact with the allocation and conservation of critical supplies. The Court said (110 C. Cls. at 279):

> "This does not mean, however, and the petition does not purport to so charge, that it was the Board's objective to shut down plaintiff's plant. It did not issue its General Preference Order No. M-251 to accomplish such an end."

Here, on the other hand, the direct, intended result of Order L-208 was to shut down the respondents' gold mines. Clearly, therefore, the decision in *St. Regis* offers no parallel to the instant case.[6]

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[6] The Government contends (Pet. p. 11) that even without the shutdown requirement Order L-208 would have resulted in the closing of the gold mines because of other provisions preventing the mine operators from acquiring or using "any material, facility, or equipment" (Pet. App. p. 86). The Court of Claims found that the latter provisions were not directed at the allocation or conservation of critical materials (indeed they were not even limited to the acquisition or use of "critical" materials) but were inserted as "part and parcel of the express order to cease doing business" (Pet. App. p. 33; Finding 48, Pet. App. p. 89-90).

II.

Order L-208 directly deprived each of the respondents of valuable property—the right to produce and sell gold from its mine over a period of two and one-half years.

In determining whether there was a compensable taking it is immaterial that the Government did not itself operate the mines or effect a physical entry.

The "property" of each of the respondents, within the meaning of the Fifth Amendment, was not limited to the "physical thing", i. e., the mine. The right to produce gold from the mine and sell it was itself property. The right to do so over a period of two and one-half years was a very substantial property right.

The opinion below correctly held (Pet. App. p. 10):

> "The property which plaintiffs contend has been taken from them, and which defendant urges was merely limited in its usefulness to plaintiffs as a consequence of a valid regulation of scarce materials, was plaintiffs' right to make profitable use of their gold mining properties. As pointed out by Mr. Justice ROBERTS in *United States* v. *General Motors Corporation*, 323 U. S. 373, while 'property' as that term is used in the Fifth Amendment certainly means the physical thing with respect to which the citizen exercises rights recognized by law, it also means the group of rights inhering in the citizen's relation to the physical thing, as the rights to exclusively possess, use and dispose of the physical thing. In this sense, the right of a gold mine owner to extract gold from his mine and to sell it for a profit, is a property right protected by the Constitution. *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393."

The Government argues that the respondents are not entitled to compensation because "there was no affirmative use or invasion of the mines by the Government, nor was ownership or possession transferred to the Government" (Pet. p. 12). But under this Court's decisions it is clearly immaterial that when the Government deprived the re-

spondents of their property, the right to mine and sell gold, the Government did not itself make any "affirmative use" of the right of which the respondents were deprived. It is equally immaterial that there was no physical "invasion of the mines by the Government" and that ownership was not transferred to the Government.

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 414, cited by the Court below, Mr. Justice HOLMES wrote for the Court that

> "As said in a Pennsylvania case, 'For practical purposes, the right to coal consists in the right to mine it.' *Commonwealth* v. *Clearview Coal Co.*, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

In *United States* v. *General Motors Corp.*, 323 U. S. 373, also cited by the Court below, Mr. Justice ROBERTS enunciated for this Court, at pages 377-378, the concepts which were summarized in the opinion below (Pet. App. p. 10; see above, p. 15) and also said (p. 378):

> "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

The *General Motors* opinion cited *United States* v. *Welch*, 217 U. S. 333, and *Richards* v. *Washington Terminal Company*, 233 U. S. 546. In *U. S.* v. *Welch* compensation was awarded when the flooding of land by the Government rendered an easement over land ineffectual. *Richards* v. *Washington Terminal Company* was an action brought by

the owner of a house near a portal of a terminal which the Washington Terminal Company had built by authority of Acts of Congress and from which there was a continuing emission of gases and smoke because of the operation of trains in the tunnel. In reversing a judgment in favor of the defendant this Court said (p. 557): "Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him."

In *United States* v. *Causby*, 328 U. S. 256, the Court held that flights of aircraft over a dwelling and chicken farm near a military airport, which were so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land, were as much an appropriation of the use of the land as a more conventional entry upon it. Mr. Justice DOUGLAS said for the Court (p. 261, 262):

> "* * * the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. *United States* v. *Miller*, 317 U. S. 369 * * *. If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."
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> * * * * *
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> "The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed."

Kimball Laundry Co. v. *United States*, 338 U. S. 1, involved the condemnation of a laundry for use by the Army for a temporary period. The Laundry Company had developed valuable "trade routes", which, of course, neither the Company nor the Army could use while the Army was operating the laundry. In discussing the question whether the Government had to compensate the Laundry Company for the value of the use of the trade routes, Mr. Justice FRANKFURTER wrote for the Court (p. 13):

> "* * * the situation is apt for the oft-quoted remark of Mr. Justice HOLMES, 'the question is what has the owner lost, not what has the taker gained.' *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195."

The Court's decision (p. 16) was "that since the Government for the period of its occupancy of petitioner's plant has for all practical purposes preempted the trade routes, it must pay compensation for whatever transferable value their temporary use may have had".

In *William C. Atwater, Jr., et al.* v. *United States*, 106 C. Cls. 196, the plaintiffs were the owners of certain property on Fire Island. The military authorities built a target range near the plaintiffs' property and established a safety zone which included the plaintiffs' property and from which all persons, including the plaintiffs, were excluded during the Government's use of the target range from December, 1941 until June 30, 1944. Although there was no "affirmative use or invasion" of the plaintiffs' property, the Court of Claims held that there was a compensable taking because the plaintiffs were denied access to their property (p. 206, 207).

In *Edward P. Stahel & Co., Inc.* v. *United States*, 111 C. Cls. 682, certiorari denied, 336 U. S. 951, the WPB had issued a directive requiring certain owners of raw silk to hold their silk subject to Government direction. The Court of Claims held that the issuance of the directive itself

effected a taking even though at the time the directive was issued the Government did not take physical possession of the silk or require the owners of the silk to surrender such possession.

The "taking" of the respondents' rights to operate their gold mines under Order L-208 was as clear and direct as the taking in any of the cases cited above.

Indeed, the taking of the respondents' property was just as complete as if the Government had stationed soldiers at each of the mines to enforce compliance with Order L-208. The entire Executive arm of the Government appeared to be behind the Order and the posting of soldiers would have added little, if anything.

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There is no basis for the Government's argument (Pet. p. 12) that "since there was as much gold in the mine when Order L-208 was revoked as when it was issued, the effect of the Order was simply to suspend until after the war the extraction of the gold". An owner of a gold mine has the same right to a profitable use of his property as the owner of a farm or factory. If the Government deprives the owner of a farm or factory of the right to use his property, it is no answer to a suit for compensation to say that the Government later returned the farm or factory in as good condition as when it was taken.

III.

The Court below did not pass upon the respondents' alternative ground for a recovery, viz., that Order L-208, if viewed as a regulation, constituted a taking because it was arbitrary.

The Government argues that this case does not fall "within the very limited category of takings" resulting from a regulation which "interferes too severely or extensively" with property rights and in this connection

refers to *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (Pet. p. 13).

The Government thus takes cognizance of an *alternative* ground for recovery which the respondents advanced in the Court of Claims but on which that Court did not pass. In support of that alternative ground the respondents cited *Chicago, Burlington & Quincy Railway Co.* v. *People of the State of Illinois, ex rel. Drainage Commissioners*, 200 U. S. 561, 593-594, and *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415-416.

The Court's opinion below summarized the first and second grounds advanced by the respondents for a recovery (Pet. App. p. 9):

> "Plaintiffs contend that L-208, while in form a regulation restricting their acquisition and use of critical materials needed for defense, was in substance a requisition or taking, for the life of the order, of plaintiffs' right to make profitable use of their gold mining properties for which taking the Government is liable to pay just compensation under the Fifth Amendment to the Constitution. Plaintiffs also contend that if the court should decide that L-208 was actually a regulation in substance as well as in form, it was arbitrary in that it went far beyond what was required by the exigencies of the war situation existing at the time of its issuance, bore no reasonable relation to its ostensible purpose of conserving critical materials needed in the defense effort, and in fact and law amounted to a taking of valuable property rights of plaintiffs for which just compensation should be paid."

The Court sustained the respondents on the first ground (Pet. App. p. 23, 32-33) and hence found it unnecessary to pass on the second, or alternative, ground.

The Government's discussion of this question in its Petition (p. 13-15) tends to suggest that this Court ought to review a question which the Court below did not find it necessary to decide.

While, as the Petition points out (p. 14, footnote 11), the Court of Claims held that the issuance of Order L-208 was "arbitrary" (Pet. App. p. 28-29), that holding was not made in connection with the respondents' alternative ground for recovery but rather in connection with the Government's contention below that, if the Order was arbitrary, it was unauthorized (Pet. App. p. 23-29).

However, the Government now insists that the Order was not arbitrary and urges that the prospects of the Order's success "justified the War Production Board's action" (Pet. App. p. 15, footnote 11).[7] The Findings of the Court below dispose of this argument conclusively (see above, p. 8, 9-10, 11).

* * * *

This case bears no resemblance to cases cited in the Petition (p. 14) involving wartime rent controls (*Woods v. Miller*, 333 U. S. 338; *Bowles* v. *Willingham*, 321 U. S. 503; *Block* v. *Hirsh*, 256 U. S. 135), regulation of commodity prices (*Yakus* v. *United States*, 321 U. S. 414; *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188), renegotiation of war profits (*Lichter* v. *United States*, 334 U. S. 742), allocation of critical materials (*L. P. Steuart & Bros., Inc.* v. *Bowles*, 322 U. S. 398), or the incidental frustration of contract rights (*Omnia Commercial Co.* v. *United States*, 261 U. S. 502). In all of those cases the injury, usually of only a limited nature, was merely the *indirect* effect of reasonable and legitimate action taken to promote the public good.

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[7] In the same footnote 11, the Government cites *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 for the proposition that, if the Order was arbitrary, respondents should have sought an injunction against its enforcement, not compensation for damages. The cited case simply does not stand for the Government's proposition and it has never been the law that the possible availability of a remedy in equity defeats a remedy at law. This Court has explicitly held that the availability of an injunction against a taking does not defeat an action at law for just compensation. *United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645, 656.

The wartime prohibition cases (*Ruppert* v. *Caffey*, 251 U. S. 264; *Hamilton* v. *Kentucky Distilleries and Warehouse Company*, 251 U. S. 146), also cited in the Petition (p. 14), present no analogy, for reasons pointed out in the opinion below (see Pet. App. p. 30-31).

IV.

There is no occasion for this Court to provide "more authoritative guidance which will be useful in current planning for future periods of stress, as well as in the actual operation of controls in times of emergency".

The Government argues that this Court should grant certiorari so that there may be "more authoritative guidance which will be useful in current planning for future periods of stress, as well as in the actual operation of controls in times of emergency" (Pet. p. 18). It says also that "a more definitive delineation between 'regulation' and 'taking' is needed as a guide for use in the current and continuing preparation for possible future national or war emergencies" (p. 8).

The Findings of the Court of Claims (Pet. App. p. 50-94) indicate the *sui generis* nature of the drastic, unprecedented—and never repeated—action taken by the WPB in depriving those owners of gold mines who were not exempted from Order L-208 of their right to mine gold by directly ordering them, under penalty of fine or imprisonment (Pet. App. p. 87-88), "to take all steps as may be necessary to close down" the operation of their mines (Pet. App. p. 86)—an action which was taken in the hope that skilled labor in the mines would move to other mining activities.

There is no reason to suppose that anything like Order L-208 will ever be repeated. There was nothing like it prior to World War II, there was nothing else like it during World War II, and it is inconceivable that "current planning for future periods of stress" will or should embrace anything remotely similar.

V.

It was not until after the decision of the Court of Claims that the Government argued for the first time, on its motion for a new trial, that there was a lack of authority to take the respondents' property.

The WPB had ample authority to issue Order L-208.

The Petition argues "that (1) the War Production Board did not have the authority to requisition property in circumstances such as are here involved and (2) the Board did not intend, nor did it purport, to exercise any requisitioning authority that it had" (Pet. p. 15-16).

This ground for denying the respondents compensation was not advanced by the Government until after the Court of Claims' decision on February 20, 1956 in favor of the respondents; the ground was the basis for the Government's motion for a new trial (Pet. App. p. 29-30, 128). That motion was denied on July 12, 1956 (Pet. App. p. 123-130).

In view of the tardiness with which the Government has urged that there was no authority for it to take what it in fact did take, the language of Mr. Justice HOLMES for the Court in *International Paper Company* v. *United States*, 282 U. S. 399, 406, seems particularly apt:

> "The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary [of War] was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that, if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has

> had. The doubt is rather late. We shall accept as sufficient answer the reference of the petitioner to the National Defense Act * * * [39 Stat. 166, 213], giving the President in the time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation."

In the *International Paper* case, the Secretary of War by telegraphic order requisitioned the water power used by the plaintiff. In this case, Order L-208 was issued with the unanimous approval of all members of the WPB who were present at the Board's meeting of October 6, 1942, and those participating at that meeting in the decision to issue the Order included Vice President Henry Wallace, Under Secretary of War Patterson "acting for Mr. Henry L. Stimson, Secretary of War", Vice Admiral Robinson "acting for Mr. Frank Knox, Secretary of the Navy", Lieutenant General Knudsen, Director of Production, War Department, Lieutenant General Somervell, Commanding General Services of Supply, War Department, and Mr. Isador Lubin, "acting for Mr. Harry L. Hopkins, Special Assistant to the President" (see footnote 4, p. 9, above).

Not only was the order issued at the insistence of the War and Navy Departments (Findings 39, 40, Pet. App. p. 83-84) but it was brought to the attention of the President himself when 21 United States Senators urged him to "stay" the Order; the President did not do so (Finding 52, Pet. App. p. 91-93).

If ever the full power of the Executive arm of this Government was brought to bear in a taking of property, it was done in this instance.

The petitioner's narrow argument appears to be that the power to requisition the precise type of property taken in these cases was not explicitly conferred upon the WPB (Pet. p. 15-17). Actually, as the Court of Claims found, by October, 1942 the Congress had conferred upon the Presi-

dent authority to requisition any real or personal property or interest therein which he deemed necessary successfully to prosecute the war and all of these powers, except the power to condemn real property, had been explicitly delegated to the WPB (Pet. App. p. 3, 29).[8]

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[8] The relevant statutes and Executive Orders are collected in the Appendix to this brief (referred to in this footnote as "App.").

The President was authorized to place mandatory orders with a company for any product or material required "of the nature and kind usually produced or capable of being produced by such * * * company" and to take over the company's plant upon its refusal to comply with any such order (Section 120 National Defense Act of 1916, 39 Stat. 166, 213, App. p. i). This was the statutory authority deemed sufficient by this Court in the *International Paper* case and the President's powers under this statute were delegated to the WPB (Ex. Order No. 9040, App. p. xix, xx).

Section 9 of the Selective Training and Service Act of 1940 (54 Stat. 892, App. p. iii) was substantially identical with the foregoing section of the National Defense Act of 1916, except that it authorized the President to act "through the head of the War Department or the Navy Department". The President's powers under this Act were also delegated to the WPB (Ex. Orders No. 8629 and 9040, App. p. xii, xiii; xx).

The Requisitioning Act of October 16, 1941 (55 Stat. 742, App. p. vi) authorized the President to requisition military or naval equipment, supplies, munitions, machinery, tools or materials necessary for the manufacture of such equipment and these powers too were delegated to the WPB (Ex. Orders No. 8942 and 9040, App. p. xvi, xx).

Title III of the Second War Powers Act (56 Stat. 177, App. p. x, xi) provided that

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The President's powers under the foregoing statute were similarly delegated to the WPB (Ex. Order No. 9125, App. p. xxi).

The Act of March 4, 1917, 39 Stat. 1192 (App. p. ii) authorized the President to requisition "any factory, or any part thereof without taking possession of the entire factory" and the word "factory" was defined to include "any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard".

Title II of the Second War Powers Act (56 Stat. 177, App. p.

Of the various laws embraced in this broad statutory scheme, perhaps the most significant is Title II of the Second War Powers Act. It is clear that under that and the other related statutes and Executive Orders, all referred to in footnote 8, there was ample authority to take the gold mines or any "interest therein".

Moreover, the WPB's action was taken at the instance of and approved by the War and Navy Departments (Findings 30, 36, 39, 40, 41, 42, Pet. App. p. 77-78, 81-85; Pltfs. Ex. 92; see above p. 7, 10, 24) and substantially ratified by the President himself (Finding 52, Pet. App. p. 91-94; see above p. 11, 24).

The Government's present contention that the WPB acted without authority is a complete reversal of the position taken by the Government in the Supplemental Brief which it filed in the Court of Claims after argument below. On the oral argument below the Government insisted that the respondents were not entitled to compensation because the shutdown of their mines was required by a "valid" regulation, and in its Supplemental Brief the Government undertook to establish the validity of Order L-208 by showing that there had been a Congressional ratification of the WPB's action in issuing the Order.

To show that there had been such a ratification the

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ix) authorized the Secretary of War, the Secretary of the Navy "or any other officer, board, commission or governmental corporation authorized by the President" to acquire "any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that should be deemed necessary for military, naval or other war purposes".

While these powers under the two last-mentioned statutes were not specifically delegated to the WPB, Executive Order No. 9024 (7 FR 329, App. p. xix) gave the Chairman of the WPB the power to "Determine the policies, plans, procedures and methods of the several Federal departments, establishments and agencies in respect to war procurement and production, including purchasing * * * [and] requisitioning * * * and issue such directives in respect thereto as he may deem necessary or appropriate".

Government established that the Congress had enacted legislation relating to the suspension of the requirements of annual assessment work on mining claims with knowledge of the prior issuance of Order L-208 and giving effect thereto (57 Stat. 74, House Report 351, 75th Congress, 1st Session, 89 Cong. Rec. 3758).[9]

The Government complains, lastly, that the Court of Claims "ignored" the fact that "the Board did not intend, nor did it purport, to exercise any requisitioning authority that it had" (Pet. p. 16). This argument was fully disposed of in the opinion of the Court of Claims denying the Government's motion for a new trial (Pet. App. p. 125-127, 129).

CONCLUSION

For the most part this case involved issues of fact which were resolved by the Court of Claims in respondents' favor. There is no conflict between the decision below and any decision of this Court or of any Court of Appeals. On the contrary, the legal conclusions which flow from the facts as found are in accord with numerous decisions of this Court.

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[9] In its Supplemental Brief, the heading of the Government's first point was this:

"Congressional ratification of WPB's action in issuing L-208"

Under that heading the Government urged that the Congress had "recognized Limitation Order L-208 as an existing legal fact, and adopted subsequent legislation in the light of it" (p. 2). The presentation of this point concluded by stating that (p. 5):

"We thus have clear Congressional recognition of L-208."

The argument in the brief was that any possible legal deficiency in the authority for Order L-208 was remedied by the "clear Congressional recognition", i. e., by Congressional ratification. Compare *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 495-496.

It is respectfully submitted that the Government's petition for a writ of certiorari should be denied.

December 5, 1956

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APPENDIX

The Statutes

(In Chronological Order)

1. Section 120 of the National Defense Act of 1916, 39 Stat. 166, 213, pertinent provisions.

"The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

"Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture

the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding $50,000.

"The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just."

2. The Act of March 4, 1917, 39 Stat. 1192, pertinent provisions.

"(a) That the word 'person' as used in paragraphs (b), (c), next hereafter shall include any individual, trustee, firm, association, company, or corporation. The word 'ship' shall include any boat, vessel, submarine, or any form of aircraft, and the parts thereof. The words 'war material' shall include arms, armament, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production, thereof. The word 'factory' shall include any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any

shipyard or dockyard. The words 'United States' shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

"(b) That in time of war * * * the President is hereby authorized and empowered, in addition to all other existing provisions of law:

* * * * *

"FOURTH. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

"(d)[1] That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b) of this section, it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

3. Section 9 of the Selective Training and Service Act of 1940, 54 Stat. 892.

"The President is empowered, through the head of the War Department or the Navy Department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organ-

[1] This should be "(c)".

ized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

"Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition or parts of ammunition, or any necessary supplies or equipment for the Army or Navy, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War or the Secretary of the Navy shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War or the Secretary of the Navy, or who shall refuse to furnish such arms, ammunition, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War or the Secretary of the Navy, as the case may be, then, and in either such case, the President, through the head of the War or Navy Departments of the Government, in addition to the present authorized methods of purchase or procurement, is hereby authorized to take immediate possession of any such plant or plants, and through the appropriate branch, bureau, or department of

the Army or Navy to manufacture therein such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and a fine not exceeding $50,000.

"The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just: *Provided,* That nothing herein shall be deemed to render inapplicable existing State or Federal laws concerning the health, safety, security, and employment standards of the employees in such plant.

"The first and second provisos in section 8(b) of the Act entitled 'An Act to expedite national defense, and for other purposes', approved June 28, 1940 (Public Act Numbered 671, Seventy-sixth Congress), are hereby repealed."

4. The Act of October 10, 1940, 54 Stat. 1090.

"That whenever the President determines that it is necessary in the interest of national defense to requisition and take over for the use or operation by the United States or in its interest any military or naval equipment or munitions, or component parts thereof, or machinery, tools, or materials, or supplies necessary for the manufacture, servicing, or operation thereof, ordered, manufactured, procured, or possessed for export purposes, the exportation of which has been denied in accordance with the provisions of section 6 of the Act approved July 2, 1940 (Public, Numbered 703, Seventy-sixth Congress), he is hereby authorized and empowered to requisition and take over for the said use or operation by the United States, or in its interest, any of the foregoing articles or materials, and to sell or otherwise dispose of any such articles or materials, or any portion thereof, to a person or a corporation of the United States whenever he shall determine such action to be in the public interest. Any moneys received by the

United States as the proceeds of any such sale or other disposition of any such articles or materials or any portion thereof shall be deposited to the credit of that appropriation out of which was paid the cost to the Government of the property thus sold or disposed of, and the same shall immediately become available for the purposes named in the original appropriation: *Provided, however,* That nothing in this section shall modify or repeal section 14 of Public Law Numbered 671, 76th Congress, approved June 28, 1940.

"Sec. 2. Whenever the President shall requisition and take over any article or material pursuant to the provisions of this Act, the owner thereof shall be paid as compensation therefor such sum as the President shall determine to be fair and just. If any such owner is unwilling to accept, as full and complete compensation for such article or material, the sum so determined by the President, such owner shall be paid 50 per centum of the sum so determined by the President and shall be entitled to sue the United States for such additional sum as, when added to the sum already received by such owner, such owner may consider fair and just compensation for such article or material, in the manner provided by sections 41 (20) and 250, title 28, of the Code of Laws of the United States of America: *Provided,* That recovery shall be confined to the fair market value of such article or material, without any allowance for prospective profits, punitive or other damages.

"Sec. 3. The authority granted in this Act shall terminate June 30, 1942, unless the Congress shall otherwise provide."[2]

5. The Act of October 16, 1941 (sometimes called the Requisitioning Act), 55 Stat. 742.

"That whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use

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[2] Such authority was extended to June 30, 1945; 56 Stat. 468, 58 Stat. 625.

of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act, but each such determination shall be made on the basis of the fair market value of the property at the time it is requisitioned or returned, as the case may be.[3] If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145

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[3] This sentence was amended by Title VI of the Second War Powers Act 56 Stat. 181, so as to read as follows:

> "The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act, but each such determination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment of the Constitution of the United States."

of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. Such courts shall also have power to determine in an appropriate proceeding any questions that may arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act, regardless of the amount in controversy in any such proceeding.

"Nothing contained in this Act shall be construed—

(1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law),

(2) to impair or infringe in any manner the right of any individual to keep and bear arms, or

(3) to authorize the requisitioning of any machinery or equipment which is in actual use in connection with any operating factory or business and which is necessary to the operation of such factory or business.

"Sec. 2. Wherever the President determines that property acquired under this Act and retained is no longer needed for the defense of the United States, he shall, if the original owner desires the property and pays the fair value thereof, return such property to the owner; but, in any event, property so acquired and retained shall, if the owner desires the property and pays the fair value thereof, be returned to the owner not later than December 31, 1943.

"Sec. 3. The President from time to time, but not less frequently than once every six months, shall transmit to the Congress a report of operations under this Act."[4]

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[4] This subsection (3) was deleted by the Act of March 27, 1942, 56 Stat. 181.

"Sec. 4. The President may issue such rules and regulations and require such information as may be necessary and proper to carry out the provisions of this Act, and he may exercise any power or authority conferred on him by this Act through such department, agency, board, or officer as he shall direct or appoint."

6. Title II of the Second War Powers Act, approved March 27, 1942, 56 Stat. 177.

"Sec. 201. The Act of July 2, 1917 (40 Stat. 241), entitled 'An Act to authorize condemnation proceedings of lands for military purposes', as amended, is hereby amended by adding at the end thereof the following section:

'Sec. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended.' "

7. Title III of the Second War Powers Act, 56 Stat. 177, 178, pertinent provisions.

"Sec. 301. Subsection (a) of section 2 of the Act of June 28, 1940 (54 Stat. 676), entitled 'An Act to expedite national defense, and for other purposes', as amended by the Act of May 31, 1941 (Public Law Numbered 89, Seventy-seventh Congress), is hereby amended to read as follows:

'Sec. 2. (a) (1) That whenever deemed by the President of the United States to be in the best interests of the national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy is hereby authorized to negotiate contracts for the acquisition, construction, repair, or alteration of complete naval vessels or aircraft, or any portion thereof, including plans, spare parts, and equipment therefor, that have been or may be authorized, and also for machine tools and other similar equipment, with or without advertising or competitive bidding upon determination that the price is fair and reasonable. Deliveries of material under all orders placed pursuant to the authority of this paragraph and all other naval contracts or orders and deliveries of material under all Army contracts or orders shall, in the discretion of the President, take priority over all deliveries for private account or for export: * * *'

'(2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

> '(A) Contracts or orders for the government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled "An Act to promote the defense of the United States";
>
> '(B) Contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States;

'(C) Subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this subsection (a).

Deliveries under any contract or order specified in this subsection (a) may be assigned priority over deliveries under any other contract or order; and the President may require acceptance of and performance under such contracts or orders in preference to other contracts or orders for the purpose of assuring such priority. Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The Executive Orders.

(In Chronological Order)

1. Executive Order No. 8629, dated January 7, 1941, 6 Fed. Reg. 191, pertinent provisions.

"ESTABLISHING THE OFFICE OF PRODUCTION MANAGEMENT IN THE EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING ITS FUNCTIONS AND DUTIES.

"1. There shall be in the Office for Emergency Management of the Executive Office of the President, an Office of Production Management which shall consist of (1) a Director General, and (2) an Associate Director General, each to be appointed by the President, (3) The Secretary of War, and (4) the Secretary of the Navy.

"2. With such advice and assistance as it may require from other departments and agencies of the Federal Government, and subject to such regulations or directions as the President may from time to time prescribe, and subject further to the general policy that the Departments of War and Navy and other departments and agencies of the Government will be utilized to the maximum extent compatible with efficiency, the Office of Production Management shall:

a. Formulate and execute in the public interest all measures needful and appropriate in order (1) to increase, accelerate, and regulate the production and supply of materials, articles and equipment and the provision of emergency plant facilities and services required for the national defense, and (2) to insure effective coordination of those activities of the several departments, corporations, and other agencies of the Government which are directly concerned therewith.

b. Survey, analyze, and summarize for purposes of coordination the stated requirements of the War and Navy and other departments and agencies of the Government, and of foreign governments for materials, articles, and equipment needed for defense.

c. Advise with respect to the plans and schedules of the various departments and agencies for the purchase of materials, articles, and equipment required for defense, to coordinate the placement of major defense orders and contracts and to keep the informed of the progress of the various programs of production and supply.

d. Plan and take all lawful steps necessary to assure the provision of an adequate supply of raw materials essential to the production of finished products needed for defense.

e. Formulate plans for the mobilization for defense of the production facilities of the Nation, and to take all lawful action necessary to carry out such plans.

f. Determine the adequacy of existing production facilities and to assure their maximum use; and, when necessary, to stimulate and plan the creation of such additional facilities and sources of production and supply as may be essential to increase and expedite defense production.

* * * * *

h. Perform the functions and exercise the authorities vested in the President by Section 9 of the Selective Training and Service Act of 1940.

* * * * *

"5. There shall be within the Office of Production Management a Priorities Board composed of six members. A chairman and three other members shall be appointed or designated by the President; the Director General and Associate Director General shall be members, ex officio. The Priorities Board shall serve as an advisory body and from time to time as may be required by the Office of Production Management, shall make findings and submit recommendations with respect to the establishment of priorities, the placing of mandatory orders, the assignment of preference ratings, the allocation of deliveries, and other related matters. In making its findings and recommendations, the Priorities Board shall take into account general social and economic considerations and the effect the proposed actions would have upon the civilian population."

* * * * *

2. Executive Order No. 8875, dated August 28, 1941, 6 Fed. Reg. 4483, pertinent provisions.

"DELEGATION AND COORDINATION OF PRIORITY AUTHORITY

"1. The Office of Production Management, in addition to the responsibilities and duties described in paragraph 2 of Executive Order No. 8629 of January 7, 1941, is authorized and directed to discharge and perform the following responsibilities and duties, subject to such policies or regulations as the Supply Priorities and Allocations Board, hereinafter described, may from time to time determine:

a. Serve as the coordinating center for the execution of the powers and activities of the several departments and agencies relating to priorities; in this connection, review, clear, and approve for execution all requests or proposals originating from other Federal agencies, private industry, or other sources for priority action with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities; issue or provide for the issuance of all priority orders, warrants, certificates, or ratings with respect to the supply, production, transmission, or transportation of materials, articles, power, fuel, and other commodities; and, with reference to specific priority authorities vested by law in established departments and agencies of the Government certify to such departments and agencies, when the Office of Production Management deems such action necessary to national defense, that preferential treatment is essential for certain materials, commodities, facilities, or services.

* * * * *

"2. The Office of Production Management may exercise the powers, authorities, or discretion conferred upon it by this Order through such officials and in such manner as it may determine, subject to such policies or regulations as the Supply Priorities and Allocations Board may from time to time determine.

"3. In order to assure unity of policy and coordinated consideration of all relevant factors involved in the supply

and allocation of materials and commodities among the various phases of the defense program and competing civilian demands, there is hereby established within the office for Emergency Management a Supply Priorities and Allocations Board. The Board shall consist of the Director General and Associate Director General of the Office of Production Management, the Secretary of War, the Secretary of the Navy, the Special Assistant to the President supervising the defense aid program, the Administrator of the Office of Price Administration, and the Chairman of the Economic Defense Board. The Chairman of the Supply Priorities and Allocations Board shall be designated by the President from among the members of the Board. The President shall also appoint an Executive Director of the Board, who will preside in the absence of the Chairman.

* * * * *

"5. Consistent with the basic defense policies of the President, the Supply Priorities and Allocations Board shall:

a. Determine the total requirements of materials and commodities needed respectively for defense, civilian, and all other purposes; establish policies for the fulfillment of such requirements, and, where necessary, make recommendations to the President relative thereto.

b. Determine policies and make regulations governing allocations and priorities with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities among military, economic defense, defense aid, civilian, and other major demands of the total defense program.

"6. The Office of Production Management through its Division of Priorities or any other of its divisions or subdivisions shall formulate general plans and programs providing for allocations and priorities with respect to the procurement, production, transmission, or transporation of materials, articles, power, fuel, and other commodities among military requirements, economic defense needs, total

civilian demands, defense aid needs, and other major elements of the total defense program. Such general plans and programs shall be submitted to the Supply Priorities and Allocations Board for approval or modification.

3. Executive Order No. 8942, dated November 19, 1941, 6 Fed. Reg. 5909, pertinent provisions.

"PROVIDING FOR THE ADMINISTRATION OF THE REQUISTIONING OF PROPERTY REQUIRED FOR NATIONAL DEFENSE.

"By virtue of the authority vested in me by the Constitution and the statutes of the United States, and particularly by the Act of October 10, 1940, entitled 'An Act to Authorize the President to requisition certain articles and materials for the use of the United States, and for other purposes,' and the Act of October 16, 1941, entitled 'An Act to authorize the President of the United States to requisition property required for the defense of the United States' (hereinafter referred to as the Acts), and in order to provide for the effective administration of the requisitioning of property required for the defense of the United States, it is hereby ordered:

"1. The Office of Production Management, in addition to the responsibilities and duties described in Executive Order No. 8629 of January 7, 1941, and Executive Order No. 8875 of August 28, 1941, shall, except as may otherwise be provided hereinafter, exercise the powers and authorities conferred upon the President by the Acts.

"2. Whenever the Office of Production Management determines, in accordance with the provisions of the Acts, the necessity for requisitioning property, that Office may:

a. requisition and dispose of such property on its own account; or

b. provide for the requisitioning and disposition of such property through the Department of War, the Department of the Navy, or any other department or agency of

the Government authorized to engage in the procurement of property of the type subject to requisition under the Acts.

"3. Whenever requested by the Office of Production Management, any department or agency of the Government is hereby authorized to requisition and dispose of property in accordance with the provisions of the Acts and to make available to the Office of Production Management such personnel, including officers of the armed services, as may be necessary to enable that Office to carry out its functions under this Order. The United States Marshals also are hereby authorized and directed, when requested by, and in accordance with directions of the Office of Production Management or the head of any department or agency of the Government authorized to requisition property pursuant to this Order, to requisition and dispose of property.

"4. The Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Secretary of Agriculture, the Chairman of the United States Maritime Commission, the Executive Director of the Economic Defense Board, or the head of such other agency as the President may from time to time designate, may initiate action for the requisitioning of property by submitting proposals for the requisitioning and disposal of such property to the Office of Production Management, whenever he determines that:

a. such property is of the type which may be requisitioned under either of the Acts;

b. with respect to proposals for requisitioning property under the Act of October 16, 1941:

(1) the use of such property is needed for the defense of the United States,

(2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply,

(3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted,

(4) if the property to be requisitioned is machinery or equipment, such machinery or equipment is not in actual use in connection with any operating factory or business or is not necessary to the operation of such factory or business, and

(5) the property to be requisitioned is not a firearm possessed by an individual for his personal protection or sport, the possession of which is not prohibited by existing law;

c. with respect to proposal to requisition property under the Act of October 10, 1940, there exists a necessity for requisitioning the property in accordance with the provisions of section 1 of the Act.

The head of any department or agency acting pursuant to the provisions of this paragraph shall be authorized to requisition and dispose of such property, provided that the Office of Production Management determines that the proposed requisitioning and disposal of such property is consistent with the priorities and allocations program and the general production and supply plan of the Office of Production Management.

"5. The Office of Production Management or the head of any department or agency which requisitions property pursuant to this Order shall determine the amount of the fair and just compensation to be paid for any property requisitioned pursuant to the Acts, and the fair value of any property returned in accordance with section 2 of the Act of October 16, 1941."

4. Executive Order No. 9024, dated January 16, 1942, 7 Fed. Reg. 329, pertinent provisions.

"ESTABLISHING THE WAR PRODUCTION BOARD IN THE EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING ITS FUNCTIONS AND DUTIES.

"1. There is established within the Office for Emergency Management of the Executive Office of the President a War Production Board, hereinafter referred to as the Board. The Board shall consist of a Chairman, to be appointed by the President, the Secretary of War, the Secretary of the Navy, the Federal Loan Administrator, the Director General and the Associate Director General of the Office of Production Management, the Administrator of the Office of Price Administration, the Chairman of the Board of Economic Warfare, and the Special Assistant to the President supervising the defense aid program.

"2. The Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:

a. Exercise general direction over the war procurement and production program.

b. Determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production, including purchasing, contracting specifications and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect thereto as he may deem necessary or appropriate.

c. Perform the functions and exercise the powers vested in the Supply Priorities and Allocations Board by Executive Order No. 8875 of August 28, 1941.

* * * * *

"3. Federal departments, establishments, and agencies shall comply with the policies, plans, methods and procedures in respect to war procurement and production as

determined by the Chairman; and shall furnish to the Chairman such information relating to war procurement and production as he may deem necessary for the performance of his duties.

* * * * * *

"5. The Chairman may exercise the powers, authority, and discretion conferred upon him by this Order through such officials or agencies and in such manner as he may determine; and his decisions shall be final.

* * * * * *

"7. The Supply Priorities and Allocations Board established by the Executive Order of August 28, 1941 is hereby abolished, and its personnel, records and property transferred to the Board. The Executive Orders No. 8629 of January 7, 1941, No. 8875 of August 28, 1941, No. 8891 of September 4, 1941, No. 8942 of November 19, 1941, No. 9001 of December 27, 1941 and No. 9023 of January 14, 1942 are hereby amended accordingly, and any provisions of these or other pertinent Executive Orders conflicting with this Order are hereby superseded."

5. Executive Order No. 9040, dated January 24, 1942, 7 Fed. Reg. 527, pertinent provisions.

"DEFINING ADDITIONAL FUNCTIONS AND DUTIES OF THE WAR PRODUCTION BOARD.

"1. In addition to the responsibilities and duties described in paragraph 2 of Executive Order No. 9024 of January 16, 1942, the Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:

a. Perform the functions and exercise the powers heretofore vested in the Office of Production Management.

b. Perform the functions and exercise the powers vested in the Supply, Priorities and Allocations Board by Executive Order No. 8942 of November 19, 1941.

c. Perform the functions and exercise the authority vested in the President by Section 120 of the National Defense Act of 1916 (39 Stat. 213).

• • • • • •

"4. The Office of Production Management, established by Executive Order No. 8629 of January 7, 1941 is abolished and its personnel records, property and funds are transferred to the War Production Board.

"5. Executive Order No. 8629 of January 7, 1941 is rescinded and Executive Order No. 9024 of January 16, 1942 and any other Executive Orders, the provisions of which are inconsistent with the provisions of this order, are amended accordingly."

6. Executive Order No. 9125, dated April 7, 1942, 7 Fed. Reg. 2719, pertinent provisions.

"DEFINING ADDITIONAL FUNCTIONS, DUTIES AND POWERS OF THE WAR PRODUCTION BOARD AND THE OFFICE OF PRICE ADMINISTRATION.

"1. In addition to the responsibilities and duties described in Executive Order No. 9024, of January 16, 1942, and in Executive Order No. 9040 of January 24, 1942, the Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall perform the additional functions and duties, and exercise the additional powers, authority and discretion conferred upon the President of the United States by Title III of the Second War Powers Act 1942.

"2. The Chairman of the War Production Board may perform the functions and duties, and exercise the powers, authority, and discretion conferred upon him by this or any other order through such officials or agencies, including the Office of Price Administration (created by the Act of January 30, 1942, Pub. Law 421, 77th Cong., 2d Sess.), and in such manner as he may determine. In any and all such cases the decision of the Chairman of the War Production Board shall be final."

7. Executive Order No. 9138, dated April 17, 1942, 7 Fed. Reg. 2919, pertinent provisions.

"PROVIDING FURTHER FOR THE ADMINISTRATION OF THE REQUISITIONING OF PROPERTY REQUIRED FOR THE PROSECUTION OF THE WAR.

"1. In addition to the authority conferred upon the Chairman of the War Production Board and the heads of certain departments and agencies by Executive Order No. 8942 of November 19, 1941, and Executive Order No. 9040 of January 24, 1942, such officials shall exercise in the manner provided in such Executive orders the authority conferred by Title VI of the Second War Powers Act, 1942,[5] except that the determination described in paragraph 4 b (4) of Executive Order No. 8942 shall not be required.

"2. Paragraph 4 b (4) of Executive Order No. 8942 of November 19, 1941, is hereby revoked."

[5] See Footnote 3, p. vii above.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~525~~ 29

THE UNITED STATES,

Petitioner,

v.

CENTRAL EUREKA MINING COMPANY (a corporation), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS, BALD MOUNTAIN MINING COMPANY (A CORPORATION) AND ERMONT MINES, INC., IN OPPOSITION.

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IN THE

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No. 525

THE UNITED STATES,

Petitioner,

v.

CENTRAL EUREKA MINING COMPANY (a corporation), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR RESPONDENTS, BALD MOUNTAIN MINING COMPANY (A CORPORATION) AND ERMONT MINES, INC., IN OPPOSITION.

OPINIONS BELOW

The opinion of the Court of Claims is printed in Pet. App. pp. 1-50 and the opinion on rehearing is printed in Pet. App. pp. 123-130. The opinion is reported at 138 F. Supp. 281.

JURISDICTION

The judgment of the Court of Claims was entered on February 20, 1956. A motion by the United States for a new trial was denied on July 12, 1956. By order

of the Chief Justice signed on October 9, 1956, the time for filing a petition for writ of certiorari was extended to and including October 24, 1956. Respondents' time for filing a brief in opposition was extended to and including December 7, 1956. The jurisdiction of this Court is invoked under 28 USC 1255.

QUESTIONS PRESENTED

1. Whether Limitation Order L-208 was under the Fifth Amendment a temporary taking of the respondents' rights to make profitable use of the gold mining properties.

2. Whether, if there was a temporary taking, such action by the War Production Board was authorized so as to impose liability therefor upon the United States.

THE CONSTITUTIONAL PROVISION, STATUTES, EXECUTIVE ORDERS AND REGULATIONS

The Fifth Amendment to the Constitution;

§ 120 of the National Defense Act of 1916, 39 Stat. 166, 213;

The Act of March 4, 1917, 39 Stat. 1192;

§ 9 of the Selective Training and Service Act of 1940, 54 Stat. 892;

The Act of October 10, 1940, 54 Stat. 1090;

The Requisitioning Act of October 16, 1941, 55 Stat. 742, as amended 56 Stat. 181;

Title II of the Second War Powers Act, 56 Stat. 177;

Title III of the Second War Powers Act, 56 Stat. 177-178.

The Executive Orders are:

Ex. Order 8629, 6 F.R. 191
Ex. Order 8875, 6 F.R. 4483
Ex. Order 8942, 6 F.R. 5909
Ex. Order 9024, 7 F.R. 329
Ex. Order 9040, 7 F.R. 527
Ex. Order 9125, 7 F.R. 2719
Ex. Order 9138, 7 F.R. 2919

STATEMENT

Respondent, Bald Mountain Mining Company, is a South Dakota Corporation and the owner in fee simple of gold-bearing lands in Lawrence County, South Dakota. Respondent, Ermont Mines, Inc., is an Oregon corporation owning a compact and contiguous group of quartz lode mining claims in Beaverhead County, Montana.

This is an action to recover just compensation under the Fifth Amendment for a taking of the respondents' right to make use of the materials, facilities, and equipment which they owned and had on hand in the operation of their legitimate and legal mining enterprises.

During the early part of World War II, Congress enacted a number of statutes which gave the President power of allocation and priority with respect to scarce materials which might be used or needed during the course of the War. Other legislation conferred upon the President the power to requisition or take by requisition or by the placing of mandatory order materials, facilities, or other things needed for national defense. The President delegated his powers under the various acts to the War Production Board or its predecessors in a series of Executive Orders. (Pet. App. p. 3 note).

The mining industry along with other industries was subject to regulations with respect to its acquisition and use of materials, supplies, and equipment needed in the defense effort. As is noted (Pet. App. pp. 4, 5) in the earlier findings in the case, the priority orders applicable to the mining industry issued prior to Order L-208 had succeeded in controlling the use of facilities, machinery, and equipment, and it was possible for this country to authorize exports of large amounts of mining machinery to foreign countries.

Copper mining and other non-ferrous metal mines were, of course, very essential to the war effort whereas it was alleged that gold mining was not. A serious manpower situation developed with respect to what is known as the non-ferrous metal mining industry. In the states where non-ferrous metal mining was an important industry, agriculture was also an important industry, and the Selective Service Board was unwilling to defer both agricultural workers and mining workers. Agricultural workers were deferred but mine labor was not. The aircraft manufacturing industry badly needed non-ferrous metal, particularly copper, but the supply of available miners was insufficient to satisfy the requirements. The rate of wages in the non-ferrous metal mines was low and working conditions were bad. There was no power in any arm of the Government to force gold miners into non-ferrous metal mines. Workers in the non-ferrous metal mines left those mines and went to the West Coast to get higher wages and better working conditions in the aircraft industry, or they stayed closer to home and found new employment in the nearby Army and Navy installations and defense projects. Similarly, some employees of the gold mines left the

gold mines in order to take advantage of war-time opportunities. However, the exodus from the gold mines was not considerable, for the reason that conditions in the gold mines were, on the whole, much better than in the non-ferrous metal mines.

The War Production Board and the armed services were concerned with the manpower problem in the non-ferrous metal mines. Everyone involved with this problem was aware of the fact that there was no legal way to force gold miners to work in the non-ferrous metal mines. Despite this fact, the idea was conceived that, if the gold mines were shut down, the gold miners would perhaps go to work in the copper mines where, however, wages and working conditions were far less desirable than in the gold mines and certainly less desirable than in other industries where the gold miners could readily get employment.

War Production Board Order L-208 was issued in the hope shared by the War Production Board and the War Department that the gold miners would go to work in the copper mines and would not go to work in the aircraft plants and shipbuilding industries. Because the War Production Board and, in fact, no agency of the Government had the right to require civilian manpower to work in any particular industry, War Production Board Order L-208 said nothing at all about manpower. The ostensible purpose of L-208 was that of allocating scarce materials, and the preamble of the Order read as follows (Pet. App. p. 86):

> "The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines;

and the following order is deemed necessary and appropriate in the public interest and to promote the national defense."

The statutory authority cited at the conclusion of the Order was Section 2(a) of the Act of June 28, 1940 (54 Stat. 676).

The order falls into two parts. It prevents the gold mine owners and operators from acquiring any new equipment, materials, and facilities. To that extent the Order merely duplicated existing priorities and allocation orders although it made them more stringent. The Court of Claims held that, had Order L-208 stopped at this point, this would not have amounted to a taking (Pet. App. p. 32, 126). But the order went on to prohibit the owners of the gold mines from even using materials, facilities, and equipment which they already owned and had on hand in the operation of their gold mining enterprises. The Court held that to the extent that L-208 denied those gold mine owners the right and authority to make use of the materials, facilities, and equipment that they had on hand in the operation of their legitimate and legal mining enterprises, L-208 had the effect of depriving those gold mining owners of the right to carry on their mining enterprise, and that that right was a valuable property which, when taken, must be paid for by just compensation by the Government. The Court held that the general statutory scheme authorizing the President to take private property or to deprive owners of its effective use was sufficiently broad to constitute an authorization to the War Production Board to deprive the gold mine owners of their right to do business, and the Court concluded that the Government must pay just compensation for a taking which is authorized.

ARGUMENT

It is clear that the basic determinations made by the Court below were:

(A) To the extent that Order L-208 denied respondents the right to make use of the materials, facilities, and equipment which they owned and had on hand in the operation of their legitimate and legal mining enterprises, L-208 deprived respondents of a valuable property right, compensable under the Fifth Amendment.

(B) The War Production Board had authority under the general statutory scheme to impose liability upon the United States for the temporary taking.

This decision does not warrant review by this Court.

A. On Page 2 of the Government's Brief in Support of the Petition for a Writ of Certiorari the Government urges that Order L-208 was issued in order to "conserve scarce war materials and bring about the voluntary relocation of skilled manpower to more vital mining activities." Yet the Order contained no provision for routing scarce war materials held by gold mine owners to the more urgent users of such material. For that matter, the owners were left free to dispose of these items as they saw fit (Pet. App. p. 90). Nor did Order L-208 say anything in the preamble or in the provisions themselves about the necessity of bringing about the voluntary relocation of skilled manpower to more vital mining activities. No agency of the Government had any explicit authority to control civilian manpower during the War. The War Production Board hoped that closing the gold mines would substantially relieve the shortage of non-ferrous metal miners, but it knew or should have known that this

desideratum would not come into being. The Court of Claims made a finding that no more than 100 gold miners went into other mines and remained there for a year or more (Pet. App. p. 8). L-208 was not intended to conserve scarce war material and was foredoomed to failure in diverting manpower.

A good portion of the Government's brief is devoted to showing that the opinion of the Court of Claims in the instant case departs from some of the statements and holdings in its decision in *Oro Fino* v. *United States,* 118 C. Cls. 18, certiorari denied, 341 U.S. 948, and *St. Regis Paper Company* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U.S. 815, in which cases the claims were rejected.

These cases can be readily distinguished from the instant case. The rationale of the Court of Claims is thoroughly consistent. The *Oro Fino* case sought recovery of damages which the plaintiff incurred in protecting its property. No taking was alleged and the plaintiff did not seek to recover the value of the property taken. The Court pointed out in the *St. Regis* case that M-251 amounted to a taking of plaintiff's inventory of pulpwood. However, plaintiff in the St. Regis case did not sue for the taking of the pulpwood, probably because shortly after M-251 was issued, the plaintiff received what it considered just compensation for the requisition on mandatory sale to the designees. The closing of plaintiff's pulpwood plant itself was really consequential to the taking of its supply of pulpwood; therefore, it amounted to a taking which was not compensable. It clearly appears that the United States under the Second War Powers Act had a right to issue an order that during a certain period of time no plant in the certain area could consume,

process, or deliver any such pulpwood except upon a specific authorization of the War Production Board. In the instant case, as we have shown above, Order L-208 was not in fact issued to conserve critical materials needed in the defense effort. No attempt was made to requisition or otherwise purchase these materials from the mines which were closed by Order L-208. In fact, the United States exported some of these materials prior to the issuance of Order L-208 and throughout the war.

On page 12 the Government's Petition urges that there was no affirmative use or invasion of the gold mines by the Government. The Government urged the same position without success in the case of *Edward P. Stahel & Co. et al* v. *United States,* 111 C. Cls. 682, certiorari denied, 336 U.S. 951. In the *Stahel* case, the O.P.M. amended General Preference Order M-22 to provide that the plaintiff could not sell to anyone but the Government or persons designated by the Government. Two months after the issuance of M-22, the Government and its designees placed mandatory orders with the plaintiffs. The Court of Claims held that by its Order of October 16 the Government took the plaintiff's silk for public use. It required the plaintiffs to sell their silk, upon request, to those who would use it for the Government's purposes, or to the Government itself, and it forbade the delivery or use of the silk for any other purpose except by the specific license of the Government, which license, so far as appears, was in no case granted. Until the silk was actually taken some two or more months afterwards, there was no affirmative use of their silk. The deprivation itself was the legal taking.

The fact that there was as much gold in the mines when Order L-208 was revoked as when it was issued is immaterial. The plaintiffs are not suing for the taking of their gold, but for the right to operate their gold mines at a profit during the period of closure.

It has been held by the Supreme Court on numerous occasions that action short of acquisition of title or short of physical occupancy may constitute a taking. *United States* v. *General Motors Corporation,* 323 U.S. 373; *United States* v. *Welch,* 217 U.S. 333; *Richards* v. *Washington Terminal Co.,* 233 U.S. 546; *Kimball Laundry Co.* v. *United States,* 338 U.S. 1.

B. The second issue is whether or not the War Production Board had authority under the general statutory scheme to impose liability upon the United States for the temporary taking. Here, too, the reasoning of the Court of Claims goes to the very heart of the matter and results in a fair and equitable determination as to which there can be no room for doubt.

On page 15 of the Petition the Government urges that "the Court of Claims has ignored the significant factors that (1) the War Production Board did not have the authority to requisition property in circumstances such as are here involved and (2) that the Board did not intend, nor did it purport, to exercise any requisitioning authority that it had." The Court of Claims did not ignore either of those factors. In the first place, the Court specifically decided that the War Production Board did have authority to requisition property in the circumstances here involved under the general statutory scheme of war-time control. The Court found that these statutes were broad and generous in their terms and required very little by way

of procedure or findings of fact, leaving such matters to the discretion of the War Production Board (Pet. App. pp. 11-12). The opinion of the Court of Claims rests squarely on substance, not shadow. The Court held that while the Board may not have intended or purported to exercise any requisitioning authority, that factor was unimportant if what the Board did amounted to a requisition and if it had authority, as the Court held it had, to requisition (Pet. App. p. 127). This is in line with the reasoning of the Court of Claims in the *Stahel* case which held that a taking in the constitutional sense occurred *ipso facto* when the Government forbade those plaintiffs from selling or delivering their silk to any user but the Government or its designees.

The Government has suggested that the Supreme Court should provide more authoritative guidance than has the Court of Claims in current planning for future periods of stress, as well as in the actual operation of controls in times of emergency. It is difficult to conceive of a more definitive delineation between "regulation" and "taking" than that laid down by the Court of Claims in this case. In view of the fact that L-208 represents the only attempt by the Government agencies in peacetime or wartime to regulate by immobilization, it seems clear that the distinction between regulation and taking discussed by the Court of Claims was one of which those agencies were aware. Any holding other than that of the Court of Claims would open the door to wholesale violation of constitutional rights by war agencies of the Government in the name of expediency rather than by due process of law.

CONCLUSION

The opinion of the Court of Claims to which the Government excepts is a careful and detailed analysis of the whole controversy. The Court makes clear, practical, and just distinctions between a regulation, a taking, and consequential injury, and between authorized and unauthorized takings. It provides sound guidance in this field for the foreseeable contingencies of the future.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER TERM, 1957

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Appendices A, B, C and D are printed in a separate Volume

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Supreme Court of the United States

October Term, 1957

No. 29

THE UNITED STATES,
Petitioner,

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENTS

Appendices A, B, C and D, which are hereinafter described, are printed in a separate Volume.

OPINIONS BELOW

The original opinion of the Court of Claims (Judge LITTLETON) and the dissenting opinions of Judges JONES and LARAMORE (R. 11-62) are reported at 134 C. Cl. 1 and 138 F. Supp. 281. The Court's opinion (Judge LITTLETON) on the denial of the motion for a new trial (R. 142-147) is reported at 134 C. Cls. 130 and 146 F. Supp. 476.[1]

[1] The Court of Claims denied motions to dismiss three of the respondents' petitions on May 6, 1952 in *Idaho Maryland Mines Co.* v. *United States*, 122 C. Cls. 670; *Homestake Mining Co.* v. *United States*, 122 C. Cls. 690; and *Central Eureka Mining Co.* v. *United States*, 122 C. Cls. 691.

A petition filed by Oro Fino Consolidated Mines, Inc. had previously been dismissed on October 2, 1950 in *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, cert. den. 341 U. S. 948 and the original petition filed by Alaska Pacific Consolidated Mining Company was dismissed on July 9, 1951, in *Alaska-Pacific Consolidated Mining Company* v. *United States*, 120 C. Cls. 307, on the authority of the *Oro Fino* decision.

JURISDICTION

This Court granted certiorari on January 14, 1957, 352 U. S. 964.

THE CONSTITUTIONAL PROVISION, STATUTES AND EXECUTIVE ORDERS.

The actions involve the taking of the property of the respondents under War Production Board Order L-208, which was issued on October 8, 1942 and is set out in the Findings of Fact of the Court below (R. 102-105) and as Appendix B hereto.

The Fifth Amendment to the Constitution provides in part:

> "* * * nor shall private property be taken for public use, without just compensation."

All the statutes which are relied upon with respect to the authority for Order L-208, whether by the petitioner or by the respondents in this brief, are set forth in full or in pertinent part in Appendix C.

The Executive Orders which are relevant in connection with the status, make-up and authority of the WPB are set forth in Appendix D.

The Special Jurisdictional Act of July 14, 1952 (66 Stat. 605) provides:

> "The United States Court of Claims be, and hereby is, given jurisdiction to hear, determine, and render judgment, notwithstanding any statute of limitations, laches, or lapse of time, on the claim of any owner or operator of a gold mine or gold placer operation for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions imposed by War Production Board Limitation Order L-208 during the effective life thereof: *Provid*[illegible] That actions on such claims shall be brought within one year from the date this Act becomes effective."

QUESTIONS PRESENTED

This case does not present the question stated in the petitioner's brief. The questions actually presented arise in this way:

By October 8, 1942 the Congress had conferred on the President very broad powers to take property, real or personal, which he thought it necessary or desirable to take in order to prosecute the War. Order L-208 was issued on October 8, 1942 by the WPB, an agency of the President and, as the Government's brief acknowledges, the Order was "approved by the President".

The Order categorically directed about 150 owners of gold mines or gold placer operations, which were classified as "nonessential", to "close down". It provided that any who failed to do so were subject to fine or imprisonment.

The sole purpose of the Order was to throw "hard-rock miners" out of work in the hope that they would seek and obtain employment in copper or other nonferrous metal mines which were producing critical materials. No other order was issued by the WPB for a similar purpose.

At the time, and throughout the War, there was no labor draft, so that it was impossible to require employees of nonessential industries to transfer to essential industries. In this one instance, the WPB decided to close down a nonessential industry, in the hope that it could "maneuver" some of the skilled labor into work which would contribute directly to the War effort. The WPB acted at the instance of the War Department and the Army (the Services of Supply) and the effect of its action was exactly the same as if the Army had taken over the respondents' mines, discharged the employees and closed down operations. Nothing at all like that was done to any other group of individuals or corporations during the War.

Order L-208 was dressed up with some of the conventional features of an order for the conservation and

allocation of critical materials, and with other features which superficially suggested that the Order was a critical materials order, but the camouflage was imperfect. The respondents sustained the burden of establishing that the only purpose of the Order was to close down the nonessential gold mines in the hope of maneuvering hardrock miners to the nonferrous metal mines. The Court of Claims so found and its Finding is supported by overwhelming evidence.

The Court of Claims found *as a fact* that Order L-208 was not an allocation order, as it purported to be. Indeed, the petitioner's brief concedes (p. 53) that the Court of Claims concluded that "L-208 was not devised for the purpose of conserving or allocating materials".

The provisions of the Order, referred to in the petitioner's statement of the question presented (p. 2), which "prohibited operators of nonessential gold mines from acquiring or using *any*[2] material, facility or equipment for mining purposes except the minimum amounts necessary for adequate maintenance" were not designed to conserve *critical* materials. As the Court below held, they merely implemented the directive that the nonessential mines close down, although they helped to give Order L-208 some superficial resemblance to an order relating to the conservation or allocation of critical materials.

Nor was the Order intended to prohibit the "sale or disposition of mining machinery and equipment without the permission of the War Production Board", as suggested in the petitioner's statement of the question presented (p. 2). Such prohibitions were only added to the Order by later amendments which were designed to deal routinely with a consequence of the closing of the mines, viz., the fact that some of the operators whose mines had been closed down might wish to sell some of the machinery and equip-

[2] Italics are supplied in this brief unless otherwise indicated.

ment which had been made idle. The two amendments of the Order were considered so unimportant by counsel for the petitioner in the Court of Claims that they were never called to the attention of that Court in any way and one is not even in the record. Nor were they adverted to in the petitioner's statement of the questions presented in the petition for certiorari; in its brief on the merits the petitioner revised the statement of the questions presented in the hope of opening the door to arguments based on the amendments (see below, p. 60-62).

The questions presented are these:

1. Whether a taking is effected when, during a period in which there is no statutory authority for the drafting or allocation of labor, an agency of the President issues an order that singles out a relatively small number of individuals and corporations who operate mines and directs them to close down, thus depriving them of their right to operate their mines, in the hope that their employees, thrown out of work, will seek and obtain other employment believed to be more useful.

2. Whether if an order which effects a taking is camouflaged, so that it has some superficial resemblance to an order for the conservation or allocation of critical materials, the Government can escape liability on that account.

3. Whether the Government can escape liability on the ground stated in the petitioner's Point II (p. 69), that "there was no intention, or authority, on the part of WPB to take respondents' property or business".

Only if the Court should conclude that there was not a compensable taking would it become necessary to consider a further question:

4. Did the Special Jurisdictional Act of July 14, 1952 establish liability to those who suffered losses as a result of Order L-208?

STATEMENT OF THE CASE.

If the facts of these cases were as indicated in the petitioner's brief they would probably never have been brought; if instituted, they would have been dismissed by the Court of Claims and this Court would never have granted certiorari.

The background, purpose, provisions and effects of Order L-208 are the subject of 52 Findings of Facts made by the Court of Claims which affect all of the six respondents (R. 62-111).

There are 88 additional Findings which relate to the six respondents respectively,[3] and 35 which relate to three plaintiffs below whose petitions were dismissed (R. 111-140).

The six respondents are all owners of gold mining operations which were closed down in compliance with Order L-208, and except for the Order could have operated until the Order was revoked on June 30, 1945 (Finding 73, R. 116; Finding 82, R. 117; Finding 104, R. 123) or for at least a part of that time.

The facts with respect to the dates when their operations were shut down, the disposition of appeals made by some of them, and the time when operations were resumed are set forth in the 88 Findings already mentioned.[4] All of such facts which are pertinent for present purposes are adequately set forth in the petitioner's brief (p. 11-13). To that extent the Statement in the petitioner's brief is fair and accurate.

The treatment in the petitioner's brief of the facts covered by the 52 general Findings of Fact (R. 62-111), and particularly the crucial ultimate Findings of Fact and the related portions of the Court's two opinions, is another matter.

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[3] The date of the revocation of Order L-208, June 30, 1945, is stated in Finding 90, which is in a group of findings relating to the respondent Central Eureka (R. 120).

[4] See table in footnote 72 at page 146 below.

The Findings of Fact made by the Court of Claims and the proceedings which led thereto.

The lower Court's 52 general Findings of Fact cover the background, purposes, provisions and effects of Order L-208 very fully. There are many detailed evidentiary or subsidiary findings; some of them give the entire text of documents or pertinent portions thereof; others set forth the Court's findings on matters with respect to which there was oral evidence.[5]

There are several ultimate Findings, such as

Finding 17, which concludes by saying that "By March 2, 1942 a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment" (R. 75);

Finding 46, which relates to the real purpose of the Order (R. 105-106);

Finding 48, which relates to the inadaptability of the Order to serve as a critical materials measure (R. 106); and

Findings 47, 50 and 51, which relate to the ineffectiveness of the Order to bring about the transfer of a significant number of hardrock miners to the nonferrous metal mines (R. 106-107).

The Findings of the Court of Claims were the culmination of formidable legal proceedings in which the Court showed itself to be outstandingly fair-minded and thorough.

The Court of Claims was certainly not predisposed in favor of claims for compensation arising under Order L-208. In *Oro Fino Consolidated Mines, Inc.* v. *United*

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[5] For example, there is a long finding, No. 36, which relates to a five-hour meeting on October 1, 1942, seven days before L-208 was issued, at which representatives of the gold mines protested against the proposed Order and were told why it was going to be issued and what it was supposed to accomplish (R. 97-98).

States (1950) 118 C. Cls. 18, cert. den. 341 U. S. 948, it dismissed a petition which did not allege the facts pertaining to the Order that were later proved by these respondents, and the *Oro Fino* opinion leaves no doubt that the Court was prepared to indulge in every reasonable presumption in favor of the Government. When three of the respondents filed petitions containing detailed factual averments with respect to Order L-208, the motions to dismiss those petitions were denied, but the Court's opinion said that the petitioners (now respondents) would have "a most difficult burden" to sustain. *Idaho Maryland Mines Corp.* v. *United States*, (1952) 122 C. Cls. 670, 689.

There were hearings before a Commissioner lasting from November 19, 1952 to April 7, 1953, with 22 hearing days, 2100 pages of transcript and over 380 exhibits received in evidence. Detailed proposed Findings of Fact were submitted by both sides and extensive objections to the proposed Findings were also submitted to the Commissioner by both sides. On March 30, 1954 the Commissioner filed his Report (R. 1), which contains 132 findings and in its original print is 61 pages long.

Exceptions, briefs and reply briefs were filed in the Court of Claims. The exceptions, brief and reply brief of Homestake Mining Company, which had the laboring oar (R. 19-20), totaled 326 pages. The Government's exceptions and brief totaled 148 pages. There was an argument of about four hours before the Court of Claims on January 12-13, 1955 (R. 10).

The Court of Claims kept the case under advisement until February 20, 1956 when it handed down its opinion and Findings of Fact, which with short dissenting opinions of Chief Judge JONES and Judge LARAMORE take up 128 pages of the record.

A study of the Findings of Fact made by the Court of Claims, in the light of the Commissioner's Report, the objections thereto and the briefs, will reveal that the Court

of Claims was extraordinarly thorough and careful: it obviously considered all the objections to the Commissioner's Report; it made many changes in the Commissioner's findings; and it added several new findings.

While the petitioner's brief contains countless assertions which are at variance with the Findings of Fact of the Court of Claims, it fails to point out a single Finding of Fact which it contends is not supported by the evidence.

It is also significant that when the Government moved for a new trial, it did not base its motion on a contention that the Court had made any errors of fact (R. 142-147).

Despite all this, the petitioner's brief now disregards the Findings of Fact almost as completely as if this Court had the first and primary responsibility to determine the facts.

The respects in which the petitioner's brief fails to make a dependable statement of the facts.

In the petitioner's brief we find all of the following:

1. There is virtually no mention of the Findings of Fact of the Court of Claims.[6]

2. When an assertion is made on a point of fact and the record is cited, any one of a number of things may be found:

(i) the assertion may be consistent with a Finding of Fact and the citation may be to the Finding without mentioning that there is a Finding;

(ii) the assertion may be in direct conflict with a Finding of Fact and the citation may be to an item of evidence on which the petitioner relied unsuccessfully below;[7] or

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[6] Except for two references (p. 67, 68) to the last sentence of Finding 47 (R. 106), we have not found a single reference in the petitioner's brief to *any* Finding of Fact of the Court of Claims *as a finding*.

[7] For an example, see Appendix A hereto at pages 55-56.

(iii) the assertion may relate to some evidentiary or subsidiary matter on which no Finding was made and the citation may be to material in the record which does not tend to establish the correctness of the assertion.[8]

3. The brief takes an important Finding, changes the sense of the Finding by changing a word or words or omitting part of the Finding, and then incorporates the changed Finding as a statement of fact in the text without indicating its origin other than by a citation to a page of the record.[9]

4. The petitioner's Statement is presented as a summary (p. 5) of the narrative "History and Background of Limitation Order L-208" (Appendix A, p. 73-110). The petitioner's Appendix A reads as if it were a complete story and parts of it are based on Findings of Fact, but

(i) the substance of many important Findings favorable to the respondents is completely omitted;[10]

(ii) in quoting from documents which are incorporated in the Findings, the petitioner quotes insignificant parts which might be thought favorable to the petitioner and leaves out important parts which are clearly favorable to the respondents;[11] and

(iii) there are other respects, of the type already referred to, in which the narrative is not dependable.[12]

5. By organization of the material and other devices the petitioner has frequently attempted to suggest a relationship, a connection or a continuity where in fact there was none.[13]

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[8] For an example, see below at page 52.

[9] For examples, see Appendix A hereto at pages 4, 13-15 (three places) 24-25, 25-26, 35 and 72-73.

[10] For examples, see Appendix A hereto at pages 20, 21-22, 23-24, 24, 26-27, 30, 30-31, 47 and 85-86.

[11] For examples, see Appendix A hereto at pages 15-18.

[12] See Notes 7, 8 and 9 above.

[13] For examples, see Appendix A hereto at pages 3-4 and 7-8.

The Statement of Facts in Appendix A to this Brief.

We believe that this Court's review of the Findings of Fact of the Court of Claims will be limited (see below, p. 63-64). Nevertheless, in view of the course which the petitioner has followed it has seemed to us to be prudent to set forth in Appendix A hereto a detailed statement of the background, purpose, provisions and effects of Order L-208.

In the following summary statement of the facts we will refer to our Appendix A as well as to the Findings of Fact of the Court of Claims.

Summary Statement of the Facts.

The War Production Board (WPB) was an agency of the Executive Office of the President (Executive Order No. 9024, Appendix D, p. 8). Technically all authority was vested in the Chairman, who acted "with the advice and assistance of the members of the Board" (*id.*). Order L-208 was "agreed" upon by the Board (Finding 41, R. 101), so it may be looked upon as the action of the Board as well as of its Chairman, who was Donald M. Nelson (Finding 38, R. 99).

Controls of critical materials by the WPB, and the elimination of the acquisition of critical materials by nonessential gold mines.

One of the WPB's most important responsibilities related to the allocation of critical materials.

The acquisition of critical materials by gold mines which did not produce substantial amounts of other metals that were needed in the War effort (the "nonessential" mines) was restricted by a series of regulations or orders issued

by the WPB's predecessors (the OPM and the SPAB) and then by the WPB itself (Findings 3-17, R. 63-75).

By March 2, 1942, seven months before the issuance of Order L-208, the nonessential gold mines (Finding 17, R. 74-75):

> "* * * * were reduced to the same priority position as that of the least essential industries in the United States, i.e., they were entitled only to an A-10 preference rating[14] for the acquisition of maintenance, repair and operating supplies under Order P-100. They were excluded from obtaining any critical materials which might have been needed by any of the nonferrous metal mines or by any other industry deemed by WPB to be more essential. While it was possible for gold mines excluded from any benefits under P-56 to apply for equipment under the general repair order P-100, the demand for desired equipment was so far above available supply that the possibility of the gold mines obtaining any was remote. *Thus, by March 2, 1942, a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment.*"

In the petition for certiorari, the petitioner informed the Court (p. 4-5):

> "Thus, by granting the lowest possible priority rating in a market where supplies were exceedingly scarce, *the War Production Board had effectively eliminated the possibility of acquisition by the gold mines of critical materials or supplies.*"

The WPB knew that any problem relating to the acquisition of critical materials by nonessential gold mines had been solved. The Court of Claims found (Finding 50, R. 106-107):

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[14] The lowest preference rating (Finding 10, R. 72-73).

*"On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of L-208 knew (1) that existing priority orders insured that the gold mines would not receive any critical materials needed by more essential users; * * *"*

An attempt is now made in the petitioner's Statement (p. 5-8) and Appendix A (p. 73-91) to create the impression that when the WPB issued Order L-208 on October 8, 1942, it was still trying to control the acquisition of critical materials by the nonessential gold mines (Appendix A hereto, p. 7-8). It was not. That problem had been solved and the Court below so found. Further detail is given at pages 2-10 of Appendix A hereto.

Nonessential industries generally permitted to continue operations.

Nonessential businesses had difficulties in obtaining materials because of the allocation program and they had difficulties in keeping men because of Selective Service, but there was no program or policy of closing them down. On the contrary, their continuance was to some extent encouraged (Appendix A, p. 5). The objective was "to avoid unnecessary dislocations in the civilian economy" (Finding 10, R. 73).

Why the gold mines were "singled out": the purpose of Order L-208.

As the petitioner's brief says, the nonessential gold mines were "singled out" (p. 6, 8). This is the same expression which was used by General Somervell, Commanding General of the Services of Supply of the Army, in

explaining the purpose of Order L-208 shortly after it was issued (Appendix A, p. 33; Plaintiff's Exhibit 127, R. 520, 1510-1511).

The nonessential gold mines were singled out by a unique Order, that expressly and directly deprived the operators of the mines of the only beneficial use to which their mines could be put, kept them out of business for two and one-half years, scattered their employees, and disrupted their business organizations generally.

The reason why the nonessential gold mines were thus singled out was because there was a shortage of trained underground miners in the copper and other nonferrous metal mines (Finding 46, R. 105-106), and it was hoped that the closing of the mines would bring about the "transfer" of a significant number of "hardrock miners to the nonferrous metal mines" (Finding 51, R. 107).

In the petition for certiorari this Court was told that (p. 5):[15]

> "In the summer of 1942, the Labor Division of the War Production Board became concerned with the problem of an acute shortage of hardrock or underground miners in the vital non-ferrous copper mines. The primary reasons for this shortage were the draft, and the migration of workers out of the mine fields because of higher wages and better working conditions in other war industries. Accordingly, it was suggested to the War Production Board that, if the gold mines were closed, the unemployed miners would probably be diverted to copper mining, thereby alleviating a shortage which severely threatened the national war effort. In this connection, it was recognized that there was no authority to require the miners to transfer to industries in which their services were more urgently required; and further that the workers thus made available by the closing

[15] In quoting from the petition for certiorari we have omitted references to the pages of the Appendix to the petition which contained the Findings of the Court of Claims.

of the gold mines might very well go to work in the West Coast war plants instead of in the non-ferrous copper mines."

The shortage of miners in the nonferrous metal mines had become acute by July, 1942 (Finding 18, R. 75-76), and in that month the idea first developed of shutting down the gold mines in the hope that the miners, thrown out of work, would go to the nonferrous metal mines (Finding 19, R. 76).

On October 6, 1942, a formal decision was reached to issue an order directing that the operators of the non-essential gold mines "close down" their operations except for standby maintenance (Finding 41, R. 101; Finding 43, R. 102-104).

The Order was issued for only one purpose. As the Chairman of the WPB announced (Finding 45, R. 105; Plaintiff's Exhibit 34, R. 430, 1323), that purpose was "*to maneuver our manpower* so that less essential mining can be diverted to vitally important operations".

General Somervell, Commanding General of the Services of Supply of the Army, who attended the WPB meeting of October 6, 1942 at which Order L-208 was agreed upon and who told the WPB at that time that "failure to stop gold production immediately would be inexcusable" (Finding 41, R. 101), said in a letter written three days after L-208 was issued (Plaintiff's Exhibit 127, R. 520, 1510, 1511):

> "*The gold mining industry has been singled for curtailment only because it constitutes the most readily available pool of 'hard rock' miners who are so urgently needed to further the war effort.*"

The Court of Claims found that (Finding 46, R. 105-106):

> "The dominant consideration by Chairman Donald Nelson of WPB in the issuance of Limitation Order L-208 was the releasing of mine labor from the gold mines for employment in mines that

were producing other metals, such as copper, which were in short supply and urgently needed in the war program."

By "the dominant consideration" the Court of Claims meant the only real purpose (Appendix A, p. 34-39).

If there could be any question as to the meaning of Finding 46, resort could be had to the Court's opinion to clarify its meaning (see below, p. 64-65). The Court said in its opinion (R. 19):

> "The record establishes that no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines.
>
> * * * * *
>
> "The record establishes that the purpose and intent of WPB in issuing L-208 was to deprive the gold mine owners and operators of the right to use their properties in the only way they could be beneficially used, i.e., to mine and sell gold for a profit, and that this was done in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines."

In effect, the petitioner's brief admits that the Court of Claims found that the only real purpose of Order L-208 was that given in Finding 46. For the brief says that the Court of Claims concluded that "L-208 was not devised for the purpose of conserving or allocating materials" (p. 53).[16]

Nevertheless, the petitioner's brief argues throughout

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[16] In this instance, as in others in the petitioner's brief (see, e.g., p. 52, 61), the word "materials" was obviously used to embrace materials, machinery and equipment (Appendix A hereto, p. 1-2).

that in fact Order L-208 was intended to "conserve scarce war materials" and "to divert mining machinery and equipment to essential wartime enterprises" as well as to bring about what the petitioner euphemistically calls "the voluntary relocation of manpower" (p. 2).[17] Indeed, in the petitioner's statement of the question presented, the manpower purpose is stated last of all (*id.*).

Moreover, the petitioner's statement of the manpower purpose of L-208 is decidedly different from the statement in Finding 46. Finding 46 is to the effect that the purpose was to release "mine labor from the gold mines for employment *in mines* that were producing other metals" (R. 105-106). The petitioner's statement implies that the manpower purpose was "to bring about the voluntary relocation of manpower to vital mining activities *and essential war work*" (p. 2), and the argument in the petitioner's brief assumes that the miners who would be discharged as a result of L-208 would go into "other essential war work" (p. 68-69). That assumption conflicts not only with Finding 46 but also with Finding 45 (R. 105) and the evidence that the WPB and the War Manpower Commission both sought to discourage the gold miners from obtaining employment in war industries other than nonferrous metal mines (Appendix A, p. 85-87). Furthermore, the contention now made that the WPB wanted to have the miners go into "essential war work" other than mining is not comprised in, and is inconsistent with, the statement of the questions presented which was made in the petition for certiorari (p. 2; see below, p. 60-62).

The petitioner's brief has "edited" Finding 46 by changing the words "*the* dominant consideration" to "*a* dominant consideration" (p. 11) and "*a* motivating factor"

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[17] Thus the petitioner now seeks to go behind the Findings of the Court of Claims, although in its petition for certiorari it appeared to be presenting the case to this Court on the basis of an acceptance of the Findings of the Court of Claims (see petition for certiorari, p. 3, and see below, p. 58-60).

(p. 60). In doing so, the petitioner has attempted to reinstate a finding of the Commissioner which the Court of Claims rejected (Appendix A hereto, p. 34).

At pages 34-39 of Appendix A we have discussed the purpose of Order L-208 in some detail, with particular reference to the Findings. The much longer prior section of Appendix A, under the heading **"The background and origin of the Order"** (p. 2-33) gives a narrative, taken principally from the Findings (and when not from the Findings, then from contemporaneous documents), which shows that the ultimate Finding of the Court of Claims, as to the purpose of L-208, is overwhelmingly supported by the record.

Indeed, if it were this Court's function to act as the trier of the facts, we are confident that it could reach only one conclusion: that there is no substantial evidence that the WPB had any purpose other than that stated by its Chairman, which was "to maneuver our manpower."

Controls over skilled labor; the taking of property "to maneuver manpower".

During World War II, both before and after the issuance of Order L-208, many unsuccessful attempts were made to secure the passage of legislation to provide for a labor draft (cf. R. 526).

The Austin-Wadsworth bill (S. 666, H. R. 1742, 78th Cong. 1st Sess.), which is referred to in Plaintiff's Exhibit 162 (R. 798, 1518-1519), was introduced in the Senate on February 8, 1943. At the preceding session of the Congress somewhat similar bills were introduced (see, e.g., S. 2788 and S. 2805) and there were hearings to which Senator Austin referred in supporting his bill (89 Cong. Rec. 666-671). The Austin-Wadsworth bill having failed of passage,

similar legislation was proposed in the 79th Congress (S. 36, S. 85, H. R. 1119, H. R. 1752).

Both before and after the closing down of the gold mines it was realized that the inability to draft labor made it difficult to "maneuver manpower", and that the results which could be obtained by shutting down a business and then trying to "maneuver manpower" were problematical.

On September 1, 1942, Chairman Donald M. Nelson of the WPB wrote to Senator McCarran of Nevada (Finding 24, R. 81):

> "We quite agree that no legal power exists today by which workers may be forced to transfer to other mines. This accentuates the mine labor problem which faces us today."

Many realized that if the nonessential gold mines were closed down, only a small percentage of the hardrock miners would go to the nonferrous metal mines (Appendix A, p. 73-83). The matter was put succinctly by Dr. Wilbur A. Nelson, the Chief of the Mining Branch of the WPB, in a memorandum on August 14, 1942 (Finding 22, R. 79):

> "I am sure that a gold miner, living in the excellent living conditions at Lead,[18] [South Dakota, where the Homestake Mine is located] is not going to leave his family and stop at Butte [Montana, where the Anaconda Copper Mines are located] if he could go to the West Coast."

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[18] The idea of maneuvering underground miners at the Homestake gold mine at Lead, South Dakota, to the Anaconda copper mine at Butte, Montana, over 500 miles away (Finding 69, R. 115), seems to have been at the fore in connection with L-208. The issuance of the Order was announced to the President of the Homestake Mining Company by the Under Secretary of War in a telegram which stated that the Under Secretary had directed immediate action to bring officials of the War Department and of the Anaconda Copper Mining Company in cooperation with the Homestake's local management at Lead (Appendix A, p. 32; Plaintiff's Exhibit 132, R. 613, 1516).

It was no easy thing to "maneuver" gold miners from Lead to nonferrous metal mines. The latter had "low wages, bad working and living conditions" (Finding 50, clause (5); R. 107), while at Lead (Finding 66, R. 114):

> "The working conditions at Homestake and the living conditions in the communities surrounding Homestake in 1942 were superior to those at the nonferrous metal mines to which the Government sought to transfer the Homestake miners. Homestake employees enjoyed free medical and hospital services, group insurance, pensions, recreational facilities, and many of the older miners owned their own homes. In 1942, approximately 440 of Homestake's employees had seen more than 21 years of service with the mine, and some had been employed there for more than 40 years. For these reasons, Homestake had enjoyed greater employment stability than the nonferrous metal mines despite the lure of higher pay in the war industries."

Many of the miners "were middle-aged men with families who owned their own homes and would not leave their communities if any alternative were possible" (Finding 50, clause (6); R. 107). This was pointed out to the WPB (Finding 23, R. 80).

Eight months after L-208 was issued, the Under Secretary of War wrote (Plaintiff's Exhibit 162, R. 798, 1518-1519):

> "The causes of the shortage of miners are well known. For one thing, men have left to take employment in industries that offer better wages. Again, they have left to go to farms, having been assured that no farmers will be drafted into the Army. These factors have caused a drift away from the mines, and conditions cannot improve so long as the drift continues. The furloughing of soldiers to work in the mines will not stop the drift. The difficulties that are inherent in the present situation will not be remedied until effective measures are adopted to keep men at occupations as essential as that of cop-

per mining and to recruit from less essential industries the additional men needed. The troubles in copper mining furnish a striking instance of the need of legislation along the lines of the Austin-Wadsworth bill."

There being no law like the Austin-Wadsworth bill, which would have made it possible to draft miners for the nonferrous metal mines, the WPB decided, at the instance of the War Department and the Army, to close down the nonessential gold mines, throw the hardrock miners out of work and try to persuade as many as possible to go to the nonferrous metal mines. That course imposed great hardships on the operators of the mines, on their employees and on their communities and it was not well designed to accomplish its purpose (Finding 50, R. 107), but it was determined upon nevertheless.

For the purposes of these cases, *it should be emphasized that the closing of the gold mines was not an incident of a general program for the assignment of manpower. It was a unique taking of property (the right to operate the mines) in the hope that as a consequence of the taking there would be a transfer of mine labor to the nonferrous metal mines.*

All nonessential industries lost employees during the War because of Selective Service: men were drafted or went into essential industries so that they would not be drafted. Doubtless a great many businesses found it difficult to continue operations as a consequence of their inability to retain enough employees or to obtain critical materials. But only the operators of the nonessential gold mines, about 150 in number, were singled out and directly and intentionally deprived of the right to make the only beneficial use which could be made of their properties, in the hope that some of their employees, who would be thrown out of work, might be induced to seek employment in the nonferrous metal mines.

The role of the War Department and the Army.

The idea of curtailing the production of gold by an order of the WPB "to free labor"[19] which was needed in the nonferrous metal mines originated, so far as the record indicates, in July 1942 with a committee organized by officials of the War Department (Finding 19, R. 76).

At that time there had been no study of (1) the number of hardrock miners who were employed in the gold mines and (2) the prospects of inducing a significant percentage of the hardrock miners to seek employment in the nonferrous metal mines.

Indeed, there was nothing approaching a careful effort to ascertain how many hardrock miners were involved until about a week before Order L-208 was issued on October 8, 1942 (Appendix A, p. 73-83). But as early as September 15, 1942, the "War Department was impatient at the delay" in issuing a close down order (Finding 30, R. 93; Appendix A, p. 20, 77).

By October 1, 1942, a decision had already been made, at least tentatively, to shut down the gold mines. On that day a meeting was held at the WPB which representatives of the gold mining industry were invited to attend (Find-

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[19] The euphemistic expressions to be found in the record and the Government's briefs are rather striking.

Order L-208 was designed to throw out of work "middle-aged men with families who own their own homes and would not leave their communities if any alternative were possible" and to maneuver them to "the nonferrous metal mines where wages were low and working and living conditions poor" (Finding 50, R. 107). Granted that the War made it important to have maximum production of nonferrous metals, it is still rather startling to have a committee organized by officials of the War Department refer to the program as one "to free labor" (Finding 19, R. 76) and to have the Government refer to the project as one for "the voluntary relocation of skilled manpower" (petition for certiorari, p. 2).

ing 36, R. 97). "At the opening of the meeting Mr. Batt [Vice Chairman of the WPB] stated that he had brought the gold mine operators to Washington to tell them that a decision had been made to close the gold mines in order to transfer the released labor to the copper mines" (Finding 36, R. 98). An extreme disagreement developed between the operators of the mines and the representative of the WPB's Labor Division as to the number of underground miners in the nonessential gold mines (*id.*). "Late in the meeting, Wilbur A. Nelson [Chief of the Mining Branch of the WPB] undertook to determine how many miners and muckers would actually be released by a closing order" (*id.*). But before this the representative of the Army had already spoken "strongly in support of a closing order" (*id.*).

As a result of what the Vice Chairman of the WPB learned at the October 1 meeting, he wrote to the Chairman suggesting further study and saying (Finding 38, R. 99):

> "Complete closing without exceptions will produce very serous economic dislocations, and the total possible gain in men is a small figure."

On October 3, 1942, the Vice Chairman received Dr. Wilbur A. Nelson's report that the proposed close down order "would make available only about 600 miners and muckers for other mining enterprises 'provided they [could] all be induced to go into other mines.'" (Finding 37, R. 98-99). It was known that the prospects were poor of inducing a large percentage of the 600 to go to the nonferrous metal mines "where wages were low and working and living conditions poor" (Finding 50, R. 107; Finding 51, R. 107). As already stated, many of the employees were "middle-aged men with families who owned their own homes and would not leave their communities if any alternative were possible" (Finding 50, R. 107).

Dr. Wilbur A. Nelson's figures were accepted by the War Manpower Commission and the WPB (Finding 41, R. 100-101).

But the War Department and the Army moved independently of Dr. Nelson's study and their momentum was not slowed down. On October 2 the Under Secretary of War wrote the Vice Chairman of the WPB a letter in which he said (Finding 39, R. 99):

> "The matter has hung fire for some time, and I trust that there will be no further delay."

In the same letter he offered to obtain the approval of the Navy Department.

On October 5 the Under Secretaries of War and the Navy sent the following memorandum to the Chairman of the WPB (Finding 40, R. 99-100), which the petitioner quotes (p. 101):

> "The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.
>
> There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production.[20] These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.
>
> The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step

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[20] As already noted, it had previously been determined that a shutdown of the gold mines "would make available only about 600 miners and muckers for other mining enterprises 'provided they [could] all be induced to go into other mines'" (R. 99). No explanation has been given of the origin of the Under Secretaries' statement that there were "two thousand to three thousand hard-rock miners engaged in gold mining".

and others will not give complete relief if nothing is done to transfer gold miners to copper mining.

The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided."

On the next day, October 6, 1942, a WPB meeting was held at which the formal decision to issue Order L-208 was reached (Finding 41, p. 100-101). At that meeting General Somervell, who was the Commanding General of the Services of Supply of the Army, made a statement which appears in the minutes immediately before the note of the action which was agreed upon (Finding 41, R. 101):

> "*General Somervell stated that* because of the critical shortage of copper, which is drastically curtailing ammunition production, the Army has taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines and that, under these conditions, *failure to stop gold production immediately would be inexcusable.*"

The action of the WPB in issuing Order L-208 was announced to the President of the respondent Homestake Mining Company by the Under Secretary of War, not by the WPB (Appendix A, p. 32, Plaintiff's Exhibit 132, R. 613, 1516).

The part played by the Army was reviewed in the opinion of the Court below (R. 17-18). Among other things, the Court said (R. 18):

> "Army officials were furnished with facts and figures showing that few hardrock miners would be released by the closing of the gold mines and that there was no way of compelling those miners to work in the copper mines and little likelihood that they would do so. Despite this, officials of the Army continued to bring great pressure to bear on the War Production Board to close down the gold mines, indicating

that otherwise WPB would not be doing its part to increase production in the nonferrous metal mines."

The petitioner's brief twice points out that L-208 was issued "with the approval and at the urging of the War Department" (p. 21, 55).

No one reading the narrative at pages 2-33 of Appendix A hereto, particularly pages 25-33, can escape the conclusion that the War Department and the Army provided the driving force which led to the issuance of the Order.

For all practical purposes, it is as though the Army physically took over the respondents' mines and kept them idle until June 30, 1945.

The close down: Order L-208.

The decision agreed upon at the WPB meeting of October 6, 1942 was this (Finding 41, R. 101):

> "An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within 60 days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition."

Order L-208, which was issued on October 8, 1942 (Finding 43, R. 102-105), is set forth in Appendix B hereto.

Order L-208 defined nonessential mines as including all lode or placer operations which did not produce substantial amounts of critical materials (Finding 43, R. 102; Finding 17, R. 74).

The key provisions of the Order were paragraph (b)(1) (R. 102):

> "(1) On and after the issuance date of this order, each operator of a nonessential mine shall immediately take all steps as may be necessary to

close down, and shall close down, in the shortest possible time, the operations of such mine."

and paragraph (i), which read in part (R. 104):

> "(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment."

Paragraph (b)(1) contained a specific directive "to close down". It represented an assumption of complete dominion and control over the mining operations—not in order to continue them, but in order to close them down, except for "minimum maintenance to keep mines dewatered and in standby condition" (Finding 41, R. 101; par. (b)(3) of L-208, Finding 43, R. 102-103).

Other provisions of L-208 are referred to below. The core of the Order was paragraph (b)(1). As the Court below held (R. 44-45):

> "The real substance and intent of the order was embodied in the prohibition directed at the continued operation of the gold mines."

Approval by the President.

As the petitioner's brief says twice (p. 21, 55), L-208 was "approved by the President". Twenty-one United States Senators from twelve gold-producing states sent the President a letter on October 10, 1942, two days after the Order was issued, in which they protested against the Order and requested a stay "at least until the whole subject of marshalling of manpower and the allocation of labor may be considered", but their protest and request were rejected (see below, p. 121; Appendix A hereto, p. 31-32).

Order L-208 unique.

Boldly disregarding the lower Court's Findings, the petitioner's brief attempts to liken L-208 to other "L" orders and reaches a climax with the astounding assertion that "L-208 was a typical exercise of the allocation authority of WPB" (p. 22).

In the part of the brief which attempts to frighten the Court by suggestions of "an incalculable and staggering financial burden" (p. 42), the brief refers to 25 "L" orders that stopped or curtailed the manufacture of various end products which required critical materials and says that such orders were similar to L-208.

Actually, L-208 was unique, and the Committees of the Judiciary of the House and Senate were correct when they said (see below, p. 40-42, 49):

> "No similar order was issued against any other segment of American industry."

"L" orders of the type cited by the petitioner are the subject of several paragraphs in Finding 3, which is not mentioned in the petitioner's brief (R. 63-64). Two of those paragraphs are quoted in Appendix A hereto (p. 4).

The "L" orders referred to by the petitioner were utterly different from L-208.

First, their true purpose was to conserve critical materials, not to "maneuver manpower".

Second, they merely stopped or curtailed the manufacture of end products which required the use of critical materials in significant amounts. No critical materials went into the end product of the gold mines, refined gold. This was pointed out by the Court below (R. 32).

Third, the "L" orders cited by the petitioner did not undertake to require a business to close down. The Court of Claims found (Finding 3, R. 63):

> "In most instances a prohibition against the production of a product resulted in the facilities being transferred to war production. Thus, the automobile industry's facilities were largely converted to war purposes although some of the facilities may have become inoperative because of a lack of adaptability to other purposes or to war production."

If any manufacturer of end products which required the use of critical materials was put out of business because of inability to obtain critical materials, that manufacturer suffered one of the consequences of a proper regulation of critical materials which were essential to the War effort. But the WPB did not issue orders relating to passenger automobiles, stoves, refrigerators and the like for the purpose of keeping the manufacturers from using their plants. On the other hand, Order L-208 directly and intentionally kept the operators of the nonessential gold mines from making any use of their mines so that as a consequence most of their hardrock miners would be thrown on the labor market.

The targets of the "L" orders to which the petitioner refers were critical materials. The targets of L-208 were the respondents' mining operations, which required hardrock miners.

The holding of the Court of Claims that Order L-208 was in fact not an allocation order.

As Judge LARAMORE said in his dissent, the majority opinion below "points out that L-208 was not an allocation order, as it purported to be, but rather was clearly an order closing gold mines deemed nonessential to the war effort" (R. 61). In this connection, the majority opinion shows that the Court's Findings of Fact constituted a holding *as a matter of fact* that L-208 "was not an allocation order" (see below, p. 95-97).

The camouflouge of Order L-208.

The Argument in the petitioner's brief under the subheading "*Purpose*" (p. 58-61) stresses the preamble to L-208, which read as follows (R. 102):

> "The fulfillment of requirements for the defense of the United States has created *a shortage in the supply of critical materials* for defense, for private account and for export *which are used in the maintenance and operation of gold mines;* and the following order is deemed necessary and appropriate in the public interest and to promote the national defense."

The implication in the preamble that L-208 was issued because of the shortage of critical materials "which are used in the maintenance and operation of gold mines" was not in accordance with the facts as found by the Court of Claims and as established by the overwhelming weight of the evidence. The WPB knew that the problem of critical materials had been solved, so far as the gold mines were concerned, seven months before (see above, p. 11-13). The preamble was camouflage.

On September 15, 1942, Mr. Morris Creditor, Special Assistant to the Chairman of the WPB, wrote to the Chairman about the preamble of a draft of the Order which was under discussion at the time (Finding 31, R. 94-95). That draft of the Order did not contain the "close down" direction which was in Order L-208 as issued, but the preamble of the draft order was identical with that of Order L-208. (Defendant's Exhibit 46, R. 962, 1594, 1595-6.) Mr. Creditor said (R. 95):

> "Actually, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, *the preamble should state the real reason; which is to direct this labor to more necessary industries.*"

This forthright recommendation was not adopted.

The citations of the authority for the Order at its foot were also camouflage (R. 104-105). They would have been suitable if L-208 had been a true priorities regulation, intended to serve the purpose stated in the preamble.

Paragraphs (b)(2) and (b)(3) prohibited the acquisition, consumption, or use of "*any* material, facility, or equipment" in any of the mining operations to which they respectively related (R. 102-103).

Chief Judge JONES said that paragraphs (b)(2) and (b)(3) "forbade the use of *critical* materials in nonessential industry," that "they would have produced the closing down of the mines whether or not paragraph (b)(1) had been included" and that paragraph (b)(1) should "be construed as mere surplusage" (R. 58-59). But the Chief Judge misread the Order and disregarded its purpose.

Paragraphs (b)(2) and (b)(3) did not relate to "*critical* materials". The references therein were to "*any* material, facility, or equipment", whether needed in the war effort or not. The prohibitions of the acquisition, consumption or use of "*any* material, facility, or equipment" in any of the several mining activities mentioned in (b)(2) and (b)(3) were obviously adopted as a device to make L-208 superficially similar to an order relating to the acquisition, consumption and use of critical materials. However, the fact is that the Order contained no mention of critical materials except in the preamble.

In the light of the direction in paragraph (b)(1) that the affected gold mines "close down", nothing whatever was added to Order L-208 by the provisions in paragraphs (b)(2) and (b)(3) prohibiting the consumption, acquisition or use of "*any* material, facility, or equipment" in the conduct of the operations of the mines thus ordered to be closed down. The only significance of the provisions of paragraphs (b)(2) and (b)(3) lay in the 7-day and 60-day deadlines imposed by their terms on the mining activities

therein specified which would have required the continued use of mine labor.[21]

To say that paragraph (b)(1), which directed the close down, was surplusage seems almost to be like saying that if a man is sentenced to be hung by the neck until dead and then to be buried in the prison burying ground, the direction that he be hung by the neck until dead can be disregarded as surplusage since the burying would result in his death in any event.

The Court below said in its opinion (R. 44-45):

> "The real substance and intent of the order was embodied in the prohibition directed at the continued operation of the gold mines. The so-called limitation on the gold mine owners' use of the equipment and supplies and facilities which they owned was not intended to make those items available to the Government or to the war effort but was expressly included in the order to insure that they would not be used in the mining of gold, and was part and parcel of the express order to cease doing business."

The Court of Claims did not find, in so many words, that L-208 was camouflaged, but its Findings were in substance to that effect. The Court's opinions point up the only conclusion which can be drawn from the Findings.

In the original opinion the Court said (R. 19):

> "The record establishes that *no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or*

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[21] Paragraph (c), which was not mentioned by Chief Judge JONES, related to the application of preference ratings "to acquire *any* material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine" (R. 103). That provision of the Order was clearly surplusage since the gold mines had already been denied access to critical materials (Finding 17, R. 74-75; Finding 50, R. 106-107).

supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines.

* * * * *

"The record establishes that *the purpose and intent of WPB in issuing L-208 was to deprive the gold mine owners and operators of the right to use their properties in the only way they could be beneficially used, i.e., to mine and sell gold for a profit, and that this was done in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines.*"

And at R. 40-41:

"*Despite its preamble and the authority cited for its issuance, the language of the order itself and the circumstances surrounding its issuance indicate that neither its purpose nor its effect was to conserve or allocate critical materials, equipment and facilities needed for defense,* but was rather to deprive the gold mine owners of their right to make profitable use of their gold mines."

Furthermore, in denying the motion for a rehearing the Court below restated its original holdings (R. 145):

"The court held that *what WPB said it was doing and what it in fact and law did, were two different things and that the Government could not escape the obligation of paying just compensation for what it had the authority to take and in fact took, simply by calling its action of taking a 'priorities order' or an 'allocation order'.*"

In saying that L-208 was camouflaged, we have no intention of impugning the motives of those of the men who were responsible for it. We heartily subscribe to the petitioner's references to them as "responsible men, selflessly dedicated to winning the war in the shortest possible time" (p. 55; see below, p. 48). However, that does not alter

the inescapable fact, confirmed by the Court of Claims, that Order L-208 *was* camouflaged. And the petitioner has tried throughout its brief to make the camouflage successful.

A fuller analysis of the provisions of the Order will be found in Appendix A (p. 40-45).

Order L-208 not adapted to serve as a priorities or allocation order relating to critical materials.

Since L-208 was not intended to serve as a priorities or allocation order relating to critical materials, it is not surprising to find that it was not adapted to serve, and did not serve, as such.

At pages 45-68 of Appendix A we have set forth in detail (1) the reasons why Order L-208 was not adapted to serve as a priorities or allocation order relating to critical materials and (2) the Findings and evidence that it did not accomplish anything significant in that field.

The portion of the Appendix which we have mentioned considers both (i) acquisitions of critical materials, machinery or equipment by the gold mines and (ii) the movement of critical materials, machinery or equipment from the gold mines.

As to acquisitions of critical materials, machinery or equipment by the gold mines (Appendix A, p. 46-48), it is enough to say that potential acquisitions of critical materials, machinery or equipment by the nonessential mines had already been "effectively eliminated" seven months before L-208 was issued—to quote from the petition for certiorari (p. 5; see above, p. 12, and Appendix A hereto, p. 6-10).

As to the movement of critical materials, machinery or equipment from the gold mines (Appendix A hereto, p.

46-48). The outstanding fact is that the Government did not requisition, or issue mandatory orders for, any critical materials, machinery or equipment owned by the gold mines which were closed down.

However, the petitioner has complicated matters by reversing the position which it took in the petition for certiorari. It now relies heavily on Priorities Regulation 13, which was issued by the WPB on July 7, 1942, and on two amendments of Order L-208 which were adopted on November 19, 1942 and August 31, 1943, and asserts that the Court below made several "demonstrably inaccurate" statements to the effect that if any of the operators of the closed gold mines wished to sell critical materials, machinery or equipment, they could sell them to whomever they pleased (p. 50).

In no less than *twelve places* the petitioner's brief refers *specifically* to Priorities Regulation 13 or one or both of the two amendments of L-208 and its presentation of the alleged facts and its argument are dependent in countless other places upon what it assumes about the Regulation and the amendments.

As we have shown at pages 58-65 of Appendix A hereto.

First: In the Defendant's Exceptions and Brief in the Court of Claims, filed November 5, 1954, comprising 148 pages, there was no reference to Priorities Regulation 13 or to either of the two amendments of Order L-208, and none of them was mentioned on the oral argument below. None of them was *ever* called to the attention of the Court of Claims in any way.

Second: Only one, the amendment of November 19, 1942, is in the record.

Third: Although the petitioner made a motion for a new trial in the Court of Claims, it made no reference to the lower Court's alleged errors of fact to which it now gives such prominence.

Fourth: The questions now raised about Priorities Regulation 13 and the two amendments of Order L-208

were not referred to in the petition for certiorari or fairly comprised therein (see below, p. 60).

Fifth: At least one of the petitioner's references to Priorities Regulation 13 is seriously incorrect, and all are incomplete. Priorities Regulation 13 did not apply to "machinery or equipment" at all. There is a complete lack of evidence as to the extent, if any, that Priorities Regulation 13 restricted sales by the gold mines after October 8, 1942 of things other than machinery or equipment.

Sixth: What the Court of Claims said about Order L-208, as issued, was clearly correct.

Seventh: The amendments of Order L-208 which were adopted on November 19, 1942 and August 31, 1943, did not change the character of the Order as issued on October 8, 1942. They undertook to deal routinely with a consequence of the closure of the gold mines which had been brought about by the Order. They simply provided that if operators of closed mines *wished to sell* machinery or equipment to which the two amendments related, respectively, they had to sell them pursuant to WPB authority.

Undoubtedly the reason why no point was made in the Court of Claims of Priorities Regulation 13 and the two amendments of Order L-208 is that the able and experienced counsel who represented the Government in the Court below considered them of no importance.

The amendments of November 19, 1942 and August 31, 1943 were afterthoughts, in the sense that they dealt routinely with consequences of the closing of the non-essential mines. The petitioner's reliance on the amendments is also an afterthought, in the sense that during more than four years of litigation the petitioner never referred to them, in brief or on argument or in its petition for certiorari.

The fundamental fact is that it was not the purpose of Order L-208 to try to channel critical material or used machinery or equipment from the gold mines to other mines.

The record discussed in Appendix A at pages 54-58 establishes conclusively that any movement of machinery or equipment to more essential industries as a result of L-208 was incidental and haphazard. While there is not enough in the record to make even an intelligent guess as to the amount of machinery and equipment which moved to the nonferrous metal mines because of Order L-208, such data as there are indicate that the amount was probably very small.

The practical failure of L-208 to maneuver hardrock miners to the nonferrous metal mines.

The practical effects of L-208 as a manpower measure were stated succinctly and accurately in *the petition for certiorari, which said that the problem involved a "shortage of hardrock or underground miners in the vital nonferrous copper mines"* (p. 5) and that as a result of the Order *"only an insignificant number of hardrock miners actually transferred to the copper mines"* (p. 6).

However, the petitioner's brief on the merits now asserts that "the success or failure of L-208, as an instrument for the diversion of manpower, remains a debatable question" (p. 65), and it suggests that the question does not pertain to hardrock miners but to all employees and that the WPB wished to divert them to "esential war work" (p. 65-69). The presentation of this subject in the petitioner's brief is truly remarkable.

The Findings and the record establish that (1) the shortage was of hardrock miners and (2) the purpose of L-208 was to divert hardrock miners to the nonferrous metal mines. The shortage was not of mining company employees of all sorts (including employees on the surface) and it was not the purpose of L-208 to divert mining company labor of all sorts to essential industries other than

nonferrous metal mines. These subjects are covered in detail at pages 68-92 of Appendix A hereto.

We have already quoted Finding 46 which sets forth the purpose of L-208 (p. 15-16).

Finding 51 reads (R. 107):

> "It is reasonable to conclude that in issuing L-208 WPB acted without any justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines."

Finding 18 sets forth the reasons for the shortage of hardrock miners in the nonferrous metal mines (R. 75):

> "The reasons for the poor production of nonferrous metals were found to be (1) the out-migration of workers in the nonferrous mines to other war industries offering higher wages and better working conditions, (2) drafting of the workers for the armed services by Selective Service, (3) excessive labor turnover within the industry, (4) low morale of the workers, (5) the short workweek in the mines, and (6) the lack of an organized and effective program of recruitment of workers for this industry."

Obviously Order L-208 did not deal with any of these causes of the shortage.

The Court of Claims found (Finding 50, R. 106-107).[22]

> "On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of L-208 knew * * * (2) that the closing of the gold mines would release only a small number of hardrock miners and helpers; (3) that no agency of the Government had the power to compel these men to accept employment in the nonferrous metal mines; (4) that in all likelihood unemployed gold miners would accept employment in shipbuilding, aircraft

[22] The omitted portions of this Finding relate to other subjects and are quoted elsewhere.

and construction industries rather than go to work in the nonferrous metal mines where wages were low and working and living conditions poor; (5) that L-208 was not in fact directed at the known reasons for the shortage of underground workers in the nonferrous metal mines, i.e., low wages, bad working and living conditions, and the refusal of Selective Service to defer miners; (6) that a substantial number of the employees of the gold mines were middle-aged men with families who owned their own homes and would not leave their communities if any alternative were possible; • • •"

As to the results, the Court below found (Finding 47, R. 106):

"47. The closing of the gold mines did very little to relieve the manpower shortage in the nonferrous metal mines because (1) a relatively small number of the type of workers needed in those mines, i.e., hardrock miners, were released (finding 37); (2) a number of these men were required to remain in the gold mines to keep them in safe condition; (3) the older and more settled experienced miners remained in their home communities doing what they could to make a living or remaining idle; (4) most of the younger hardrock miners released sought employment in the better paying war industries, construction projects, or were drafted in the armed services. *Approximately 100 hardrock miners are known to have gone to work in the nonferrous metal mines and to have remained there for a year.*"

We reserve for consideration in the Argument (see below, p. 103-105) the suggestion in the petitioner's brief that it is irrelevant whether or not L-208 failed of its purpose (p. 65).

The Congressional findings with respect to Order L-208.

Shortly after the opinion of the Court of Claims was handed down in *Idaho Maryland Mines Corporation* v. *United States*, 122 C. Cls. 670, denying the Government's motion to dismiss the petitions of three of the respondents, the Senate Committee on the Judiciary reported favorably on a bill (S. 3195, 82nd Cong., 2nd Sess.) relating to claims for losses incurred because of the shutdown of the gold mines under Order L-208 (Plaintiff's Exhibit 178, R. 855, 1559-1572). An identical favorable report was made by the House Committee on the Judiciary, and on July 14, 1952, the bill, a Special Jurisdictional Act, became law (66 Stat. 605). The Act is quoted at page 2 above.

The Reports of the two Committees are significant.

After a statement of the "purpose of the proposed legislation" (which is merely a repetition of the language of the Act itself), the Reports said in part (Senate Report No. 1605, House Report No. 2220, 82nd Cong., 2nd Sess.; Plaintiff's Exhibit 178, R. 855, 1559-1560):

"Statement

"On October 8, 1942, the War Production Board issued order L-208 which summarily closed the gold mines in this country. The order was rescinded on July 1, 1945, having been in effect approximately 2½ years.

"The records of the War Production Board show that the gold mining industry was selected as a guinea pig to test the policy of shutting down so-called nonessential industries during the war. The issuance of the order was based upon dubious if not nonexistent authority. The order failed completely to make any substantial contribution to the war effort and inflicted ruinous costs on the gold mining

industry. No similar order was issued against any other industry in the Nation during the war years."

The Reports contained extensive quotations from the Report of a Subcommittee of the House Committee on War Claims, on H. R. 4393, 79th Congress (R. 1561-1570).[23] By doing so the two Committees indicated their agreement with unequivocal statements to the effect that compensation should be paid to those who suffered as a result of the issuance of Order L-208.

Significant statements in the Report of the Subcommittee of the House Committee on War Claims which were quoted by the two Committees in May and June of 1952 include the following (R. 1561-1562, 1570):

> "Your committee believes that this order inflicted a sacrifice on the gold-mining industry which the Federal Government in common fairness should try to relieve.
>
> • • • • •
>
> "It is clear, in the opinion of your committee, which opinion is supported by expert testimony and is uncontroverted by Government witnesses, that there was little or no basis for issuing Order L-208, and that it was not only an administrative error but that the War Production Board proceeded on dubious authority. *The conclusion further has been reached that the order should have provided a mechanism for*

[23] H. R. 4393, 79th Congress, provided that the Secretary of the Treasury should be authorized to determine the validity of claims of operators of gold mines closed down by Order L-208 and to reimburse a gold mine operator for the "financial loss due to the closing or curtailment of operations of such mine • • • but not including payment for lost production". Hearings on H.R. 4393 were held by the Subcommittee of the House Committee on War Claims in December, 1945 and in February and March, 1946 and the Subcommittee unanimously rendered a favorable Report on July 19, 1946 to the full Committee on War Claims. The Report of the Subcommittee is referred to in Plaintiff's Exhibit 175 (R. 846, 1524, 1525-1534), as well as in Plaintiff's Exhibit 178, from which we have quoted above. H.R. 4393 was never reported out by the Committee on War Claims so that it never reached the floor.

> *compensation and that, as such was not provided, the Congress should so provide, even while realizing that much of the loss and damage is irreparable.* Your committee believes that the prompt repayment of such losses as are covered in the pending bill, H. R. 4393, will not only do substantial justice to an industry which was selected for a unique experiment, but will greatly aid in reestablishing an important industry, provide thousands of jobs to veterans and start a flow of taxes into county, State, and the Federal treasuries."

After the quotations from the earlier Subcommittee Report, the Senate and House Committees each stated its own conclusions as follows (R. 1570):

> "The committee has carefully studied the facts relating to the situation that arose as a result of the proclamation of the War Production Board Limitation Order L-208 and is convinced that the gold mining industry was dealt with in a fashion which *merits the consideration of the court in the adjudication of the losses which may have been occasioned by this order.* The Idaho Maryland Mines Corp. decision is ample evidence of the fact that the least that can be done is to allow those persons affected by Order L-208 their day in court for such recompense as may seem justified. * * *"

SUMMARY OF ARGUMENT

The judgment of the Court of Claims is based on Findings of Fact which are supported by abundant evidence. In the petition for certiorari the Government did not indicate any intention to challenge the adequacy of the Findings or the support therefor and this Court's review of the Findings would in any event be limited.

Yet the presentation in the Government's brief on the merits is consistently and fundamentally in conflict with the Findings of Fact. The brief does not even indicate what Findings were made, to say nothing of specifying

what Findings the petitioner challenges or the basis of any challenge. The arguments on matters of law are predicated on the petitioner's assumptions or assertions on points of fact, not on the facts as found by the Court of Claims. If the parts of the brief which are dependent upon an acceptance of the petitioner's factual assumptions and assertions were to be deleted, the brief would be in shreds.

* * * * *

Because of the petitioner's reliance on its version of the facts, rather than on the Findings, and because it has materially modified the statement in the petition for certiorari of the questions presented, the case is very different from the one which this Court must have thought was presented by the petition for certiorari.

* * * * *

On October 8, 1942 the WPB, an agency of the President, issued Order L-208, which directed the owners of about 150 gold mines and gold placer operations to "close down" in the shortest possible time. It provided that any violation was punishable by fine or imprisonment.

All of the respondents owned gold mines which were in operation on October 8, 1942, which were shut down in compliance with the Order and which remained shut down until the revocation of the Order on June 30, 1945.

The key paragraph of the Order was a peremptory and explicit direction to "close down" mining operations except for standby maintenance. It constituted an exercise of complete dominion and control over the respondents' mines.

The Order effected a direct taking of the respondents' property, viz., their right to produce and sell gold from their mines. That right was itself property. Only that right made the mines of any value or in any way useful.

It is immaterial that the Government did not take physical possession of the mines or operate them itself. The deprivation suffered by the respondents of the right

to use their mines constituted a taking. "The question is what has the owner lost, not what has the taker gained." Moreover, the Government got what it wanted.

The respondents' gold mines were closed down by the WPB in the hope that the hardrock miners employed in the mines would seek and obtain other employment in copper and other nonferrous metal mines where there was a labor shortage.

The Order was unique. Admittedly gold mining was not essential, but it was not the policy to try to close down nonessential industries; they were permitted to continue and to some extent helped to do so. The operators of the gold mines were "singled out" so that the hardrock miners would be discharged and thrown on the labor market. No other segment of any industry was similarly treated in World War II, or at any other time in our history.

The WPB camouflaged the Order so that it had some superficial resemblance to an order for the allocation of critical materials. The preamble to the Order referred only to critical materials; subordinate paragraphs of the Order mentioned materials; and the Order closed with a citation of Executive Orders and a statute which related to critical materials. No reference was made in the Order to its real purpose. But the camouflage of the Order did not hide the all-important first directive, that "each operator of a nonessential mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time the operation of such mine." And the Findings below, abundantly supported by the record, establish that the purpose of that directive was to "maneuver" miners, not to conserve critical materials, and that the Order was *in fact* "not an allocation order".

St. Regis Paper Co. v. *United States* (1948) 110 C. Cls. 271, cert. den. 335 U. S. 815, frequently cited in the peti-

tioner's brief, has no application for the reason, among others, that the closing down of the gold mines by Order L-208 was the direct, intended effect of the Order—not, as in *St. Regis*, the consequential result of an order which in fact dealt with the allocation of critical materials.

Since Order L-208 was not intended as an allocation order, it was naturally not adapted to serve as one. As the Court below found, the "existing priority orders insured that the gold mines would not receive any critical materials needed by more essential users", so that the Order was wholly unnecessary to keep the owners of gold mines from acquiring critical materials. Nor was the Order intended or effective to make critical materials or used equipment or machinery owned by the gold mines available for use by more essential industries.

The notion of closing the gold mines to relieve the shortage of miners in the nonferrous metal mines was advanced as early as July, 1942 with almost incredibly confused assertions about the number of miners in the gold mines and the total number of all employees of the mining companies. Shortly before the decision was made to issue Order L-208, the Chief of the Mining Branch of the WPB was directed to ascertain the facts, and he reported that the Order would make available only about 600 miners and muckers if they all could be persuaded to go into the nonferrous mines. There were reasons, well known to the WPB, why only a small percentage of the 600 could be expected to go to the nonferrous mines. Hence the Court of Claims found that the WPB had no reason to anticipate that the Order would bring about a transfer of a significant number of hardrock miners to the nonferrous metal mines.

The issuance of the Order by the WPB was all the more extraordinary because the minutes of the meeting at which the decision was made to issue the Order show that the WPB actually accepted the figures just summarized but issued the Order nevertheless. The explanation is that the

WPB acted at the instance of the War Department and the Army which, clinging to incorrect figures, told the Board that it was "of the utmost importance that prompt action be taken and that half measures be avoided", and that "failure to stop gold production immediately would be inexcusable".

As a manpower measure, the Order proved a failure.

Everything said above is supported by Findings of Fact made by the Court of Claims, which were supplemented by statements in the opinion of the Court. Of the two Judges who dissented, Judge LARAMORE agreed with the majority as to the purpose of Order L-208 and, so far as appears from his opinion, on all the other points referred to above except the President's authority to close the mines.

Long prior to the decision of the Court below, the Committees on the Judiciary of the Senate and the House had concluded that Order L-208 "completely failed to accomplish its purpose, or any purpose whatever, and inflicted irreparable and unjustifiable loss on the gold-mining industry".

The basic issue is whether, when an agency of the Chief Executive with his approval has taken dominion and control of the property of a relatively small number of individuals and corporations, so as to close down their operations and throw their skilled employees out of work in the hope that the skilled labor can be "maneuvered" into more essential industries, the Government can escape its obligation to pay compensation for the taking by camouflaging the taking order with a preamble and citations relating to critical materials. As the Court below said, "what the WPB said it was doing and what in fact and law it did, were two different things". If an agency of the President dresses up a taking order which ought to provide for compensation in an effort to make it appear to be a non-compensable regulation of critical materials, can the Government escape liability?

The issue should not be confused by the circumstance that Order L-208 related to gold mining. The mining of gold was not a noxious activity, subject to suppression as such. Indeed, both before and after the issuance of Order L-208 critical materials, machinery and equipment subject to allocation and control by the WPB were shipped in substantial quantities to South Africa, Canada, Honduras, Nicaragua and Colombia, for use in gold mining which continued in those countries throughout the War.

After the judgment of the Court of Claims was handed down against the Government, the latter made a motion for a new trial and took the position for the first time that it lacked the authority to take the respondents' property. This Court's decision in *International Paper Co.* v. *United States* (1931) 282 U. S. 399, 406, calls for a summary rejection of such a belated repudiation of responsibility.

It is immaterial whether or not power to take the respondents' property was formally delegated by the President to the WPB. The WPB was an agency of the President and, as the petitioner's brief twice concedes, the Order was approved by the President.

The statutory authority of the President to take the respondents' property is clear. Furthermore, by the Special Jurisdictional Act of July 14, 1952, Congress waived any question as to the authority for the Order.

* * * * *

While the Court below did not find it necessary to pass on the point, the Special Jurisdictional Act went further. The Act acknowledged liability to each gold mine owner who could establish that it incurred losses because it was prevented by Order L-208 from producing and selling gold and thus made it unnecessary to prove a taking.

ARGUMENT

I

THE RESPONDENTS' CLAIMS ARE JUST, AND THEIR RIGHTS UNDER THE CONSTITUTION SHOULD NOT BE OBSCURED BY SPECIOUS OR IRRELEVANT SUGGESTIONS.

The petitioner's brief disregards the Findings of Fact of the Court of Claims and, instead of considering whether on the facts as found there was a compensable taking of the respondents' property, the brief advances sundry specious or irrelevant suggestions about the respondents' claims. We will dispose of those suggestions first.

The War leaders.

It is, of course, agreed that those who authorized Order L-208, including the President, were, as the petitioner says (p. 55), "responsible men, selflessly dedicated to winning the war in the shortest possible time." But it is not necessary to argue in this Court that the consequences of the actions of officials and agencies of the Government are determined by the Constitution and are not affected by admiration or regard for individuals who are involved. In *Ex parte Milligan* (1866) 4 Wall. 2, this Court's opinion, holding that military commissions created by Lincoln were unconstitutional, was written by Justice David Davis, who had been one of Lincoln's closest friends and was the Administrator of his estate. Justice Davis' enduring respect and affection for Lincoln did not prevent him from announcing the principle that (p. 120-121):

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

The suggestion that the respondents are unpatriotic.

The petitioner's brief contains what appears to be a thinly veiled suggestion that these respondents and others who have similar claims against the Government[24] are unpatriotic because they do not "accept in the spirit of patriotism the hardships, inconveniences, and economic sacrifices required by present day warfare" (p. 43).

The respondents do not seek to profit from the War. They do not ask for compensation measured by values enhanced because of the War. They ask only that they not be required to sustain, without compensation, a unique deprivation which was imposed upon them by the WPB at the instance of the Army.

Order L-208, unique.

The effect of Order L-208 was to deprive about 150 individuals and corporations of the right to the beneficial use of their mines or placer operations until June 30, 1945.

The Congressional Committee Reports said (Plaintiffs' Exhibit 178, R. 855, 1559, 1562):

> "No similar order was issued against any other segment of American industry."

That statement was correct. Order L-208 was radically and fundamentally different from other "L" orders to which the petitioner attempts to liken it (see above, p. 28-29).

The petitioner says that "to single out the gold industry for full compensation would be an even grosser discrimination" (p. 43). The respondents were singled out by an Order which imposed a unique deprivation. Compensation required by the Constitution for a unique injury cannot be called discriminatory (see above, p. 28-29; Appendix A, p. 2-5).

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[24] Said to number 150 in all (p. 5, Note 3; p. 40).

The language of this Court in *Monongahela Navigation Co.* v. *United States* (1893) 148 U. S. 312, is pertinent. In speaking of the right to compensation where property is taken, the Court said (at p. 325):

> "It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

The Government's *in terrorem* arguments.

In the prosecution of World War II the Government required private property worth many billions of dollars. It got that property by the constitutional method of paying for what it needed.

The petitioner's brief says that there are approximately 150 claims like those of the respondents, with "an aggregate value estimated to exceed forty millions of dollars" (p. 40). Certainly that number of claims, with that total liability, should not give this Court pause if, as the Committees of the Congress said, Order L-208 "inflicted a sacrifice on the gold-mining industry which the Federal Government in common fairness should try to relieve" (R. 1562).

The Committees also observed that "the great majority of the mine operators affected by the order were the small operators" (R. 1561).

* * * * *

Not limiting itself to the 150 claimants, the petitioner warns against the "staggering financial burden" and discrimination which would result from the application of a rigid constitutional doctrine in these cases (p. 40-44). That argument *in terrorem* should receive short shrift. It rests

on the false premise that Order L-208 was similar to other "L" Orders. It was unique (see above, p. 28-29).

World War II ended more than 12 years ago. *St. Regis Paper Co.* v. *United States* (1948) 110 C. Cls. 271, cert. den. 335 U. S. 815, disposed of any question about claims for the indirect results of proper "L" Orders (see below, p. 87-89). If it had not, the statute of limitations would bar such claims.

The respondents' claims are not for compensation for the indirect results of a proper "L" Order. They are claims for compensation for a direct taking of their property through an Order which was not properly an "L" Order at all.

The petitioner's singular attack on gold mining in the United States and its defense of gold mining in Honduras and other foreign countries.

The petitioner's brief contains sundry rather remarkable comments about gold and gold mining, in this country and abroad.

Later herein (p. 89-95) we answer the contentions made by the petitioner which seem to be based on the premise that gold mining is "noxious". But some general observations are in order at this point.

It is not disputed that the respondents' gold mining operations were "nonessential". However, that was at least equally true of innumerable other operations which were carried on during the war and to some extent encouraged (see above, p. 13). And it would be absurd to say that the respondents' operations or the product of those operations, refined gold, were noxious. Neither the operations nor their product were in any way similar to those which have been treated as noxious by valid Congressional or state legislation.

On the other hand, the contributions made by gold mining should not be minimized. As we show in more detail later (p. 93-95), the Findings set forth that:

(1) The respondents provided splendid working and living conditions for their employees.

(2) The operations supported the communities where they were located. In particular, two communities in South Dakota with total populations of 16,000 were totally dependent on the mine of one of the respondents.

(3) The respondents paid substantial taxes to the states in which their operations were conducted and to the Federal Government.

The petitioner's brief says (p. 8):

> "The gold industry was singled out for particularly restrictive treatment because gold was not of importance to the war effort, yet its production consumed material in short supply, badly needed by essential nonferrous metal mines (R. 69)."

The nonessential gold mines could not be justly "singled out", for a taking without compensation, simply because their product was "not of importance to the war effort". That was true of countless other products (see above, p. 13).

The assertion that they were singled out because the production of gold "consumed material in short supply, badly needed by essential nonferrous metal mines" is refuted by the Findings, as well as by the record (see above, p. 11-13; see below, p. 95-97). That was the *pretext* for L-208 as set forth in the preamble; it was not the real reason. The petitioner's citation to the record is one of many examples that can be found in the petitioner's brief of citations which do not afford the slightest support for assertions which are made in the petitioner's brief.[25]

While gold mining was shut down in the United States (including Alaska), it was encouraged by the WPB in several foreign countries (Finding 49, R. 106):

[25] The petitioner's citation (R. 69) is to a memorandum written in ***December, 1941.*** The problem of the acquisition of critical materials by the gold mines was solved by ***March 2, 1942*** (see above, p. 11-13), and Order L-208 was not issued until ***October 8, 1942.***

> "Prior to the issuance of L-208, and afterwards until the end of the war, critical materials, machinery and equipment subject to allocation and control by WPB were shipped in substantial quantities to foreign countries for use in their gold mining industry. These countries included South Africa, Canada, Honduras, Nicaraugua and Columbia, in all of which gold mines continued to operate throughout the war."

At the October 6, 1942 meeting of the WPB, at which Order L-208 was agreed upon, there was discussion of gold mining in South Africa, Honduras and Canada (Finding 41, R. 100-101). Two sentences from the minutes of that meeting, dealing respectively with an area in this country and with Honduras, are especially interesting:

> "Lead and Deadwood, South Dakota, with aggregate populations of 16,000 are *totally* dependent on the mine's operations."
>
> * * * * *
>
> "The basic industries of Honduras are the cultivation of bananas, of which exportation to the United States has been reduced to 20 percent of normal, and gold mining."

We have no wish to raise any issue about the shipments of critical materials, machinery and supplies to Honduras and other foreign countries. But the petitioner's brief is notably silent about the devastating effects of L-208 in the United States and Alaska, at a time when gold mining was being supported in Honduras.

The justice of the respondents' claims.

The principal theme of the petitioner's brief is that the respondents' claims are unjust.

The outstanding fact about these cases is that the tribunals, legislative and judicial, which have had the responsibility of ascertaining the facts and the time to do

so, have come to the unqualified conclusion that a failure to compensate the operators of the nonessential gold mines would be most unjust.

* * * * * * *

The Senate and House Committees on the Judiciary both adopted in 1952 the conclusion which had been reached in 1946 by the Subcommittee of the House Committee on War Claims, after full hearings,[26] that Order L-208 "inflicted ruinous costs on the gold mining industry"—a "sacrifice on the gold-mining industry which the Federal Government in common fairness should try to relieve" (see above, p. 40-42).

The reference in the petitioner's brief to the Judiciary Committee of the Senate is one of the many remarkable features of the brief. After saying that the respondents "belittle the constructive accomplishments of L-208", the brief adds (p. 65) "The gold mining industry as a whole, as could be expected, concurs in this view (R. 1547) as do *the political representatives of gold mining states* (R. 1524-1534)." At the cited place in the record the Court will find a Report of the *Judiciary Committee of the Senate* issued on February 22, 1949 to accompany S. 45 of the 81st Congress 1st Session.[27] The Senate Judiciary Committee Report, much of which was later incorporated in the 1952 Committee Reports from which we quoted in our statement of the case (see above, p. 40-42), said, among other things:

> "The conclusion further has been reached that the order should have provided a mechanism for compensation and that, as such was not provided, the Congress should so provide, even while realizing that much of the loss and damage is irreparable."

The Chairman of the Committee on the Judiciary was Senator McCarran of Nevada. It is nonetheless remarkable

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[26] See above, p. 28, Note 3.

[27] S. 45 did not pass.

for the petitioner's brief to refer (p. 65) to the *entire* Senate Committee as "the political representatives of gold mining states".

* * * * *

The petitioner's brief says that the Court of Claims made "a particularly myopic appraisal of the results of L-208" (p. 53). But the brief fails to set forth what the Court found or to give anything even remotely approaching a fair summary of the bases for its Findings. And the record leaves no doubt that the Court of Claims reached its conclusions after a most thorough and fair-minded analysis of the evidence and the arguments.

As we have shown above (p. 7-9), the history of the claims under L-208 establishes that the Court of Claims was prepared to indulge every reasonable presumption in favor of the Government.

After the facts had been proved and the cases had been argued before the Court of Claims, the Court decided that the respondents had sustained what it had described as "a most difficult burden" *and it is evident from the Court's opinion that the majority was profoundly impressed that the respondents' claims are just.*

The comparison with other War losses and other suffering.

In many places the petitioner's brief develops the theme that the losses sustained by the respondents under Order L-208 were inevitable war losses for which no compensation should be awarded. But we submit that there is no rule of law or justice which requires or permits an indiscriminate grouping of all war losses as inevitable and not compensable.

Those who sustained monetary losses or suffered personally in the War as a result of price ceilings, the freezing of wages or the draft shared their parts of common burdens imposed by regulatory systems which were deemed

necessary to win the War. Those regulatory systems were administered with a view to their several objectives, as fairly as could be expected and without discrimination.

If a man who was entitled to Selective Service exemption was denied that exemption, it was no answer to say to him that other men had been inducted into the Service.

It was and is part of our Constitutional system that if property be taken by the Government, in war or in peace, just compensation must be paid. If land is taken for an army camp, if a ship is taken for the transportation of ammunition or food, or if any other property is taken for any other war purpose, the owner is entitled to compensation.

Indeed, in many instances where property is taken during a war, the compensation allowed will be the greater because of factors for which the war is responsible. Nothing of that kind is involved here because the War did not result in any increase of the price of gold.

The respondents' mines were not shut down as a consequence of the application of a general regulatory system for the control of critical materials. Their mines were "singled out" for one reason only: because the Government wanted to have those particular mines stand idle in the hope that hardrock miners employed in them would go to the nonferrous metal mines.

The guiding principle.

We believe that the applicable principle was stated by Mr. Justice Douglas, dissenting, with the concurrence of Mr. Justice Black, in *United States* v. *Caltex (Philippines) Inc., et al.* (1952) 344 U. S. 149, 156,[28] which involved the destruction by the Army of the respondents' terminal facilities in Manila at the time of the Japanese attack on Pearl Harbor, in order to keep them from falling into the hands of the enemy:

[28] Cited in the petitioner's brief at pages 18, 30-31.

> "It seems to me that the guiding principle should be this: Whenever the Government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss."

Of course, we do not contend that this statement in a dissenting opinion is binding on the Court, but we think that it is consistent with this Court's holdings over the years. The decision of the majority in *Caltex* rested on the ground that the destruction during a war of property which is about to fall into the hands of an enemy is analogous to the destruction of property to prevent the spread of a fire or of a contagious disease. *Caltex* did not establish any general proposition that the Government may destroy or otherwise take property during a war and escape liability for compensation on the broad ground that war entails sacrifices. On the contrary, *Caltex* represents an exception to the general rule that compensation must be paid if property be taken, an exception based upon the fact that the Caltex property in Manila was about to fall into the hands of the Japanese.

Order L-208 singled out a limited number of corporations and individuals who were thousands of miles from any theatre of operations and directly deprived them, for a period of 2½ years, of their right to produce and sell gold. Their mines were useless for any other purpose. No other property owners were similarly deprived of their property right to make any beneficial use of what they owned. The respondents have as just a claim for the taking of their property as any other citizen whose property was taken during the War.

II

BY DISREGARDING ESSENTIAL FINDINGS OF FACT OF THE COURT OF CLAIMS AND IN OTHER RESPECTS THE PETITIONER IS SEEKING TO RAISE QUESTIONS WHICH WERE NOT SET FORTH IN THE PETITION FOR CERTIORARI OR FAIRLY COMPRISED THEREIN.

IN ANY EVENT, THE SCOPE OF THIS COURT'S REVIEW OF JUDGMENTS OF THE COURT OF CLAIMS IS A LIMITED ONE.

THIS COURT MAY RESORT TO THE OPINION OF THE COURT OF CLAIMS, IF NECESSARY, FOR CLARIFICATION OF ANY FINDINGS.

As we have set forth at pages 6-7 above, the Court of Claims made very full Findings of Fact, covering the background, purpose, provisions and effects of Order L-208. The Court's judgment and Findings of Fact followed a vigorously contested litigation over a period of years.

The petitioner's brief presents the case virtually as if the Court of Claims had made no Findings at all. The *only* mentions of *any* Finding of Fact which we have located are two references at pages 67 and 68 to the last sentence of Finding 47 (R. 106). Innumerable assertions are made which are in direct conflict with explicit Findings; subjects which were disposed of by Findings are treated as if they were completely open; and Findings are "edited" so that their sense is changed and then used "without credit" (see above, p. 9-10).

The petitioner's brief, taken as an entirety, is an attack on all of the ultimate Findings, although it is not presented as such.

By disregarding essential Findings of Fact of the Court of Claims and in other respects the petitioner is seeking to raise questions which were not set forth in the petition for certiorari or fairly comprised therein.

Rule 23 of the Rules of this Court provides:

> "1. The petition for writ of certiorari shall contain in the order here indicated—
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> * * * * *

> "(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

See *General Talking Pictures Corp.* v. *Western Electric Co.* (1938) 304 U. S. 175, 177-178.

In the petition for certiorari, the petitioner prefaced its Statement by saying (p. 3):

> "The pertinent facts *as found by the Court of Claims* may be summarized as follows:"

All references to the record were to the Findings of Fact of the Court of Claims.

The statement of the facts which followed gave no hint that the petitioner intended to present the case in this Court as if the Court were the original trier of the facts and as if the petitioner's only obligation were to present such facts, suppositions and theories as it thinks may be helpful to its defense.[29]

The basic questions now presented by the petitioner's brief necessarily relate to the adequacy of the Findings of the Court of Claims and the support in the record therefor. Unless the petitioner challenges the Findings there was no occasion for it to make the kind of presentation which it has made.

Questions as to the adequacy of the Findings of Fact of the Court of Claims and the support therefor in the record

[29] The petition did imply, in its statement of the questions presented, that L-208 was issued in "order to conserve scarce war materials" as well as "to bring about the voluntary relocation of manpower to vital mining activities" (p. 2), but it did not otherwise suggest any disagreement with the Findings of Fact of the Court of Claims.

were not "set forth in the petition or fairly comprised therein."

* * * * *

The statement of the questions presented in the petition for certiorari (p. 2-3) and the statement of the question presented in the brief on the merits (p. 2-3) are significantly different. The differences will be found in the opening paragraphs.

1. The brief on the merits states that one of the purposes of L-208 was "*to divert mining machinery and equipment to essential wartime enterprises*" and that "as amended" the order "prohibited the sale or disposition of mining machinery and equipment without the permission of the War Production Board" (p. 2). Everything which we have just quoted is new. On the other hand, the brief omits this sentence which was in the petition for certiorari (p. 2):

> "The Order contained no provision for routing the scarce war materials held by the mine owners to the more urgent users of such materials."

The purpose of the changes made by the brief on the merits is to try to pave the way for the petitioner's arguments about the two amendments of L-208 which were adopted on November 19, 1942 and August 31, 1943 (see above, p. 35-36, and Appendix A hereto, p. 58-65). No argument based thereon had *ever* been made previously (id.).

The petitioner's arguments about the two amendments clearly present a question which was not "fairly comprised" within the petition for certiorari.

2. The Government in its brief on the merits now says that Order L-208 was issued "to bring about the voluntary relocation of manpower to vital mining activities *and essential war work*" (p. 2). The words we have italicized are new; the other words quoted were in the statement of the "Questions Presented" in the petition for certiorari.

Having thus attempted to open the door to a new point that Order L-208 was intended "to bring about the volun-

tary relocation of manpower to * * * essential war work" *other than mining*, the petitioner's brief argues that the WPB was motivated by "the expectation that a sizable number of laborers released by a further restriction of the gold mining industry would be diverted to the nonferrous metal mines *as well as other essential industries*" (p. 8-9), and bases part of its argument on this latter point (p. 68-69; see Appendix A hereto, p. 86-87).

This new contention conflicts with the Findings of Fact of the Court of Claims (Appendix A, p. 33-39) and with the record (Appendix A, p. 70-73, 86-87).

* * * * *

The differences between the single question which the petitioner now presents (p. 2-3) and the two questions which were stated in the petition for certiorari (p. 2) may be summarized as follows:

The petitioner's brief now argues (p. 58-61) that Order L-208 had four purposes, which are mentioned in the statement of the "Question Presented" (p. 2).

(1) "to conserve scarce war materials",

(2) "to divert mining machinery and equipment to essential wartime enterprises",

(3) "to bring about the voluntary relocation of manpower to vital mining activities", and

(4) "to bring about the voluntary relocation of manpower to * * * essential war work".

Of these four alleged purposes, the petition for certiorari referred only to (1) and (3).

Alleged purpose (2), involving "mining machinery and equipment", was brought into the case in the petitioner's brief with Priorities Regulation No. 13 and two amendments of Order L-208, none of which was mentioned in the Court below or adverted to in the petition for certiorari (see above, p. 35-36, 60; Appendix A, p. 58-68).

Alleged purpose (4) was also not referred to in the

petition for certiorari; it was brought in at the last minute, in the teeth of the Findings of the Court of Claims and the record (see above, p. 17, 60-61; Appendix A, p. 33-39, 70-73, 86-87).

The preamble to the Order (R. 102) which the petitioner quotes (p. 58) mentioned only alleged purpose (1). The implication in the preamble was definite that the Order was "deemed necessary and appropriate in the public interest and to promote the national defense" because of "*a shortage in the supply of critical materials* for defense, for private account and for export, *which are used in the maintenance and operation of gold mines*".

The Court of Claims found that the only real purpose of the Order was (3), viz., to try to bring about what the petitioner calls "the voluntary relocation of manpower to vital mining activities" — in other words, to use the contemporaneous expression of the purpose, to maneuver hard-rock miners to the nonferrous metal mines (see above, p. 13-18; Appendix A, p. 34-39).

After introducing contentions relating to two new alleged purposes of Order L-208 and thus blurring the sharp issue, which was stated in the petition for certiorari, as to the purpose of the Order—an issue decided as a matter of fact by the Court of Claims in favor of the respondents (see above, p. 13-18; below, p. 95-97)—the petitioner's brief ranges over the whole record, and into the fields of speculation and imagination, in an effort to retry these cases on the facts in this Court, with reference to all four of the alleged purposes of the Order and substantially without regard to the Findings of the Court below.

Indeed, as a consequence of the introduction of the two new alleged purposes of Order L-208, the range of the petitioner's assertions and arguments on matters of alleged fact is much broader than the factual presentation which the petitioner made before the Commissioner or the Court of Claims.

In any event, the scope of this Court's review of judgments of the Court of Claims is limited.

The scope of this Court's review of judgments of the Court of Claims is set forth in Note 4 to the opinion in *United States* v. *Penn Foundry & Manufacturing Co., Inc.* (1949) 337 U. S. 198, 207-208. As a convenience, we set forth that Note in full just as it appears, without any quotations except those in the Note itself. Except as indicated in our Note 30, the emphasis was supplied by the writer of the opinion, Mr. Justice BURTON:

> The scope of our review of judgments of the Court of Claims is a limited one. The early practice and rules are discussed in *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 536-540. At the time of all the proceedings in the Court of Claims in the instant case, the authority of this Court to review causes upon petition for a writ of certiorari was set forth expressly in the Act of February 13, 1925, c. 229, 43 Stat. 939, § 3 (b), as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752, which became 28 U. S. C. § 288 (b). It provided:
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> "(b) In any case in the Court of Claims, . . . it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.
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> "In such cases the Supreme Court shall have authority to review, in addition to other questions of law,

errors assigned to the effect *that there is a lack of substantial evidence to sustain a finding of fact;*[30] *that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue.*" (Emphasis supplied.)

The foregoing expressly controlled the practice until repealed by the new Judicial Code, effective September 1, 1948. The new Code, 28 U. S. C. § 1255, said merely:

"Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted on petition of the United States or the claimant; . . ."

The Reviser's Notes to that Section said:

"Provisions for authority to review, in addition to other questions of law, 'errors assigned to lack of evidence to sustain a finding of facts; that an ultimate finding or findings are not sustained by findings of evidentiary or primary facts; or that there is a failure to make a finding of fact on a material issue,' *were omitted as unnecessary.*" (Emphasis supplied.) H. R. Rep. No. 308, 80th Cong., 1st Sess. A107 (1947).

This Court may resort to the opinion of the Court of Claims, if necessary for clarification of any Findings.

In *United States* v. *Wells* (1931) 283 U. S. 102 this Court said (p. 120-121, footnotes omitted):

"It is evident that the court did not consider the statements in its opinion, which we have quoted, as

[30] The words "that there is a lack of substantial evidence to sustain a finding of fact" were not italicized by the Court at 338 U. S. 207.

additional findings of fact, but as an argument with respect to the conclusion to be drawn from its findings. *In its opinion, the court was summarizing what it considered to be the effect of its findings, and no useful purpose would be served in returning the case for a specific finding that the motive which impelled the decedent to make the transfers was precisely that which the court has thus definitely stated.*"

In *American Propeller Co.* v. *United States* (1937) 300 U. S. 475, the Court said (p. 479-480, footnote omitted):

> "While it is true that this court is not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings, the rule is not absolute and does not preclude reference to the opinion for all purposes whatsoever. It is well established that in case of ambiguity, extrinsic aid may be sought in order to settle the meaning of a statute or a contract. *We see no reason why the principle of that rule does not permit reference to the opinion of the court in order to clarify the meaning of a finding otherwise in doubt.*"

See also *United States* v. *Penn Foundry & Manufacturing Co., Inc.* (1949) 337 U. S. 198, at page 209.

III

THE COURT MAY CONCLUDE THAT THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

In the petition for certiorari the Government told this Court that the Court of Claims had "erroneously decided an issue of unusual constitutional importance in the twilight zone between non-compensable regulation and compensable takings" (p. 7.). It was certainly indicated that the issue presented was one of law, not one of fact.

The petition for certiorari summarized "the pertinent

facts as found by the Court of Claims", with citations to the Findings (p. 3-7).[31]

On the other hand, the petitioner's brief on the merits ignores the Findings of Fact almost as completely as if they had never been made, and presents a story which is in conflict with every important ultimate Finding, with many of the subsidiary or evidentiary Findings, and with the record as a whole (see above, p. 9-10).

At the same time the petitioner has changed the statement of the "Questions Presented", which it made in the petition for certiorari (p. 2), in the hope of opening the door to arguments that L-208 was intended (1) "to divert mining machinery and equipment to essential wartime enterprises", and (2) "to bring about the voluntary relocation of manpower to * * * essential war work" other than nonferrous mines (see above, p. 60-62).

It would take anyone who was not intimately familiar with the Findings of Fact of the Court of Claims and the other proceedings herein (including the petition for certiorari) many days to select such scattered portions of the petitioner's brief as do not involve either (1) a disregard of the Findings of the Court of Claims or (2) a departure from the petitioner's statement of the "Questions Presented" in the petition for certiorari.

The petitioner's arguments on points of law are predicated on the petitioner's version of the facts (expanded by

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[31] The only suggestion in the petition that the petitioner might challenge any of the Findings was in the first sentence of the section entitled "Questions Presented", where it was implied that L-208 was issued in order "to conserve scarce war materials" as well as "to bring about the voluntary relocation of skilled manpower to more vital mining activities" (p. 2). But since the Statement of the case purported to refer only to the "pertinent facts as found by the Court of Claims" (p. 3), no one who was not thoroughly familiar with the case would have suspected that the reference to conservation of "scarce war materials" (p. 2) might indicate an intention to challenge any of the Findings of Fact of the Court of Claims.

the petitioner's new statement of four alleged purposes of L-208) rather than on the Findings of the Court of Claims.

Under similar circumstances this Court has dismissed writs of certiorari as improvidently granted. *Houston Oil Co. of Texas, et al.* v. *Goodrich, et al.* (1918) 245 U. S. 440; *Southern Power Co.* v. *North Carolina Public Service Co.* (1924) 263 U. S. 508. See also *Rice* v. *Sioux City Cemetery* (1955) 349 U. S. 70.

IV

ORDER L-208 EFFECTED A TAKING WHICH IS COMPENSABLE UNDER THE FIFTH AMENDMENT.

Under the above heading, we will consider the first of the questions presented (see p. 5 above).

The purpose, nature and effects of Order L-208.

Our analysis of the consequences under the Fifth Amendment of the issuance of Order L-208 will be based on the following premises as to the purpose, nature and effects of the Order, all of which are established by the Findings of Fact and opinions of the Court of Claims or are conceded in the petitioner's brief:

1. The operators of the "nonessential" gold mines, about 150 in number, were "singled out" by a unique Order.[32]

2. That Order directly deprived them of their right to make any beneficial use of their mines, under penalty of fine or imprisonment, so long as the Order was in effect.[33]

3. The Order was issued by the WPB at the instance of the Army and the War Department.[34]

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[32] See above p. 13-18, 28-29, 49-50.

[33] See above p. 26-27.

[34] See above p. 22-26, and Appendix A p. 25-33.

4. The WPB was an agency of the President (Appendix D, p. 8) and the Order was approved and ratified by the President.[35]

5. The potential acquisition of critical materials by the nonessential gold mines had been eliminated seven months before the issuance of the Order, and the Order was not intended to have any relation to the allocation of critical materials.[36]

6. The Government did not requisition the critical materials, machinery and equipment in the mines which were closed down, and the Order was not intended to, and did not, allocate such critical materials, machinery and equipment to essential industries.[37]

7. The only real purpose of the Order was to "maneuver our manpower"—that is, to maneuver to the nonferrous metal mines some of the hardrock miners who were employed in the gold mines. It was hoped that if the mines were closed down, the hardrock miners who would be thrown out of work would seek and find employment in nonferrous metal mines, even though the latter might be far away and the working conditions unattractive.[38]

8. The order was "not an allocation order."[39]

9. The intent and effect of the Order were exactly the same as if the Army or the WPB had taken over the respondents' mines, discharged their hardrock miners (except those needed for standby operations), and tried to persuade them to go to the nonferrous metal mines.[40]

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[35] See p. 11, 27, 120-122.

[36] See above p. 11-13, and Appendix A p. 6-10.

[37] See above p. 34-37, and Appendix A p. 45-68.

[38] See above p. 13-18, and Appendix A p. 34-39.

[39] See below, p. 95-97.

[40] See below, p. 77-82.

10. During World War II there was no authority for the drafting of civilian labor. Neither the Army nor the WPB could require a hardrock miner at Lead, South Dakota, to go to Butte, Montana, or Climax, Colorado. Nor did the President have any such authority.[41]

11. The President did, however, have the authority to take any interests in the respondents' mines which he thought it necessary to take for any purpose of the War.[42]

12. By Order L-208 the Government exercised as complete a dominion and control over the respondents' rights to the beneficial use of their mines as it would have exercised if members of its staff or officers and soldiers of the Army had gone to the mines and taken physical possession of them.[43]

13. By Order L-208 the Government got what it wanted, since the respondents' hardrock miners were thrown out of work, and some of them did go to work in nonferrous metal mines.[44] It was no fault of the respondents that a relatively insignificant number of hardrock miners went to the nonferrous metal mines for more than transient employment, so that the value of what the Government got was less than it had hoped.[45]

14. There was no other instance where the WPB (or any other agency of the Government) closed down a business in order to have its employees discharged and thrown on the labor market. Nor, so far as we know, has anything of that kind happened at any other time in the history of this country.[46]

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[41] See above p. 18-21.

[42] See below p. 115-120.

[43] See below, p. 71-82.

[44] See above p. 37-39; see below, p. 85.

[45] See below p. 163.

[46] See above p. 28-29, 49-50.

15. Order L-208 was camouflaged in the hope of having it mistaken for an order dealing with the conservation and allocation of critical materials. The main effort of the petitioner's brief is to have the camouflage succeed.[47]

The "property" involved; the taking; and the reason why an issue has arisen as to compensation.

The respondent Homestake was the owner of "patented mining claims" in the Black Hills area of South Dakota near the City of Lead, South Dakota (Finding 54, R. 112). The respondent Central Eureka held the fee of gold-bearing lands at Sutter Creek, Amador County, California (Finding 77, R. 116). The respondent Idaho Maryland was the owner in fee of gold-bearing lands in the Grass Valley Mining District, County of Nevada, in the State of California (Finding 92, R. 120). The mines of the respondent Alaska-Pacific were in the Territory of Alaska; some were held in fee, others by location notices, and still others by a lease and royalty agreement, coupled with a purchase option (Finding 120, R. 127). The respondent Bald Mountain was the owner of gold-bearing lands in Lawrence County, South Dakota (Finding 139, R. 135). The respondent Ermont was the owner of a Quartz Lode Mining Claim in the County of Beaverhead, State of Montana (Finding 162, R. 140).

We will use the term "mines" to denote the respondents' interests in gold-bearing lands (whether fee, leasehold or mining claims), their mills and other surface installations, and their tangible personalty below the ground and on the surface.

In effect, the Government took over the respondents' mines, closed them down (except for the necessary standby operations), forced the discharge of the hardrock miners, and kept the mines idle until the Order was revoked on June 30, 1945.

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[47] See above p. 30-34, and below p. 97-101.

If the Executive had done that by an order which stated what was being taken and which provided "a mechanism for compensation",[48] no actions by the respondents would have been necessary. Moreover, if the Order had stated what was being done but had not provided a "mechanism for compensation", the Government would probably not have questioned the respondents' rights to judgments for compensation in actions under the Fifth Amendment. Difficulties have arisen in these cases only because the Government chose not to say frankly what was being done but camouflaged its action as a regulation of critical materials.

A. Order L-208 deprived each of the respondents of property within the meaning of the Fifth Amendment—the right of the respondent to mine and sell gold during the period when its mine was closed down.

L-208 deprived the respondents of their right to make any beneficial use of their mines while the Order was in effect. By doing so it deprived them of their mining businesses for that period.

The Court of Claims, summarizing its Findings of Fact, said (R. 19):

> "The record establishes that the purpose and intent of WPB in issuing L-208 was to deprive the gold mine owners and operators of the right to use their properties in the only way they could be beneficially used, i. e., to mine and sell gold for a profit, and that this was done in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines."

At R. 35:

> "L-208 was aimed, in all its provisions, directly at the beneficial use of the mining properties of the

[48] See Report No. 1605 of the Judiciary Committee of the Senate (Plaintiff's Exhibit 178, R. 855, 1559, 1570) quoted at pages 41-42 above.

gold mine owners, and the only intention reasonably inferrible from the language of the order itself and the circumstances surrounding its issuance was an attempt to temporarily deprive them of that property right. By the issuance of Order L-208 the defendant prohibited the carrying on of otherwise lawful mining operations and thereby placed a definite servitude on plaintiffs' profitable use of their mines which resulted in a temporary taking of that property right."

At R. 40-41:

"Despite its preamble and the authority cited for its issuance, the language of the order itself and the circumstances surrounding its issuance indicate that neither its purpose nor its effect was to conserve or allocate critical materials, equipment and facilities needed for defense, but was rather to deprive the gold mine owners of their right to make profitable use of their gold mines."

And at the conclusion of its opinion (R. 45):

"We conclude that L-208 by prohibiting the carrying on of otherwise lawful mining operations placed a servitude on plaintiffs' profitable or beneficial use of their mines and thus amounted to a temporary taking of that property right in the case of those mine owners and operators who were forced to close their mines by virtue of their compliance with those provisions of L-208 which prohibited them from using their materials, facilities and equipment to mine gold and which ordered them to close down their mines."

The taking by L-208 was obviously direct and intended, as the Court of Claims found.

The "property right" of each of the respondents which was taken by L-208 was clearly "a legally recognized 'property right'" such as is referred to in the petitioner's brief (p. 27-28).

The right of any of the respondents to extract gold bearing ore from its mine or mines was, of course, the foundation of the respondent's business of producing and selling gold.

It is immaterial that the Government did not take any fee or leasehold interests held by the respondents or any of their patented mining claims. It did take their right to make any beneficial use of what they had, and the Court below so held (R. 19, 35, 40-41, 45). That right was "property" within the meaning of the Fifth Amendment.

The controlling definition of "property" for the purposes of the Fifth Amendment was given by this Court in *United States* v. *General Motors Corporation* (1945) 323 U. S. 373, 377-378:

> "The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: 'nor shall private property be taken for public use, without just compensation,' which conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs.
>
> The critical terms are 'property', 'taken' and 'just compensation'. It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with that lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the

> interest known as an 'estate or tenancy for years', as in the present instance. *The constitutional provision is addressed to every sort of interest the citizen may possess.*"[49]

There can be no question that the right to mine gold-bearing ore and to produce and sell gold therefrom is "property" within the meaning of the Fifth Amendment as thus interpreted.

What Justice Holmes said about the right to mine coal is equally true of the right to mine gold, *Pennsylvania Coal Co.* v. *Mahon* (1922), 260 U. S. 393, 414:

> "As said in a Pennsylvania case, 'For practical purposes, the right to coal consists in the right to mine it.' *Commonwealth* v. *Clearview Coal Co.*, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

The Court of Claims said that Order L-208 placed a definite *servitude* on the respondents' profitable or beneficial use of their mines that amounted to a temporary taking of that property right (R. 35, 45).

Black's Law Dictionary (Fourth Ed., 1951) says, in part, in its definition of the term "servitude" (p. 1535):

> "When the freedom of ownership in land is fettered or restricted, by reason of some person, other than the owner thereof, having some right therein, the land is said to 'serve' such person. The restricted condition of the ownership or the right which forms the subject-matter of the restriction is termed a

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[49] See also *Grand Rapids Booming Co.* v. *Jarvis* (1874), 30 Mich. 308, 320-321 and *City of St. Louis* v. *Hill* (1893), 116 Mo. 527, 533-534. Both cases involved the question whether there had been a taking of private property and both cases defined "property" in terms of the right of a person to use, enjoy and dispose of land or personalty as distinguished from the land or personalty itself.

'servitude,' and the land so burdened with another's right is termed a 'servient tenement,' while the land belonging to the person enjoying the right is called the 'dominant tenement.' The word 'servitude' may be said to have both a positive and a negative signification; in the former sense denoting the restrictive right belonging to the entitled party; in the latter, the restrictive duty entailed upon the proprietor or possessor of the servient land."

3 *Powell on Real Property* says that in Roman law the term "servitude" encompassed, among other things, "the easement proper of the English law" (p. 388-389, Note 31) and, with respect to a negative easement, that (p. 391, footnote omitted):

> "* * * a negative easement consists solely of a veto power. The easement owner has, under such an easement, the power to prevent the servient owner from doing, on his premises, acts, which, but for the easement, the servient owner would be privileged to do."

The Restatement of the Law of Property, Vol. V (1944), defines a negative easement (Section 452; p. 2912):

> "A negative easement assures to the owner thereof a particular use or enjoyment of the land subject to the easement by enabling him to prevent the possessor of the land from doing acts upon it which, were it not for the easement, he would be privileged to do."

In *United States* v. *Dickinson* (1947) 331 U. S. 745, 748 this Court said:

> "*Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.* The Fifth Amendment expresses a principle of fairness and not a technical rule of pro-

> cedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die."

This Court used the term "*servitude*" to describe the nature of the taking effected in *United States* v. *Causby* (1946), 328 U. S. 256, 266-267, where the servitude was imposed by frequent low level flights of military aircraft over the plaintiffs' farm.

In *Peabody* v. *United States* (1913) 231 U. S. 530, this Court had previously used the term "*servitude*" with respect to action which would have deprived the owner of land of its profitable use without any entry by the Government onto the land itself (p. 538):

> "It may be assumed that if the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such *a servitude* would constitute an appropriation of property for which compensation should be made."

To paraphrase what was said in *United States* v. *Dickinson, supra,* inroads were made by L-208 on the respondents' mines "to an extent that, as between private parties, a servitude" would have been acquired.[50] The Government took dominion and control over the mines to the extent of requiring them to remain idle except for standby maintenance.

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[50] In Note 14 (p. 28) of the petitioner's brief it is stated: "Where a constitutional taking is implied, it is assumed that the United States has acquired a definite interest in the property, permanent or temporary, such as • • • an easement, a servitude, • • •."

B. It is immaterial that "the United States took no gold" and that there was no physical invasion of the respondents' mines.

The petitioner's brief says that "Order L-208 took absolutely nothing for the Government in the physical sense" and, after mentioning that there was no requisitioning of materials, machinery or equipment, it adds (p. 45):

> "The United States took no gold; as much gold remained for extraction when the restrictions of L-208 were lifted as when they were imposed."

This argument is so patently fallacious that it seems almost an imposition on the Court to refer to it. There is universal recognition, whether by geologists, by economists or by businessmen, that the present right to operate a profitable mine over a period of time has value, and the fact that the ore is left in the ground and can be extracted later—perhaps a great many years later—does not establish that nothing has been taken from the owner.

* * * * *

The Government emphasizes that there was no physical invasion of the respondents' mines—that neither the WPB, which issued the Order, nor the Army, at whose instance the Order was issued, took physical possession of the mines (p. 17, 27-28). That is beside the point.

The petitioner's argument amounts to this: that there cannot be a taking of a property right which relates to realty or tangible personalty unless the realty is invaded physically or the tangible personalty is taken physically. That argument obviously involves a failure to distinguish between (1) realty and tangible personalty, which are physical things and can be "invaded", and (2) property rights, which are not physical things and cannot be "invaded". Moreover, it is a mere *ipse dixit* of the petitioner, for which no authority is or could be cited.

It is clear that, for there to be a taking of the right

to the beneficial use of a mine, factory or other plant, it is not necessary for the Government physically to invade the mine, factory or plant.

By Order L-208 the WPB, with the approval of the President, exercised complete dominion and control over the respondents' mines. It directed each of the respondents to "close down in the shortest possible time, the operation of [its] mines" (Finding 43, R. 102). The petitioner's statement that "the Government did not otherwise interfere with respondents' exclusive possession and control of the mines" (p. 3) means merely that the respondents were allowed to continue "minimum maintenance to keep mines dewatered and in standby condition" (Finding 41, R. 101; Finding 43, R. 102-103). The real dominion and control was exercised by the Government, not by the respondents.

It is interesting to compare L-208 with what the Secretary of the Interior did by his "Order for Taking Possession" in *United States* v. *Pewee Coal Co.* (1951) 341 U. S. 114, 116:

> "To convince the operators, miners and public that the United States was taking possession for the bona fide purpose of operating the mines, the Government formally and ceremoniously proclaimed that such was its intention. It required mine officials to agree to conduct operations as agents for the Government; required the American flag to be flown at every mine; required placards reading 'United States Property!' to be posted on the premises; and appealed to the miners to dig coal for the United States as a public duty."

Paragraph (b)(1) of Order L-208 constituted as complete an exercise of dominion over the respondents' mines as the Order for Taking Possession in *Pewee Coal Co.* The paragraph contained a direction to "each operator of a nonessential mine" to immediately take all such steps as might be necessary to close down, and to "close down, in

the shortest possible time, the operations of such mine." Both in substance and in form it was the kind of a directive which might have been issued by the Board of Directors of an operating company to the manager of operations. The paragraph was not even worded as a prohibition, restriction or regulation of mining operations—it was a directive to take affirmative action to close down.

The opinion in *Pewee Coal Co.* mentions that the Secretary's order was accompanied by (1) a requirement that mine officials agree to conduct operations as agents for the Government, (2) a requirement that the American flag be flown at every mine, and that placards reading "United States Property!" be posted on the premises, and (3) an appeal to the miners to dig coal for the United States as a public duty. The first of these features had its counterpart in the directive in L-208 that mining operations be closed down; in *Pewee* the formal agreements to conduct operations as agents for the Government were incident to the continuance of operations, and the action of the respondents' mine officials in closing down operations in obedience to the directive in L-208 was not materially different. The appeal to the Pewee Coal Co. miners finds its counterpart in the appeal of the Chairman of the WPB and the Chairman of the War Manpower Commission to the gold miners to transfer to nonferrous metal mines (Appendix A, p. 30; Finding 45, R. 105; Plaintiff's Exhibit 34, R. 430, 1323). The only difference between what happened in *Pewee Coal Co.* and what happened under L-208 is that the operators of the nonessential gold mines were not required to fly the American flag or post placards. Any "invasion" in *Pewee Coal Co.* was purely symbolic.

In *United States* v. *Causby* (1946) 328 U. S. 256, the Court held that flights of military aircraft over a chicken farm near a military airport, which were so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land as a chicken farm, were

as much an appropriation of the plaintiffs' right to the use of the land as a more conventional entry upon it. The opinion discussed the situation which would exist if by reason of the frequency and altitude of the flights the owners of the land could not use it for any purpose and the Government's concession that in that event there would be a taking. The Court said (p. 261-262):

> "We agree that in those circumstances there would be a taking. Though it would be only an easement of flight which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of *complete dominion and control* over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed."

The opinion in *Causby* indicates what is decisive, viz., whether there is an exercise of "dominion and control". Under Order L-208 there was an exercise of dominion and control as complete as that in the hypothetical case put in the *Causby* opinion.

In *Causby* the fact the planes never touched the surface of the land was considered "as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate." When a Government agency issues an order which asserts complete dominion and control over a mine, it is similarly irrelevant whether the taking is accompanied by an entry onto the surface or a descent to the levels at which the ore is being extracted. In the Middle Ages dominion and control ordinarily had to be exercised by physical presence and word of mouth or gesture. In modern days, dominion and control of a mine, factory or plant can be exercised effectively from thousands of miles away.

In *Richards* v. *Washington Terminal Company* (1914) 233 U. S. 546, it was held that the owner of a house near a portal of a tunnel which Washington Terminal Company had built by authority of Acts of Congress, and from which there was a continual emission of gases and smoke, was entitled to compensation on the ground that the resulting depreciation of the value of plaintiff's house amounted to a "taking" of the plaintiff's property.[51] Although the case did not involve any physical invasion of plaintiff's land, this Court said at page 557:

> "Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him."

The burden imposed on the respondents' property rights by Order L-208 was certainly "direct and peculiar and substantial".

Other pertinent decisions are *United States* v. *Welch* (1910) 217 U. S. 333, 339, which was cited by the Court below (R. 31, Note 10; R. 43); *William C. Atwater, Jr.* v. *United States* (1946) 106 C. Cls. 196;[52] and *Edward P.*

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[51] This taking is to be distinguished from the consequential effect of a legalised nuisance, also discussed in *Washington Terminal Company*, which is mentioned in *United States* v. *Causby*, 328 U. S. at p. 262.

[52] In *Atwater* v. *United States*, the plaintiffs were the owners of certain property on Fire Island, New York. The military authorities built a target range near the plaintiffs' property and established a safety zone which included the plaintiffs' property and from which all persons, including the plaintiffs, were excluded during the Government's use of the target range from December 1941 until June 30, 1944. Although there was no actual physical occupation or invasion of the plaintiffs' property, the Court of Claims held that there was a compensable taking because the plaintiffs were denied access to their property. The Court said (p. 207):

> "The land was not damaged; it was merely part of a safety zone. But just compensation is not to be denied the plaintiffs, for there was an actual taking and intent to take, although it took the form only of extinguishing, for the time being, the right of ingress."

Stahel & Co., Inc. v. *United States* (1948) 111 C. Cls. 682, cert. den. (1949) 336 U. S. 951, which was discussed fully in the opinion of the Court of Claims (R. 28-30).

Numerous state courts have also given expression to the rule that "any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a taking, in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed".[53]

Here, at the instance of the Army and War Department, and with the approval of the President (despite a protest from 21 Senators), the WPB directly and explicitly deprived the respondents, under penalty of fine and imprisonment, of the right to make any beneficial use of their mines. The Order was announced to the respondent Homestake by the Under Secretary of War (Appendix A, p. 32). What difference can it possibly make that the Army did not send officers, or the WPB send members of its staff, to symbolize the exercise of dominion which the Order represented?

C. It is immaterial that the Government did not operate the respondents' mines.

In the discussion in the petitioner's brief of what is called "an unintended taking", it is said (p. 28, italics in original): "* * * there must generally be (a) an actual invasion by the Federal Government of private property,

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[53] Quoted from *Stockdale* v. *Rio Grande Railroad* (1904) 28 Utah 201, 211. See also *In re Forsstram* (1934) 44 Ariz. 472, 481; *Nalon* v. *City of Sioux City* (1933) 216 Iowa 1041, 1044; *Webster County* v. *Lutz* (1930) 234 Ky. 618, 620; *Pearsall* v. *Board of Supervisors* (1889) 74 Mich. 558, 561; *City of St. Louis* v. *Hill* (1893) 116 Mo. 527, 533-534; *Forster* v. *Scott* (1893) 136 N. Y. 577, 584; *Miller* v. *Beaver Falls* (1951) 368 Pa. 189, 196; *Philadelphia Appeal* (1950) 364 Pa. 71, 74-75; *Matter of Sansom Street* (1928) 293 Pa. 483, 489-490; *Early* v. *South Carolina Public Service Authority* (1955) 228 S. C. 392, 407-408.

(b) some public *use* of that property, and (c) that *use* must be *by* the United States." The contention in the brief is that the Government did not use the respondents' property.

The petitioner's argument amounts to this: that if a mine, factory or other plant is taken by the Government, compensation need not be paid unless the Government either continues the operation theretofore conducted or commences some new operation. If this were true, it would mean that if the Government took over a related group of five factory buildings, converted three to the manufacture of a new product and left two idle, it would not be deemed to have taken the two. That is, of course, not the law.

In *Kimball Laundry Co.* v. *United States* (1949) 338 U. S. 1, this Court held that when the Army took the Kimball Company's laundry, it also took the Company's "trade routes", although it could not use them. The Court said (p. 13):

> "• • • an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable 'taking' of property. See *United States* v. *General Motors Corp.*, 323 U. S. 373, 378; cf. *United States* v. *Causby*, 328 U. S. 256. If such a deprivation has occurred, the going-concern value of the business is at the Goverment's disposal whether or not it chooses to avail itself of it. Since what the owner had has transferable value, the situation is apt for the oft-quoted remark of Mr. Justice HOLMES, 'the question is what has the owner lost, not what has the taker gained.' *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195."

The taking of the respondents' right to make a beneficial use of their mines, with the directive that operations be closed down, was analogous to a case where the Government takes property and destroys it. This was pointed out by the Court below (R. 43, italics in original):

"That the Government did not make any physical use of the gold mines does not deprive its action of its character of a taking. The Supreme Court has held that *destruction* of private property for a *public purpose* is the equivalent of a *taking* of private property for a *public use*. *United States* v. *Welch*, 217 U. S. 333; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1."

The controlling principle was stated by this Court long ago in its decision in *Pumpelly v. Green Bay Company* (1872) 13 Wall. 166, 177-178:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of public good, which had no warrant in the laws or practices of our ancestors."

So also in *United States* v. *General Motors Corporation* (1945) 323 U. S. 373, 378, this Court said:

"In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has

not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. *Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.*"

When the Government exercised dominion and control over the respondents' mines, it made the use of the mines which it wanted. It so happened that that use consisted of keeping the mining operations idle except for minimum necessary maintenance. However, that was the particular kind of use, although in a sense a negative one, which the Government wanted.

As a consequence of its exercise of dominion and control over the use of the respondents' mines, the Army and the WPB accomplished their objective: the discharge of the hardrock miners. Thus the Government got what it wanted. And it was no fault of the respondents that what the Government got was so disproportionate to the injuries sustained by the respondents, their employees and the communities where their mines were located (see below, p. 103).

D. The cases cited by the petitioner which involved wartime controls of prices, rents, profits and materials are inapplicable.

At pages 32-33 the petitioner's brief cites *Bowles* v. *Willingham*, 321 U. S. 503, *Yakus* v. *United States*, 321 U. S. 414, and *Lichter* v. *United States*, 334 U. S. 742, and also a number of cases in Note 17,[54] all of which involved

[54] The petitioner's Note 17 reads:

"See, also, *Block* v. *Hirsch*, 256 U. S. 135; *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188; *Highland* v. *Russell Car Co.*, 279 U. S. 253; *Wilson* v. *Brown*, 137 F. 2d 348 (Em. Ct. App.); *Taylor* v. *Brown*, 137 F. 2d 654 (Em. Ct. App.), certiorari denied, 320 U. S. 787; cf. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 569-570; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 392-396."

wartime controls of prices, rents or profits. Such controls of prices, rents and profits are in no way analogous to Order L-208.

The legislation authorizing such controls contemplated that those subject to regulation would receive a fair and equitable compensation for their property sold or rented or for their efforts in fulfilling war contracts. The price control legislation called for the fixing of prices which in the judgment of the administrator would be "generally fair and equitable". Cf. *Yakus* v. *United States* (1944) 321 U. S. 414, 420. The rent control legislation contained a similar requirement for the establishment of "fair and equitable" maximum rents. Cf. *Bowles* v. *Willingham* (1944) 321 U. S. 503, 516. The Renegotiation Acts were designed to insure only that profits on war contracts would not be "excessive". Cf. *Lichter* v. *United States* (1948) 334 U. S. 742, 793 *et seq.*[55]

None of the statutes providing wartime controls of prices, rents or profits required the property owners to keep their property idle and nonproductive, preventing them from earning any return at all.

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[55] The petitioner's brief quotes (p. 32) the following sentence from this Court's opinion in *Bowles* v. *Willingham:*

> "A nation which can demand the lives of its men and women in the waging of • • • war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property".

The meaning of what this Court said was not at all what might be supposed by a casual reader of the quotation.

The statement was made by this Court in a discussion as to whether the "generally fair and equitable" standard of the rent control legislation was adequate or whether it was necessary that rentals be fixed, like utility rates, so as to produce a "fair return" on an investment (321 U. S. 516-519). Since the rent control legislation called for "generally fair and equitable rentals", the quoted sentence from the Court's opinion cannot be interpreted to mean that the Government is free, for example, to deprive landlords of *any* return on their properties or to order them to "close down" their properties, without making just compensation.

Moreover, the statutes imposing wartime controls of prices, rents and profits all provided for systems of regulation which were general in their application. Any classifications which they made or authorized were reasonably related to the statutory objectives—to see that prices, rents and profits should not be more than fair and equitable. By contrast, L-208 was not the product of any general system for the control of nonessential industries. The operators of nonessential gold mines were "singled out".

Such wartime controls over prices, rents and profits may have contributed to the closing down of business enterprises but, if and when they did, the closing down was merely a consequence of the control—it was not the purpose of the control. By contrast, the closing down of nonessential gold mines was the direct intended effect of Order L-208, which prescribed that the operator of each such mine "shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time" (R. 102).

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At pages 38-40 the petitioner's brief cites *St. Regis Paper Co.* v. *United States* (1948), 110 C. Cls. 271, cert. den. 335 U. S. 815, *Steuart & Bro.* v. *Bowles* (1944), 322 U. S. 398, and other cases involving losses due to the wartime allocation of materials.

The distinction between Order L-208 and the cases which involve the wartime allocation of materials is made clear by comparing the instant case with *St. Regis Paper Co.* v. *United States*. In that case, which was discussed fully in the opinion below (R. 24-26), the WPB, faced with shortages in the supply of pulpwood needed in essential war industry, issued its Order M-251 prohibiting the consumption, processing and delivery of pulpwood in certain specified areas, except with the specific authorization of the WPB. As a consequence of M-251, which was ultimately found to be a proper and valid regulation of the use of materials

needed in the war effort, the plaintiff's plant was unable to obtain or use pulpwood and was compelled to discontinue manufacturing and selling all bleached and unbleached kraft pulp for a period of more than a year. St. Regis sought compensation in the Court of Claims. That Court dismissed the petition on demurrer and this Court denied certiorari. The Court below pointed out the salient distinctions between M-251 in *St. Regis* and Order L-208 (R. 26):

> "The court held that M-251 did not require the closing of plaintiff's plant nor did it interfere with plaintiff's use of the plant; that on the contrary, the order represented a valid exercise of WPB's admitted power to allocate a scarce material such as pulpwood, and that any injury to plaintiff's profitable use of its plant, or any loss in value of its plant, were merely consequential and therefore did not amount to a taking and were not compensable. The terms of the order itself certainly bore out the court's conclusion since the order merely represented an attempt by the Government to secure all the available supply of pulpwood in the area by freezing the supplies on hand with the owners in the area and immediately placing mandatory orders directing delivery to specified users elsewhere, and by prohibiting the users in the area in question from acquiring any more pulpwood."

In other words, the St. Regis Paper Company plant closed down, under the direction of the St. Regis Paper Company management, as a result of inability to obtain pulpwood. Since the WPB's Order M-251 controlled the allocation of pulpwood, the closing of the St. Regis plant may be said to have been a result of M-251. But the closing of the St. Regis plant was not an objective of the order; it was merely a consequence of a proper regulation of the use of materials needed in the war effort.

In the *St. Regis* opinion the Court of Claims emphasized that (110 C. Cls. p. 279):

> "This does not mean, however, and the petition does not purport to so charge, that it was the Board's objective to shut down plaintiff's plant. It did not issue its General Preference Order No. M-251 to accomplish such an end."

By contrast, under L-208 the nonessential gold mines were closed down by direction of the WPB which was contained in an Order that had no relation to the allocation of critical materials (see above, p. 13-18, 29-37; see below, p. 95-97; Appendix A, p. 34-39).

E. Gold mining was not a "public evil", subject to suppression on that account.

The petitioner's brief relies heavily (p. 33-36) on decisions which upheld the wartime prohibition of liquor traffic by the Federal Government in World War I (*Hamilton* v. *Kentucky Distilleries Co.* (1919) 251 U. S. 146; *Jacob Ruppert* v. *Caffey* (1920) 251 U. S. 264), and on cases sustaining prohibitions by the states of the use of property for purposes determined by state legislatures to be injurious to the health, morals or safety of the community.[56] All such cases involved statutes designed to suppress a public evil.

The principle of the cases arising out of the exercise of the police power by the states is summarized in the paragraph from the opinion in *Mugler* v. *Kansas* (1887) 123 U. S. 623, 669, which the petitioner has quoted (p. 35-36):

> "The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the

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[56] *Mugler* v. *Kansas* (1887) 123 U. S. 623 (liquor prohibition); *Powell* v. *Pennsylvania* (1888) 127 U. S. 678 (sale of oleomargarine); *Lawton* v. *Steele* (1894) 152 U. S. 133 (prohibition against maintaining fishing nets on state waters); *North American Storage Co.* v. *Chicago* (1908) 211 U. S. 306 (diseased poultry); *Miller* v. *Schoene* (1928) 276 U. S. 272 (destruction of disease-bearing trees).

> existence and safety of organized society, cannot be burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, *by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.* The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."

In *Hamilton* v. *Kentucky Distilleries Co., supra,* the potential evil of liquor traffic was recognized to the point that the plaintiff conceded that the Congress might temporarily regulate or forbid the sale of liquor "in order to guard and promote the efficiency" of the armed forces and defense workers (251 U. S. at p. 155). In *Jacob Ruppert* v. *Caffey, supra,* it was "assumed" that the war need demanded the immediate discontinuance of the manufacture of malt liquors (251 U. S. at p. 302).

Relying on these cases, bearing upon the right of a lawmaking body to prohibit a noxious use of property, the petitioner makes the untenable argument that gold mining was subject to suppression by the WPB.

In this connection the opinion of the Court of Claims said (R. 42-43):

> "The only circumstance under which the Government may escape the obligation to pay for property which is destroyed or taken by the authorized action of its agents, is where, in time of war, that property is inherently dangerous, or is being used in such a manner as to clearly endanger the public safety. *Hamilton* v. *Kentucky Distrilleries Co.,* 251 U. S. 146; *United States* v. *Caltex,* 344 U. S. 149.

> Gold mines which did not possess a serial number under WPB Order P-56 because they did not produce significant amounts of critical metals in addition to gold, were determined by WPB to be 'nonessential,' but we know of no precedent which would justify our holding that a nonessential industry or business was, *ipso facto,* one endangering the public safety in time of war. That such an industry could be regulated, and strictly regulated in wartime, is unquestioned, and resulting losses are not compensable if the action taken is truly regulatory in nature. But the power to regulate a nonessential but nondangerous industry in wartime is not the power to destroy, and limitation is not the equivalent of confiscation."

During World War II other nonessential industries were allowed and even encouraged to continue with the help of the WPB's policy of allowing limited priority assistance to such industries for maintenance, repair and operating supplies in order that dislocation of the civilian economy be avoided (see above, p. 13). The reason why the gold mining industry was singled out had nothing to do with the nature of gold mining as an occupation or with the nature of gold itself.

In the cases cited in the petitioner's brief, the determinations that products, occupations or activities constituted public evils were made by the Congress or by the state legislatures. Whether or not power to make such a determination could have been delegated to the President or to the WPB, certainly no power to determine that gold mining was noxious was delegated.

Moreover, neither the WPB nor the President made any such determination. Order L-208 was not issued on the theory that gold mining or gold was a public evil.

The petitioner says (p. 36, footnote omitted):

> "* * * that the power of a nation at war to restrict or to prohibit the use of property because, in the judgment of those whose responsibility it is to deter-

> mine, the use impairs or its non-use contributes to the war effort, is no less extensive than the power of the state to impose similar restrictions upon property in the name of the health, morals, or safety of the community."

If the foregoing statement is meant to be applicable to this case, it seems to imply that, *without any enabling statute,* (a) the President, or such agency as he may designate, has in time of war the unqualified power to restrict or prohibit, at will, the use of any property which the President or the agency may choose, (b) a property owner is to have no recourse if the restriction or prohibition is necessary in the judgment of the authority which decides upon the restriction or prohibition, and (c) the Fifth Amendment to the Constitution must be subordinated to any such determination. No President of the United States has ever asserted such a power.

* * * * *

In view of the foregoing, further comments about gold mining and gold may be superfluous; but a brief reply to certain suggestions in the petitioner's brief seems in order.

Two pages about the Congressional powers over gold conclude with an acknowledgment that the national power under the coinage authority of the Constitution is not involved in these cases (p. 46-48). We are concerned, not with gold as money or a commodity, but with gold mining.

However, there seem to be hints in the petitioner's brief that there is something noxious about gold. The brief seems to liken it to liquor or beer, quotes passages which use such terms as "peculiar" and "noxious" and speaks of the petitioner's use of their property as "detrimental to the public interest" (p. 33-36). But we cannot believe that the Government, which itself has purchased all the gold produced in the United States for more than two decades, would argue that the metal itself is noxious.

Moreover, gold mining in the United States and Alaska has made contributions the importance of which should not be minimized.

As to the largest of the gold mines affected by L-208, the Court of Claims found (Finding 66, R. 114):

> "The working conditions at Homestake and the living conditions in the communities surrounding Homestake in 1942 were superior to those at the nonferrous metal mines to which the Government sought to transfer the Homestake miners. Homestake employees enjoyed free medical and hospital services, group insurance, pensions, recreational facilities, and many of the older miners owned their own homes."

In a memorandum dated September 9, 1942, which was sent by the Chief of the Miscellaneous Minerals Branch of the WPB to the Deputy Director General for Industry Operations (Finding 27, R. 85-90), the dependence on the gold mines of the "old established mine employees", of the communities and of some of the states was pointed out[57] (R. 87-88). As to the communities and employees the memorandum said (R. 88):

> "Losses in county and municipal taxes will be felt much more severely by the communities in the vicinity of the mines. In this respect, shutting down mining operations is not comparable with shutting down other industrial operations in communities where enterprise is diversified; in the West it is generally true that the mine is the sole major source of income for local communities. For example, it has been reported that the Homestake Mining Company pays 65 percent of the local com-

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[57] The petitioner's Appendix A quotes a 9-line paragraph from this memorandum (p. 98), but makes no reference to the paragraphs quoted above or to a statement in the memorandum of the purpose of the proposed shutdown of the gold mines (see Appendix A, hereto, p. 15-18).

munity taxes and 50 percent of the county taxes; that the wage earners and those servicing them pay the balance largely from the $4,500,000 in annual wages paid by the company. At least 19,000 people, the population of the county, are directly or indirectly dependent upon its operation.

For reasons stated in the last paragraph, hardships faced by old established mine employees will be severe. There is virtually no possibility of converting the facilities at the mines to war work."

The Court of Claims found (Finding 50, R. 106-107) that on and prior to October 8, 1942, "officials of WPB who were responsible for the issuance of L-208 knew"

"* * * (7) that in many instances the communities in the vicinity of gold mines were entirely dependent upon the operation of the mines for their continued prosperity; (8) that the deeper mines were likely to deteriorate and become flooded if closed down, and that many operators would not be able to afford the cost of keeping their mines safe and accessible or their machinery, equipment and buildings in repair during a long period of unproductivity."

As to Lead, South Dakota, and that state, the Court found (R. 115-116):

"71. The closing of the Homestake mine pursuant to Order L-208 had far-reaching and drastic repercussions in the city of Lead and the surrounding communities. The population declined sharply, more than 750 homes and apartments were left vacant and boarded up, and 36 business establishments which had served the communities were left vacant.

72. In the years immediately prior to the issuance of Order L-208, the State of South Dakota received about $1,000,000 per year, or approximately ten per cent of its annual revenues, from Homestake. The State was deprived of this source of revenue by the order closing the gold mines."

Of course, operators of gold mines contributed many millions a year in income taxes to the Federal Government (cf. R. 1233).

Nevertheless, within the Government there was some hostility to the mining of gold and a belief in some quarters that "a reduction in gold mining should be envisaged for the post-war period" (R. 1176). Whether, and if so to what extent, that feeling contributed to the forces which resulted in the issuance of Order L-208, it is impossible to tell. Certainly neither the WPB nor the President adopted the policy that there should be a reduction in gold mining in the postwar-period.

Nor did either determine that gold mining was a public evil.

F. The Court of Claims found as a fact that Order L-208 was not a regulation.

In the petition for certiorari this Court was told that these cases presented "an issue of unusual constitutional importance in the twilight zone between a non-compensable regulation and compensable takings" (p. 7).

It is perfectly clear that L-208 was ***not*** a regulation, and the Court of Claims so found as a fact.

While L-208 recited that there was "a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of the gold mines", it was not the purpose of Order L-208 to deal with any such alleged shortage. The only real purpose of the Order was to close down the non-essential mines, throw the hardrock miners on the labor market and try to maneuver them to the nonferrous metal mines. Furthermore, the Order was not reasonably adapted to function as a critical materials regulation.

What we have just said is abundantly supported by the Findings of Fact of the Court of Claims, particularly Findings 46, 47, 48, 49, 50 and 51 (R. 105-107).

The fundamental issue between the majority of the Court of Claims, on the one hand, and Chief Judge Jones, on the other hand, was whether the only real purpose of Order L-208 was to close the gold mines so as to maneuver hardrock labor to the nonferrous metal mines and the Order was not a critical materials measure at all, as the majority held, or whether the direction in paragraph (b) (1) of the Order that the mines be closed down should "be considered as mere surplusage" and the balance of the Order sustained as a valid critical materials regulation, as the Chief Judge thought. This becomes entirely clear on an analysis of Chief Judge JONES' dissenting opinion (R. 58-61) and a comparison of the views expressed by the Chief Judge with those in the majority opinion (R. 12-45).

Judge LARAMORE wrote (R. 61):

> *"The majority opinion points out that L-208 was not an allocation order, as it purported to be, but rather was clearly an order closing gold mines deemed nonessential to the war effort;* i.e., those mines whose gold production in dollar value exceeded 30 percent of their total production."

Judge LARAMORE's opinion, read as a whole, shows that he agreed with the majority that "L-208 was not an allocation order, as it purported to be", so that there was in effect, therefore, a 4-to-1 vote that L-208 was not an allocation order: and that vote was consistent with the Findings of Fact agreed upon by the majority.

We submit that *it was a question of fact—predominantly, if not exclusively—whether or not L-208 was an allocation order; that that question of fact was decided against the petitioner by the Court of Claims; and the Findings of the Court of Claims are abundantly supported by the evidence.* If there were any doubt that it was primarily, if not exclusively, a question of fact whether L-208 was "an allocation order", that doubt would be resolved by a read-

ing of the petitioner's brief, which is an attempt to retry the facts in the hope of establishing that the Order was an allocation order.

V

THE CAMOUFLAGE OF ORDER L-208 CANNOT AVAIL THE PETITIONER AND DID NOT CONVERT A TAKING INTO A REGULATION.

If Order L-208 had set forth the purpose and intent of the Order frankly in the preamble and the citation of authorities, and had omitted the superfluous references in paragraphs (b)(2) and (b)(3) to "any material, facility or equipment", it would have been entirely clear that there was a taking under the Order and the Government would presumably not have contested the right of the respondents to just compensation.

The preamble and other features of Order L-208 were camouflage.

We have already dealt so fully with the only real purpose of Order L-208, and with the camouflage in the Order (the preamble, paragraphs (b)(2) and (b)(3), and the citation of authority), that it would be an imposition on the Court to go over the same ground again (see above, p. 13-18, 30-34; Appendix A, p. 33-68).

While the Court of Claims did not use any such expressions as "camouflage", "pretext" or "window dressing", its Findings could have only one meaning even without the confirmation provided by the Court's opinions (see above, p. 30-34). The opinions point up the only conclusion which can be drawn from the Findings.

We have just quoted, at page 96, the portion of the opinion of Judge LARAMORE, dissenting, which shows that there was no doubt in the minds of any of the Judges of the Court of Claims as to what was meant by the decision

of the majority, i.e., that Order L-208 was not what "it purported to be".

Moreover, the petitioner's brief expressly concedes *that the Court of Claims concluded "that L-208 was not devised for the purpose of conserving or allocating materials"* (p. 53). This concession is, of course, tantamount to an acknowledgment that the Court of Claims found that L-208 was not devised for the purpose for which the preamble said that it was devised.

That Court had previously pointed out that the respondents had "a most difficult burden" to sustain in proving the allegations of their petitions. *Idaho Maryland Mines Corp.* v. *United States* (1952) 122 C. Cls. 670, 689. And certainly it was no light task to establish that the preamble and other provisions of an Order of the importance of L-208 were camouflage. But that is exactly what the respondents did establish.

In saying that the Order was camouflaged, we have not the remotest idea of reflecting on the patriotism, integrity, character or personal motives of the Chairman or any members of the WPB, or any of the others in authority, such as General Somervell, who made their influence felt.

It is unnecessary to try to decide what consideration was given to the preamble and the camouflage features of Order L-208. The question is not *why* they were included in the Order, but *whether* they are to serve successfully as camouflage.

The camouflage of the Order cannot succeed.

The petitioner says (p. 61) that "it is settled that if executive action is justified by a lawful purpose, it is not rendered unlawful by the motive of those responsible for the action even if that motive were otherwise illegal" and that "the motives of WPB in issuing the order were

proper ones". This contention has no relevancy. The judgment of the Court of Claims is based on the conclusion that Order L-208 was issued for "a lawful purpose"—in order to take the respondents' property in the hope that hardrock miners would seek and obtain employment in the nonferrous metal mines. It has not been held, and the respondents did not argue, that the Order was "unlawful".

Certainly the Court of Claims was not bound by the statement of the WPB, in the preamble of L-208, that the Order was being issued because of "a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines". The Court was not required to accept as a fact what the evidence before it showed conclusively was not the fact.

Throughout this litigation the Government has recognized that there was a justiciable issue as to the purpose of the Order.[58]

An inquiry into the purpose of the Order is not an inquiry into motives, in the sense that anyone is trying

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[58] The Commissioner made a finding that, while the dominant purpose of L-208 was "the releasing of mine labor", another purpose was "as stated in the preamble" (R. 7-8). The respondents objected to so much of the finding as set forth that one of the purposes of the Order was "as stated in the preamble that the fulfillment of the requirements for the defense of the United States had created a shortage in the supply of critical materials which had been used in the maintenance and operation of gold mines" (Appendix A, p. 34). The Government was satisfied with the Commissioner's finding as to the purposes of the Order, and the Defendant's Exceptions and Brief, filed November 5, 1954, contained a long narrative at the conclusion of which the Commissioner's finding was quoted with evident satisfaction (p. 380-405). There was no contention that the Court of Claims had no power to determine the purpose of the Order.

In the petition for certiorari the statement of the questions presented started by assuming that the Order had two purposes, of which one was that stated in the preamble and the other the labor purpose (p. 2). In the petitioner's brief on the merits the statement of the question presented starts with the assumption that the Order had four purposes (see above, p. 61-62).

to disclose any secret or personal considerations which motivated those who were responsible for Order L-208. The questions decided by the Court of Claims were simply these: *What was Order L-208 intended to do? What did it in fact do?*

An inquiry as to the purpose (or purposes) of Order L-208 is obviously proper because the Order on its face raises the issue which was stated in the petition for certiorari, i.e., whether it provides for a non-compensable regulation or a compensable taking (p. 7). Paragraph (b)(1) reads like a taking. The same thing is true of paragraphs (b)(2) and (b)(3) except perhaps for the references therein to "any material, facility, or equipment". On the other hand, the preamble, the references in paragraphs (b)(2) and (b)(3) to "any material, facility, or equipment" and the citation of authorities are mentioned in support of the view that the Order was "an allocation order". Chief Judge JONES, who concluded that the Order was an allocation order, reached that conclusion only as a result of treating (b)(1) as surplusage and misreading (b)(2) and (b)(3) (see Appendix A, p. 42). If it was necessary for the Chief Judge to go that far to reach the conclusion that the Order was an allocation order, it certainly was permissible to show, and for the Court of Claims to find as a fact, that it was not an allocation order.

It is unnecessary to make any extended argument in support of the proposition that *the use of camouflage in a preamble or elsewhere in an order which effects a taking cannot deprive the order of the character of a taking or defeat a claim for just compensation.* This Court, and the judiciary of this country generally, have consistently respected the division of powers which our Constitution commands and have been most careful to be sure that no inquiry as to the purpose of any Executive action shall result in an infringement on the prerogatives of the Executive. But the Fifth Amendment commands that if prop-

erty be taken by the Executive just compensation be paid. There is no need of argument to establish the correctness of what the Court of Claims said in denying the motion for a rehearing (R. 145), that the *Government cannot "escape the obligation of paying just compensation for what it had the authority to take and in fact took, simply by calling its action of taking a 'priorities order' or an 'allocation order'".*

VI

ORDER L-208 WAS NOT WELL ADAPTED TO MANEUVER HARD-ROCK MINERS TO THE NONFERROUS METAL MINES AND WAS A PRACTICAL FAILURE.

The petitioner's brief says that the Court of Claims held "that the issuance of L-208 in order to divert manpower to essential nonferrous mines was, in effect, ill-conceived, unwise and unsuccessful" (p. 53). That is a fair summary of the Court's Findings on this subject.

We have already quoted the ultimate Findings of the Court of Claims (see above, p. 38-39), and the subject is covered in detail at pages 68-92 of Appendix A hereto.

The WPB acted "without any justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines" (Finding 51, R. 107). There was an almost incredible statistical confusion until correct statistics were finally obtained seven days before the Order was issued, and then the correct statistics were apparently disregarded (Appendix A, p. 70-73). A basic defect of L-208 as a manpower measure was that it was not "directed at the known reasons for the shortage of underground workers in the nonferrous metal mines, i.e., low wages, bad working and living conditions, and the refusal of Selective Service to defer miners" (Finding 50, R. 107). Many of the hard-rock miners were "middle-aged men with families who

owned their own homes and would not leave their communities if any alternative were possible" (Finding 50, R. 107; see also Finding 47, R. 106). Consequently they could not be "maneuvered" to distant nonferrous metal mines (see above, p. 19-20, 37-39).

When the Under Secretary of War announced the issuance of L-208 to the President of the Homestake Mining Company, which is located at Lead, South Dakota, his telegram spoke of copper and molybdenum and solicited assistance in getting the gold miners at Lead, South Dakota, to go to "the Anaconda copper mine at Butte, Montana, and the Climax Molybdenum mine at Climax, Colorado, both about 500 miles from the Homestake mine" (Appendix A, p. 32; Finding 60, R. 115). The difficulties in "maneuvering" the miners from Lead doubtless included not only the distances to Butte and Climax, but the altitude at Climax, the highest mine in North America, which is about 11,000 feet above sea level. Fifty-one Homestake employees accepted employment at Climax but 41 stayed less than six months and only 6 remained as long as one year (Finding 69, R. 115).

As to all workers referred to Climax from all of the gold mines, Dr. Wilbur A. Nelson's Report of April 30, 1943 set forth (Plaintiff's Exhibit 52, R. 545, 1352, 1353-1354):

> "The Climax Molybdenum Company had 125 workers from the gold mines, referred to them, and at present, according to Mr. Coulter of that company, have only 10 of these workers on their payroll. They had 60 workers from the gold mines come to their mine. Six of them failed to pass the physical examination, and 44 of them have since then quit working for this company."

Doubt as to the wisdom of the close down of the gold mines was expressed within the WPB before L-208 was

issued (Appendix A, p. 74-75, 78). When the Vice Chairman of WPB finally obtained the correct statistical data, he urged further study, saying that a close down "will produce very serious economic dislocations, and the total possible gain in men is a small figure" (Finding 38, R. 99).

But the die was cast. At least five times[59] between September 15 and October 6 the Army or the War Department spoke up in no uncertain terms, not to make sure that the correct facts were ascertained or that there was an analysis of the objections to the close down made within the WPB, but only to express impatience, to demand action, and finally at the October 6 meeting of the WPB to say that "failure to stop gold production immediately would be inexcusable" (see above, p. 22-26).

Actually only about 100 hardrock miners went from the gold mines to the nonferrous metal mines and remained there for more than a year (Finding 47, R. 106). The petitioner's contention, that the Finding of the Court of Claims on this point was arbitrary, is frivolous (Appendix A, p. 91).

It was no fault of the respondents that more impressive results were not obtained. The respondents did what they could to further the objective of the Order (Finding 56, R. 112; Plaintiff's Exhibit 99; R. 438, 1495, 1496-1497). The Order was a practical failure because it was "ill-conceived".

The petitioner's brief suggests that it is irrelevant "that, as an instrument for diverting manpower to nonferrous metal mines, L-208 failed of its purpose" (p. 65).

We wish to make it unmistakably clear that in our view the respondents' right to compensation is in no way de-

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[59] Finding 30, R. 93; Finding 36, R. 98; Finding 39, R. 99; Finding 40, R. 99-100; Finding 41, R. 101.

pendent upon the showing that Order L-208 failed of its labor purpose. Indeed, if the Order had succeeded in bringing about a large increase in the number of hardrock miners and a proportionate increase in the production of the needed nonferrous metals, the benefits which the Government derived from the Order would have been that much greater and its reluctance to compensate the respondents for the taking of their property might perhaps not be so great. However, we do not agree that it is immaterial that L-208 was "ill-conceived, unwise and unsuccessful".

In the first place, the evidence and the Findings completely dispose of the bold assertions in the petitioner's brief that the Order was issued "on the basis of repeated and careful studies, and after other expedients had been tried and had failed" (p. 16, 25). The *only* careful study of the situation was undertaken on October 1, 1942, seven days before the Order was issued; it showed that the number of hardrock miners in the gold mines which would be closed down was approximately 896,[60] as compared with the assertion by the representative of the WPB's Labor Division on October 1, 1942 "that there were between 10,000 and 12,000 men who were then employed in the gold mines" and the unexplained statement by the Under Secretaries of War and the Navy on October 5, 1942 that there "were two thousand to three thousand hard-rock miners engaged in gold mining". The smaller of the two figures given by the representative of the WPB's Labor Division was more than *eleven times* the correct figure. It is fantastic to assert, in the face of the record on this and many other points, that the WPB acted "on the basis of repeated and careful studies".

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[60] Of whom about 300 would be needed for standby maintenance, so that only about 600 would be available if "all could be induced to go into other mines" (Finding 37, R. 98-99). Actually, as appears from Findings 47 and 52, quoted above, only about 100 hardrock miners went into nonferrous mines and remained there for a year or more.

The petitioner is not content with its reference to "repeated and careful studies", but sponsors a broad endorsement of L-208 (p. 56):

> "Viewed, as it must, in a wartime context, there can be small room for doubt as to the necessity and justification for L-208."

Certainly the Findings of Fact of the Court of Claims dispose of the petitioner's endorsement of the Order.

Moreover, those Findings point up a feature of L-208 which should not be overlooked. *The Order represented the first and only time in the history of this country when the Executive has taken dominion and control of a business activity and closed it down in order to throw labor on the market in the hope of channelling that labor to other employment. It was a practical failure for the reason that such a method of trying to "maneuver" men was ill-conceived and unlikely to be successful.* It was particularly unlikely in the case of the hardrock gold miners because of the special factors which are referred to in the Findings of the Court of Claims. But even if those factors had not been present, the question would certainly arise as to the soundness of trying to recruit skilled employees as was done by L-208. *It cannot be doubted that the taking of the respondents' property under L-208 was a unique and regrettable episode, most unlikely ever to be repeated.*

VII

THE GOVERNMENT CANNOT ESCAPE ITS OBLIGATION TO PAY COMPENSATION ON THE GROUND THAT THERE WAS A LACK OF AUTHORITY TO TAKE THE RESPONDENTS' PROPERTY.

The petitioner's Point II is that "There was no intention, or authority, on the part of WPB to take the respondents' property or business" (p. 69-71). The dissenters below expressed views on that subject quite differ-

ent from those advanced by the petitioner. We will discuss both the arguments made by the petitioner and the views expressed by the dissenters below.

The Government raised no question as to the authority for the Order until more than 4 years after the respondents' actions were started.

It was not until after the decision of the Court of Claims in the respondents' favor on February 20, 1956 that the Government first raised, in its motion for a new trial, a question as to the authority for Order L-208.

The respondents' actions had been pending for more than four years: motions to dismiss had been denied; testimony had been taken over a period of more than four months; the Commissioner's Report had been issued; exceptions and briefs thereto had been filed; argument had been had before the Court of Claims; supplemental briefs had been filed; and the Court's decision had been handed down.

The Court below said in denying the Government's motion for a new trial (R. 145, italics in the original):

> "It should be noted that this is the *first* occasion in this lengthy litigation on which the Government has taken the position that it lacked authority to take plaintiffs' [respondents'] property. • • • It would seem that as a defense 'lack of authority to take', if there was any such lack of authority, which we think there was not, should have been raised and supported at an earlier stage."

What Mr. Justice HOLMES said for this Court in *International Paper Co.* v. *United States* (1931) 282 U. S. 399, 406, is particularly apt:

> "*The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary [of War] was au-*

thorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that, if any technical defect of authority had been pointed out it would have been remedied at once. *The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late.* We shall accept as sufficient answer the reference of the petitioner to the National Defense Act * * * [39 Stat. 166, 213], giving the President in time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation."

In the brief of the Government in *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952) 343 U. S. 579, this statement by Mr. Justice HOLMES was cited as authority for the proposition that the Government could not change its position that the order in *Sawyer* was valid. The Government's brief in *Sawyer* said (p. 70-71):

"A further word should also be said as to the practical probabilities of plaintiffs' not having a remedy in the Court of Claims. Government counsel have assured them and the courts that, if an injunction is not issued, no objection will be raised to the Court of Claims' jurisdiction on the ground that the taking was invalid. *The Pewee case shows that this is not an idle promise, but established Government policy.* It is certainly not to the plaintiffs' interest to raise the point of validity in the Court of Claims. Their sole fear is that future Government counsel will make such a defense or that present counsel will change their position. But if that should happen, the courts have a ready answer in the pungent

words of Mr. Justice HOLMES in *International Paper Co.* v. *United States*, 282 U. S. 399, 406 * * *."

We will now discuss the arguments advanced in the petitioner's Point II, and also what was said in the dissenting opinions below.

A. The arguments advanced in the petitioner's Point II are plainly untenable.

The petitioner's Argument relates to (1) the asserted intent of the WPB not to take the respondents' property and (2) the extent to which the President delegated his authority to the WPB. The brief does not contain any discussion of the authority of the President, although it acknowledges that he approved L-208 (petitioner's brief, p. 21, 55).

The WPB clearly intended to do just what it did— take the respondents' property rights. The fact that it purported to act under its allocation authority is immaterial in determining the legal effect of its action.

The petitioner contends that the "WPB never had any intention to 'take' respondents' property or business for public use"; that the "WPB was acting solely under the allocation authority it possessed, by delegation from the President, under the Second War Powers Act", and that it was functioning solely in the field of "regulation, not of eminent domain"; and that the Court below "so recognized in its opinion on rehearing (R. 143)" (p. 69).

None of these contentions is sound.

The WPB certainly intended to do what in fact it did. And as we have shown, what it did amounted to a taking under the Fifth Amendment.

The petitioner's wish to avoid the constitutional effects of what the WPB did cannot change the character or consequences of its actions.

There is no finding below as to what powers the WPB thought that it was exercising when it issued L-208. The Government adduced no evidence on that subject. The record shows that in May, 1943 claims for compensation by the operators of the nonessential mines were expected. On May 24, 1943, Edward H. Rott, Deputy Administrator of L-208, wrote in a report to the Administrator (Plaintiff's Exhibit 13, R, 857, 1292, 1300):

> "The magnitude of the effect of this order is very great, with but extremely limited accomplishment. *The losses entailed by all mines through forced closing under Order L-208, promptly became potential claims for post war adjustment.* Those claims are cumulative."

The Court below did not find, and we cannot say, that Mr. Rott's memorandum of May 24, 1943 establishes that the WPB expected claims for compensation when it issued L-208. The record does not show whether or not it expected claims on the ground that the Order effected a taking. But there is no evidence that it was advised that claims on that ground could not be sustained.

The Government's brief relies on what appears on the face of L-208, particularly the preamble (petitioner's brief, p. 58-61). But the preamble was a camouflage (see above, p. 30-34, 97-98).

The argument that the WPB was acting solely under its allocation powers and functioning solely in the field of "regulation" is equally untenable. The WPB *purported* to act under its allocation authority but in fact and in law its action constituted a taking.

The petitioner's contention is reminiscent of that advanced by the Government in *United States* v. *Pewee Coal Co.* (1951) 341 U. S. 114, where the coal mines were seized

pursuant to the President's Executive Order dated May 1, 1943. The order there cited no specific statutory authority but relied generally upon the powers of the President as Chief Executive and as Commander-in-Chief. The Government contended that since the President did not purport to act under Title II of the Second War Powers Act (56 Stat. 176, 177), the "limited take-over of the coal mines for a restricted purpose" could not be deemed an exercise of the Government's eminent domain power.[61] None of the members of this Court agreed with that contention.

Nor did the Court of Claims conclude that the WPB was "functioning solely in the field of regulation", as the petitioner seems to suggest (p. 69). In its opinion on the Government's motion for a new trial, the Court below did point out that it had not held that the "WPB purported or intended to exercise any of its several requisitioning powers" and had held that the WPB purported to act

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[61] The Government's argument was as follows (brief of the Government in *United States* v. *Pewee Coal Co.*, p. 42-43):

> "Further evidence that the executive branch did not view the limited take-over of the coal mines for a restricted purpose as in the nature of a Fifth Amendment taking is the failure to rely on any federal statute implementing the eminent domain power. At the time of the 'seizure', Title II of the Second War Powers Act (56 Stat. 176, 177) was in effect, empowering the departments and agencies of the Government, upon authorization by the President, 'to acquire by condemnation, any real property, temporary use thereof, or other interest therein * * * that shall be deemed necessary, for military, naval, or other war purposes.' This statute authorized temporary takings of 'interests in realty normally purchased by private persons.' *United States* v. *Westinghouse*, 339 U. S. 261, 262. Nevertheless, the President's authorization to take possession of the coal mines nowhere invoked this or any other statute pertaining to the exercise of the Government's eminent domain power, but, rather, relied generally upon his powers 'as President of the United States and Commander-in-Chief of the Army and Navy.' (R. 10)."

under its allocation powers (R. 143). It went on to say, however (R. 145):

> "The court held that what WPB said it was doing and what it in fact and law did, were two different things and that the Government could not escape the obligation of paying just compensation for what it had the authority to take and in fact took, simply by calling its action of taking a 'priorities order' or an 'allocation order'."

The petitioner's brief does not cite the relevant statutes and in Point II of its brief no reference is made to the admitted fact that Order L-208 was issued "with the approval and at the urging of the War Department, and was approved by the President".

As to the "authority" for the taking, the petitioner's brief considers only "the allocation authority [the WPB] possessed, by delegation from the President, under the Second War Powers Act" (p. 69). The petitioner would treat as decisive the WPB's citation in Order L-208 of the authority for the Order (R. 104-105). But that citation of authority was merely one of the trappings of the Order, designed to make the Order appear as an allocation Order (see above, p. 30-34, 97-98).

It is immaterial what powers were delegated by the President to the WPB. The petitioner's brief says (p. 21):

> "L-208 was issued upon the unanimous recommendation of the War Production Board, with the approval and at the urging of the War Department, and was approved by the President."

And at page 55:

> "The decision to issue L-208 was made upon the unanimous recommendation of the WPB (R. 101) and with the approval and at the urging of the War Department (R. 99, 101). Upon its issuance, L-208 was, in effect, approved by the President (R. 107)."

Since the President approved L-208, the action of the WPB must be regarded as duly authorized unless it is established that the President had no power to authorize the taking of the respondents' property. The petitioner's brief says nothing whatever about the authority of the President.

The discussion of the statutes in the petitioner's brief is most incomplete and uninformative.

Under the heading "Statutes and Regulations Involved" at pages 3-4, the only statutory provision cited in connection with what happened in 1942 is the last sentence of Section 2(a)(2) of **Title III** of the Second War Powers Act, 56 Stat. 176, 177, which will be found at the end of Appendix C to this brief (p. 11). While that sentence from Title III of the Second War Powers Act is quoted at page 3 of the petitioner's brief, it is not discussed in the Point in the brief relating to the WPB's authority except for the naked statement at page 69 already quoted.

The petitioner's brief discusses three statutes, Section 9 of the Selective Service and Training Act of September 16, 1940, the Act of October 10, 1940 and the Act of October 16, 1941, and argues that "the particular property that respondents claim has been taken—*viz*, the right to mine gold—does not fall within the terms of these acts" (p. 70). No reference whatever is made to the other statutes which were quoted in the Appendix to the respondents' brief in opposition to certiorari, and which are quoted again in Appendix C to this brief and discussed below (p. 114-120), including particularly **Title II (not Title III)** of the Second War Powers Act.

The final paragraph in the petitioner's Argument (p. 70-71) seems to relate solely to the formal delegation of authority to the WPB, and thus the approval of the War Department and the President's approval and ratification of Order L-208 are again disregarded.

On page 70 of the petitioner's brief five cases are cited in connection with the proposition that "In absence of the legal authority to take or requisition, it is clear that the Government may not be held liable if a taking occurs." None of the cases concerned a wartime taking effected by an agency of the President, which was approved and ratified by the President. They are discussed below (p. 122-125).

B. On no theory can the Government escape its obligation to pay compensation on the ground that Order L-208 was unauthorized.

Judge LITTLETON discussed the authority for Order L-208 at length in his opinion for the Court below (R. 35-43).

Judge LARAMORE expressed the opinion "that the President lacked[62] the constitutional power and statutory authority to close these mines and, therefore, the unauthorized closing could and should have been enjoined" (R. 61).

Chief Judge JONES said (R. 60):

> "The President had neither the constitutional power nor the statutory authority to close the mines directly. It is probable that as a legal matter the enforcement of that part of the order which directed the closing of the mines could have been enjoined. However, in wartime that is not a very practical remedy because it puts any individual or company in the position of hindering the war effort."

Thus to some extent the Chief Judge agreed with Judge LARAMORE, although he thought that in wartime a suit for an injunction "is not a very practical remedy".

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[62] This word appears as "lack" in the record (R. 61). It was correctly given as "lacked" in Appendix A to the petition for certiorari (p. 50).

Statutes and Executive Orders.

Appendices C and D set forth, fully or in pertinent part, the statutes and Executive Orders which are relevant in considering the powers of the President with respect to critical materials, manpower and the taking of property, and the extent to which the President's powers had been formally delegated to the WPB by October 8, 1942.

The range of the President's powers with respect to critical materials and the taking of property of all kinds was very broad, and the Court below was correct in saying (R. 41):

> "By October 1942, Congress had conferred upon the President authority to requisition, place mandatory orders for, or take for title or for use, any real or personal property or interests therein which he deemed necessary to successfully prosecute the war. These statutes left the determination of war necessity to the absolute discretion of the President, but they required the payment of just compensation for any property taken or used. Congress also authorized the President to take possession of factories or other business establishments and to operate them if it was deemed by him to be in the interests of the national defense to do so."

The principal statutes which the Court evidently had in mind are the following:

(a) Section 120, National Defense Act of 1916, 39 Stat. 213 (Appendix C, p. 1);

(b) The Act of March 4, 1917, 39 Stat. 1192 (Appendix C, p. 2);

(c) Title II, Second War Powers Act, approved March 27, 1942, 56 Stat. 177 (Appendix C, p. 9).

Section 120 of the National Defense Act of 1916 authorized the President to place mandatory orders with a company for any product or material of the kind usually

produced or capable of being produced by such company and to take over the company's plant upon its refusal to comply with such an order (Appendix C, p. 1).[63] This statute was held to afford sufficient authority for the World War I taking involved in *International Paper Co.* v. *United States* (1931), 282 U. S. 399, 406, discussed above at pages 106-107.

The Act of March 4, 1917 authorized the President to "requisition and take over for use or operation by the Government any factory, or any part thereof" and the word "factory" was defined to include "any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard" (Appendix C, p. 2). This authorized the President to "requisition and take over for use and operation by the Government" any of the respondents' installations on the surface which were required in the production of refined gold.

Title II of the Second War Powers Act authorized the "Secretary of War, the Secretary of the Navy, or *any* other officer, *board,* commission, or governmental corporation *authorized by the President" to acquire "any real property, temporary use thereof, or other interest therein, * * * that shall be deemed necessary, for military, naval, or other war purposes"* (Appendix C, p. 9). It is difficult to imagine more comprehensive language covering all manner of interests in real property.

The Court below correctly held "that L-208 by prohibiting the carrying on of otherwise lawful mining operations placed a servitude on the plaintiffs' profitable or

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[63] Section 9 of the Selective Training and Service Act of 1940, 54 Stat. 892 (Appendix C, p. 3), which is referred to in the petitioner's brief (p. 69-70), was substantially identical with Section 120, National Defense Act of 1916, except that it authorized the President to act through the head of the War Department or the head of the Navy Department. The powers under both statutes were specifically delegated to the WPB (Executive Orders Nos. 8629, 9024, 9040, Appendix D, p. 1-2, 8-9, 9-10).

beneficial use of their mines'' and that that ''amounted to a temporary taking of that property right'' (see above, p. 71-76).

L-208 and the respondents' obedience to the Order had exactly the same effect as if the respondents had granted the Government a negative easement over their mines by agreeing not to operate them so long as L-208 was in effect. What the Government got by the Order was clearly ''an interest'' in real property. Indeed, while L-208 was in effect the Government's interest in the respondents' mines was much greater than the respondents' interest in them. The Government's interest in the mines enabled it to keep them idle, except for necessary standby operations. The respondents had only the privilege of continuing, at their own expense, ''minimum maintenance to keep the mines dewatered and in standby condition'' (Finding 41, R. 101; Finding 43, R. 102-103).

When the Government acquired a servitude over the respondents' mines, it did so for a ''war purpose'' within the meaning of Title II of the Second War Powers Act. True, the purpose was not that stated in the preamble of the Order. It was, nevertheless, a war purpose, i.e., to obtain the discharge of the hardrock miners so that at least some of them could be maneuvered to the nonferrous metal mines where they would produce critical materials. The Government cannot escape liability because L-208 was not well adapted to accomplish that war purpose, or because its accomplishments were disappointing (see above, p. 103).

Title II specifically mentioned several alternative methods of taking an interest in real property: (1) purchase, (2) donation, (3) other means of transfer, and (4) condemnation (Appendix C, p. 9).

Manifestly, the statute had two objectives: *first*, to enable the Government to obtain whatever the President might consider necessary in the war effort, and, *second*, to insure that those whose property was taken (and not

donated) would receive either an agreed price for the property or judicially determined compensation.

As to the first purpose of the statute, the legislative history is clear. At 88 Cong. Rec. 1645 (February 25, 1942) Representative Hobbs, a sponsor of the statute, explained its provisions:

> "Mr. Keefe. Will the gentleman address himself to the provisions of title II, especially lines 16 and 17? I am not quite sure that I understand the gentleman's position as to exactly what that language means where it states that the Government may acquire by condemnation any real property, the temporary use thereof, or other interest therein.
>
> "What is contemplated in the event the Government seeks to condemn the temporary use of real estate or personal property or seeks to condemn some undefined, illusory other interest therein? What is meant by the language of that statute, so that we shall know what we are voting for? I confess to be ignorant on that.
>
> "Mr. Hobbs. I think the language is so strong as to make the gentleman's question one that should be answered, but I have not the time in which to do it. *I will say this, that as far as that goes, and its scope is almost unlimited, in the face of this national emergency and toward the winning of the war, we are willing for our Government to take any rights that they may need for the prosecution of this war.* If under your land there be underlying deposits of tin, the Government ought to have the right to take it. *If there be any other mineral rights, any other water rights, or any rights at all that are necessary for the winning of this war, then the Government ought to have the power to take such rights.*"

In considering the scope and effect of Title II, it is, of course, fitting to bear in mind the principle which was summarized by John W. Davis in his argument for the petitioner in *International Paper Co.* v. *United States* (1931) 282 U. S. 399, 401:

> "The extent of a statutory authorization is not to be narrowly or unnecessarily restricted, where the circumstances warrant giving to the words used a wider scope, in order fully to carry out the purpose of the legislation. This is particularly true of a wartime authorization granted to the President as commander-in-chief of the armed forces, or to an agency of the Government acting in the interests of the national defense. *Manufacturers' Land & Imp. Co.* v. *Emergency Fleet Corp.*, 264 U. S. 250, 255."

The decision cited by Mr. Davis, *Manufacturers Land & Improvement Co.* v. *United States Shipping Board Emergency Fleet Corp.* (1923) 264 U. S. 250, 255, is an apt example of the spirit evidenced by the courts in interpreting legislation relating to war powers which is "intended to be susceptible of practical application in varying situations". Pertinent decisions of lower courts are *In re Inland Waterways, Inc.* (D. C., D. Minn., Fifth Division, 1943) 49 F. Supp. 675, 677; *Brown* v. *Bernstein et al.* (D. C., M. D. Penn., 1943) 49 F. Supp. 728, 731-732; *United States* v. *Russell-Taylor, Inc.* (D. C., E. D. Mich. S. D., 1946) 64 F. Supp. 748, 752.

There being no doubt as to the President's powers under Title II of the Second War Powers Act, it is unnecessary to consider the scope of his powers as Commander-in-Chief during a war. See *United States* v. *McFarland* (C. C. A. 4, 1926) 15 F. 2d 823, 826; *Alpirn* v. *Huffman* (D. C. Neb. 1943) 49 F. Supp. 337, 340-341; *In re Inland Waterways* (D. C. Minn. 1943), 49 F. Supp. 675, 677. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952) 343 U. S. 579, 611-613.

As to the second objective of the statute, which was to insure that those whose property was taken would receive either an agreed price or judicially determined compensation, unless they donated the property,

it is true that the WPB did not follow one of the procedures prescribed by the statute. But it is the respondents, not the Government, who have a standing to complain on that account. By Order L-208 the Government was in fact able to take the respondents' property even though the WPB did not follow one of the prescribed procedures. The Government got what it wanted (see above, p. 85). Because the WPB did not follow one of the prescribed procedures, the respondents were left to recover their compensation by a suit against the Government instead of obtaining either an agreed price or just compensation fixed in a condemnation proceeding. Only the respondents can complain of that.

If the WPB, by authority of the President, had agreed with the owners of the gold mines that the mines should be shut down and that the Government should pay compensation to be calculated under an agreed formula, Title II would have been followed strictly and there could be no complaint on the part of either the Government or the respondents; there would have been a "purchase" of an interest in the mines, expressly contemplated by the statute, and both the Government and the respondents would have been properly protected. The WPB's action in taking the respondents' property without providing compensation for the respondents *at the time of the taking* cannot relieve the Government of the responsibility of paying just compensation later.

Hurley v. *Kincaid* (1932) 285 U. S. 95 establishes that the Government is liable for a taking, if one is authorized, even though it does not follow the procedure provided in the statute authorizing the taking. That was a suit by a landowner to enjoin the Government, the Secretary of War, the Chief of Engineers and the Mississippi River Commission from carrying out a flood control plan which the plaintiff claimed constituted a taking of his property. The Mississippi River Flood Control Act, enacted by Congress in 1928

(45 Stat. 534), authorized the Government agents involved to condemn property needed for the execution of the plan. The plaintiff contended, however, that the Government agents were acting illegally since they had not brought condemnation proceedings to take over his property. In denying the injunction sought by the plaintiff, this Court said (p. 104):

> "If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 658; *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 600; *Tempel* v. *United States*, 248 U. S. 121, 129; *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U. S. 280, 283. The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires. Nor is it material to inquire now whether the statute does so require. For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law."

No question survives as to the formal delegation of the President's powers to the WPB, since the action of the WPB in issuing Order L-208 was approved and ratified by the President.

We have already quoted at page 111 above the acknowledgments in the petitioner's brief that Order L-208 was "approved by the President".

The WPB itself was an arm of the Executive Office of the President, established within the Office for Emergency Management (Appendix D, p. 8).

Whether or not the President knew of the decision to issue the Order at the time when that decision was made—and it seems hardly conceivable that he did not—the issuance of the Order was vigorously called to the President's attention on October 10, 1942, two days after the Order was issued, by 21 United States Senators from 12 gold-producing Western States in a detailed written protest (Finding 52, R. 107-111). The protest pointed out the many hardships the Order would entail. It emphasized the negligible benefits which the Order could be expected to achieve as a labor measure and contrasted those benefits with the injuries which the Order would impose. It drew attention to the fact that Great Britain was stimulating the production of more gold in South Africa and that the Canadian Government was doing the same thing in Canada. It concluded by saying (R. 110-111):

> "We respectfully bring this matter to your attention with the request that you stay the order made by the War Production Board affecting the gold mine operations of the United States, at least until the whole subject of marshalling of manpower and the allocation of labor may be considered, and the vital questions involved, concluded; thus that the gold mining industry of the United States may not be subjected to unwarranted and unusual hardship and injury which may not eventually be considered necessary, and which may not be equitably borne by other industries."

The President's disposition of the protest of the 21 Senators was succinctly stated by former Senator Gurney of South Dakota, who was one of the 21: they "got turned down" (R. 526).

The petitioner's brief twice acknowledges that the President's rejection of the protest constituted an approval of the Order[64] (p. 21, 55).

The cases cited by the petitioner do not support its contention that the Government can escape liability.

Hooe v. *United States* (1910) 218 U. S. 332, involved a claim by a landlord for the rental of premises which were used by the Civil Service Commission. The statute which provided for quarters for the Commission put a *specific limit* on the rental and the Congress had refused to increase the appropriation for the rental although requested to do so. The landlord knew of the limitation which had been imposed by Congress This Court pointed out that an attempt had been made to bind the Government "to pay a sum in excess of that *limited by Congress*" (p. 334).

In *United States* v. *North American Co.* (1920) 253 U. S. 330, an Army General, acting on his own authority, seized the plaintiff's property in Alaska. His action was later approved by the Secretary of War, who had the statutory authority to take the property for an Army post: The question presented which involved the statute of limitations, was when the plaintiff's claim accrued. The Court held that there was no compensable taking until the General's action was approved by the Secretary of War and that the running of the statute of limitations started at that time.

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[64] In view of the explicit acknowledgments in the petitioner's brief that the President approved L-208, it is unnecessary to consider the legal effect under Title II of the Second War Powers Act, of the showing, and the acknowledgments by the petitioner (p. 21, 55), that the Under Secretary of War, acting on behalf of the Secretary, urged that the Order be issued. However, under Title II of the Second War Powers Act the Secretary of War had the same authority as a "board • • • authorized by the President" (Appendix C, p. 9).

United States v. *Goltra* (1941) 312 U. S. 203, involved the repossession by the Chief of the Inland and Coastwise Waterways Service, on orders from the Acting Secretary of War, of some tugboats and barges which had been leased by the United States to Goltra, who sued under a special jurisdictional act. The principal question decided by this Court related to the amount of the judgment entered by the Court of Claims, which included interest. This Court held that the seizure of the tugboats and steel barges was an unauthorized tortious act and that the special jurisdictional act should not be construed as providing for interest. While the opinion in *Goltra* contains some rather broad language, *Goltra* purported to follow *Hooe* and *North American Co.*, and we do not think it can be reasonably construed as supporting a rule of immunity anything like as broad as that suggested by the petitioner.

In *Mitchell* v. *Harmony* (1851) 13 How. 115, the plaintiff, a trader and merchant, accompanied the United States Army forces in their invasion of Mexico during the Mexican War. The plaintiff tried to leave the expedition but the Army officer in charge seized the plaintiff's property and used his wagons for the transport of Army property. Subsequently the plaintiff's wagons were captured and destroyed by the enemy and the plaintiff brought a suit against the Army officer individually. At the trial in the lower Court the jury determined that the defendant officer had not acted on behalf of the United States and, thus, that he occupied the status of a trespasser. This Court said, however (p. 133):

> "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the

> government is bound to make full compensation to the owner; but the officer is not a trespasser."

In *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952), 343 U. S. 579, the Court merely said (p. 585):

> "Prior cases in this Court have cast doubt on the right to recover in the Court of Claims on account of properties unlawfully taken by government officials for public use as these properties were alleged to have been. See *e.g., Hooe* v. *United States,* 218 U. S. 322, 335-336; *United States* v. *North American Co.,* 253 U. S. 330, 333. But see *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, 701-702."

The President's seizure of the steel plants during a wage dispute in *Sawyer* was effected in the face of unequivocal Congressional rejection of a proposed amendment to the Labor Management Relations Act of 1947 (the Taft-Hartley Act) which would have authorized seizure as a means of settling labor disputes during an emergency (343 U. S. at p. 586, 598-602). In that respect, *Sawyer* is analagous to *Hooe,* for in both cases the taking violated limitations or prohibitions imposed by Congress expressly or by clear implication. Finally in *Sawyer,* as Mr. Justice FRANKFURTER stated in his concurring opinion, "reliance on the powers [of the President] that flow from declared war has been commendably disclaimed by the Solicitor General" (*id.* at p. 613).

Here, on the other hand, during the height of the War Order L-208 was issued with the unanimous concurrence of the WPB, an agency of the President, at the instance and with the approval of the War Department, and shortly after its issuance it was approved by the President himself. In other words, the full power of the Chief Executive and of the highest military authorities during wartime was brought to bear in order to close down the operations of a limited

number of concerns, the owners of "nonessential" gold mines. The WPB acted under color of authority, and not in defiance of any specific statutory prohibition or restriction. Under such circumstances, the Government has no standing to contend that the taking was unauthorized and that the Government is not liable for that reason.

In any event, as we have shown (p. 115-120), under Title II of the Second War Powers Act the President had ample statutory authority to take any interest in real property deemed necessary "for military, naval, other war purposes".

The Congressional waiver by the Special Jurisdictional Act of July 14, 1952 of any issue as to the authority for Order L-208.

The Special Jurisdictional Act of July 14, 1952 has been quoted at page 2 above.

We set forth at pages 130-146 below the bases for the view that the Special Jurisdictional Act constituted an acknowledgment of liability on the part of the Government to claimants who suffered losses as a result of the issuance of the Order. If this Court were to find it unnecessary (as the Court of Claims did), or should be unwilling, to adopt that view of the Special Jurisdictional Act, it would still be true that the Act was intended to, and did, waive any possible defense as to the authority for L-208. Both the wording of the Act and its legislative history support this conclusion.

The Act speaks of "the closing or curtailment or prevention of operations of [a gold mine or gold placer operation] as a result of the restrictions imposed by War Production Board Limitation Order L-208 during the effective life thereof". The Act thus expressly treats the Order as having had *an effective life*. Its wording is wholly inconsistent with the view that the respondents might be denied compensation on the ground that the Order was unauthorized.

This interpretation of the wording of the Act is fortified by the two identical Senate and House Committee Reports, discussed at pages 142-146 below, one of which is in the record as Plaintiff's Exhibit 178 (R. 855, 1559-1572). They evidence the conviction of the Committees that Order L-208 "failed completely to make any substantial contribution to the war effort and inflicted ruinous costs on the gold mining industry" (R. 1560), and that "the least that can be done is to allow those persons affected by Order L-208 their day in court for such recompense as may seem justified" (R. 1570).

Moreover, the Reports said that: "The issuance of the Order was based upon dubious if not nonexistent authority" (R. 1560). Manifestly the Committees and the Congress considered any doubt as to the authority for the Order to be an additional reason for the Court of Claims to award compensation to those whose mines were summarily shut down, not a reason against awards of compensation. There is not a word in the Committee Reports, one of which takes upon eleven pages of the record (exclusive of the Appendix to the Report), suggesting that the Committees and the Congress intended to allow the Government to question the authority for the Order. Everything in the Committee Reports indicates the contrary.

Stubbs v. *U. S.* (1937) 86 C. Cls. 152, discussed at pages 135-136 below, is in point. By the special act in that case jurisdiction was "conferred upon the Court of Claims of the United States to hear, determine and render judgment" upon the claims of the plaintiffs "for any losses and damages sustained by" the plaintiffs arising "by virtue of any acts, or actions, of any and all officers and employees of the United States in carrying out or in connection with the extension of the limits of Mount McKinley National Park after the 19th day of March, 1932". The Court held that that language eliminated any issues as to whether or not the acts of any of the officers and employees were authorized (p. 160-161).

The grounds for holding that the Act of July 14, 1952 eliminated any issue as to the authority for Order L-208 are considerably stronger than the grounds for the decision in *Stubbs* that the special act in that case precluded any objection that the actions of the Government officers were "unwarranted or unnecessary" or "in the nature of torts".

Even if specific statutory authority for the taking were not established, the respondents would be entitled to compensation under the circumstances presented in this case.

The suggestion that the respondents should have sought an injunction is unrealistic.

Judge LARAMORE's dissenting opinion below says "the President lacked the constitutional power and statutory authority to close these mines and, therefore, the unauthorized closing could and should have been enjoined", citing *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952) 343 U. S. 579 (R. 61).

While Chief Judge JONES also felt that the President did not have the power or the authority "to close the mines directly," his approach to the subject was more qualified. He pointed out that "in wartime [an action for an injunction] is not a very practical remedy because it puts any individual or company in the position of hindering the war effort" (R. 60).

The conclusions reached by both dissenting Judges were based on the premise that the President did not have the power to authorize the taking of the respondents' property. We have shown that this is not the fact—that, as the Court below held, the President had the power to authorize the taking of any sort of property he deemed necessary to the war effort (see above, p. 114-120).

Moreover, we submit that whenever there is a taking in wartime by authority of the Chief Executive, under such

circumstances as were present in these cases, there should be compensation under the Fifth Amendment whether or not a post-war analysis establishes specific statutory authority for the taking. Otherwise private property can be taken with impunity without just compensation. For it is not a practical view of things to say that in wartime one whose property is taken under an order like L-208 under such circumstances can resist an agency of the Chief Executive (after an appeal made directly to the Chief Executive has been turned down) or can successfully maintain an injunction action to establish that the purpose of the order which was stated in its preamble was not its real purpose.

In a footnote to his opinion in *Hurley* v. *Kincaid*, Mr. Justice BRANDEIS said (285 U. S. at 104, Note 3):

> "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury."

Assuming *arguendo* that the President lacked specific statutory authority to take the respondents' property by Order L-208, it is clear that the obstacles which would have confronted counsel for the respondents if they had instituted an injunction action during the War would have been insurmountable.

Such an action would have had no prospect of success unless the plaintiff was able to establish, not only that the President had no authority to take the respondents' property, but also what these respondents eventually did establish: (1) that Order L-208 was not what it purported to be, and what the Government still asserts that it was, a proper exercise by the WPB of regulatory powers

over critical materials such as was involved in *St. Regis Paper Co.* v. *United States* (1948), 110 C. Cls. 271, cert. den. 335 U. S. 815, and (2) that the Order involved a direct taking of the respondents' property in the hope that it "would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines" (R. 107).

Documents which would have been needed were classified (R. 1562).[65] The difficulties in interviewing witnesses and assembling documentary and oral evidence during wartime can be imagined. If one makes the unrealistic assumption that a well prepared action for an injunction could have been tried before L-208 was revoked on June 30, 1945, how long would have elapsed before an injunction order was entered? The history of this litigation suggests the answer.

Viewed realistically, the argument that the respondents should have sought an injunction to restrain the enforcement of Order L-208 is tantamount to saying if the President had acted without specific statutory authority in taking the respondents' property, the respondents would have been at all times without a practical remedy.

We submit that that would not be consistent with what this Court said in *Larson* v. *Domestic & Foreign Corp.* (1949), 337 U. S. 682, 704, footnote omitted:

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[65] Examples are Plaintiff's Exhibit 10 (R. 1278-1288) from which there are extensive quotations in Finding 8 (R. 66); Plaintiff's Exhibit 45 (R. 1335-1338) which is quoted in part in Finding 24 (R. 80); Plaintiff's Exhibit 87 (R. 1460) which is quoted in part in Finding 34 (R. 96-97); Plaintiff's Exhibit 25 (R. 1321) which is quoted in Finding 39 (R. 99); Plaintiff's Exhibit 26 (R. 1321-1322) which is quoted in Finding 40 (R. 99-100); and Plaintiff's Exhibit 1 (R. 1163-1254), a paragraph from which is quoted in Finding 52 (R. 111).

The originals or copies of these exhibits, as marked, show on their face that they were classified, and that in each case the classification was not cancelled until March 12, 1946 or later. Except for Plaintiff's Exhibit 1, this does not appear on the copies of the exhibits as printed.

"For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. . It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, 'The inference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief. . . .'

"'There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event.'"

VIII

UNDER THE SPECIAL JURISDICTIONAL ACT OF JULY 14, 1952 THE GOVERNMENT IS LIABLE TO A GOLD MINE OWNER WHICH ESTABLISHES THAT IT INCURRED LOSSES BECAUSE IT WAS PREVENTED BY ORDER L-208 FROM PRODUCING AND SELLING GOLD.

In the Court of Claims the respondents contended that even if it were not established that Order L-208 effected a compensable taking, the Special Jurisdictional Act of July 14, 1952 (66 Stat. 605) conferred on the Court of Claims jurisdiction to render judgment for any losses which re-

sulted from the issuance of L-208 (R. 13).[66] The Court of Claims found that the respondents had established a compensable taking and accordingly concluded that "it is unnecessary to discuss the various contentions relative to" the Special Jurisdictional Act (R. 58).

The petitioner's brief says (p. 44, Note 29):

> "Respondents unsuccessfully urged in the Court of Claims that this Act was a mandate from Congress to the court to award compensation wherever it was proved that losses were incurred as a result of L-208."

That would seem to imply that the Court of Claims decided against the respondents as to the Special Jurisdictional Act. It did not. As already stated, the Court found that it was unnecessary to pass on the contentions of the parties relating to the Act (R. 58).

We quote again the provisions of the Act (66 Stat. 605):

> "AN ACT
>
> Granting jurisdiction to the Court of Claims to hear, determine and render judgment upon certain claims.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> That the United States Court of Claims be, and hereby is, given jurisdiction to hear, determine, and render judgment, notwithstanding any statute of limitations, laches, or lapse of time, on the claim of any owner or operator of a gold mine or gold placer operation for losses incurred allegedly because of

[66] Recovery under the Special Jurisdictional Act might be for a lesser amount than for a taking, since the claim for a taking bears interest, *Phelps* v. *United States* (1927) 274 U. S. 341, while the claim under the Special Jurisdictional Act may not. *Tillson* v. *United States* (1879) 10 Otto 43, 47; *United States* v. *Thayer-West Point Hotel Co.* (1947) 329 U. S. 585, 590.

the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions imposed by War Production Board Limitation Order L-208 during the effective life thereof: *Provided;* That actions on such claims shall be brought within one year from the date this Act becomes effective."

The issues presented by claims based on Order L-208, at the time when the Special Jurisdictional Act was passed.

At the time when the Act of July 14, 1952 was enacted actions were pending on several claims based on Order L-208 and it was known that there were many other owners or operators of gold mines who believed that they had claims against the Government.

All of the claims presented two issues and some of them presented a third:

First: Did the claimant suffer as a result of Order L-208?

Second: If the claimant suffered as a result of Order L-208, was there any liability on the part of the Government?

Third: Was the claim barred by the statute of limitations?

As to *First*, the Act of July 14, 1952 required a gold mine owner or operator who claimed to have suffered from Order L-208 to show that the claimant incurred losses as a result of those provisions of the Order which prevented further production from the claimant's mine. The Act did not contain an admission of liability applicable to all owners or operators of gold mines when Order L-208 was issued. For example, an owner who had shut down a mine before October 8, 1942 because of a shortage of materials or labor,[67] or which would have had to shut down in

[67] As in the case of Alabama-California Gold Mines Company, one of the plaintiffs below (R. 136).

October, 1942 even if Order L-208 had never been issued, and who could not have resumed operations before June 30, 1945 in any event, would presumably be unable to show that it had "losses incurred * * * as a result of the restrictions imposed by War Production Board Limitation Order L-208". The Act contemplated that there should be an adjudication whether Order L-208 was the competent producing cause of a loss allegedly incurred by a claimant.

As to *Third,* the Act removed the bar of the applicable statute of limitations as to any claim on which an action was brought within one year from the effective date of the Act.

There is no dispute about the effect of the Act on issues *First* and *Third.* The Act did not affect *First* and it disposed of *Third.*

As to *Second,* the respondents' contention is that by the Act a liability on the part of the Government was admitted —or created—as to each owner or operator of a gold mine which proved that it incurred a loss because it was prevented by Order L-208 from producing and selling gold.

The decisions interpreting comparable Special Jurisdictional Acts.

On several occasions it has been held that a Special Jurisdictional Act similar to that of July 14, 1952 was intended to admit, or if necessary to create, a liability on the part of the Government. In some instances the decision was based primarily on the wording of the act, in others largely on the setting in which the act was adopted and the legislative history of the act, and in others on a combination of both the language of the act and the legislative history. Before analyzing the language of the Act of July 14, 1952 and reviewing its legislative history, we will refer briefly to certain decisions which passed on questions similar to those presented in this case.

In *Creech, et al.* v. *United States* (1944) 102 C. Cls. 301, 302-303, cert. den. 325 U. S. 870, the Court had before it a Special Jurisdictional Act reading as follows:

> "That *jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment* upon the claims of * * *; C. E. Thomas; * * *; R. Y. Creech; * * *; Roscoe Lee Braddock; * * *; or other persons engaged in farming on Kreamer, Torry, or Ritta Islands, in Lake Okeechobee, *for damage to or loss of crops alleged to have resulted* from the construction of levees along the Caloosahatchee River and Lake Okeechobee drainage areas in Palm Beach County, Florida, by the Corps of Engineers, War Department, and from high waters caused thereby: *Provided,* That suits hereunder shall be instituted within one year from the enactment of this Act."

The phraseology of the italicized provisions was substantially identical with the phraseology of the comparable provisions of the Act of July 14, 1952. In *Creech* the burden of the plaintiffs' contention was that a levee constructed by the Government caused wind tides to back up against the levee, thereby flooding the islands on which the plaintiffs' farms were located. In the opinion of the Court of Claims, rendered by Judge LITTLETON, it was first pointed out (p. 323) that the plaintiffs had no claim for compensation under the Fifth Amendment, because "whatever damage plaintiffs sustained as a result of the Government work was consequential and the result of authorized action of the Government".

Proceeding to a consideration of the special act, Judge LITTLETON's opinion said (p. 323):

> "* * * This act had a purpose, and its history and language indicate that such purpose was to confer jurisdiction and authority upon the court to render judgment for the amount of damage to or loss of

> crops if it should be established by proof that such damage or loss in fact and in law 'resulted from the construction of levees * * * and high waters caused thereby.' In other words, the damages which may be allowed are to be determined according to the usual principles of legal cause and legal liability. The act does not concede liability, and plaintiffs do not so contend."

The Court of Claims found that no damage suffered by the plaintiffs in *Creech* had been caused by the Government's erection of the levee and consequently no recovery was allowed. However, the Court's interpretation of the Special Jurisdictional Act involved in *Creech*, under which there would have been a recovery if damage or loss had been shown, is directly in point.

In *Stubbs* v. *United States* (1937) 86 C. Cls. 152, the Court had before it an act conferring jurisdiction to hear, determine and render judgment upon a claim "for any losses and damages sustained by Duke E. Stubbs and Elizabeth S. Stubbs in the silver fox farming and trading post business, or other business and occupation, conducted by them, or either of them, at McKinley Park, Alaska, arising out of the extension of the limits of the Mount McKinley National Park by an Act of Congress approved on the 19th day of March 1932 (47 Stat. 68), and/or by virtue of any acts, or actions, of any and all officers and employees of the United States in carrying out or in connection with the extension of the limits of Mount McKinley National Park after the 19th day of March 1932:". In interpreting the special act in that case the Court said (p. 160-161):

> "The evidence leaves no doubt that the plaintiffs sustained heavy losses and damages as a result of the extension of the limits of Mount McKinley Park which were unavoidable and also sustained very considerable loss and damage by reason of unwarranted or unnecessary acts of the defendant's officers or employees in connection with this extension.

> *Most of the acts complained of are such that ordinarily would afford no basis for a cause of action* and some of the acts, especially those of the officers or employees of the Government, were in the nature of torts, but *any objection that might arise on account of their nature is precluded by the act of Congress under which the case comes before us.*"

Other cases in which the Court of Claims construed comparable special jurisdictional acts as admitting or creating a liability are:

> *Carroll* v. *District of Columbia* (1887) 22 C. Cls. 104;
> *Radel Oyster Co.* v. *United States* (1934) 78 C. Cls. 816;
> *Edwards* v. *United States* (1934) 79 C. Cls. 436;
> *Norfolk Southern Railroad Company* v. *United States* (1942) 96 C. Cls. 357.

The decisions of the Court of Claims under the River and Harbor Act of 1935 (49 Stat. 1028, 1049; 28 U. S. C. (1946 Ed.) 250 (a)) also throw light on the proper interpretation of the Act of July 14, 1952. *Schroeder Besse Oyster Co.* v. *United States* (1942) 95 C. Cls. 729; *H. J. Lewis Oyster Co.* v. *United States* (1952) 123 C. Cls. 358. The Court there construed the following provisions of the River and Harbor Act:

> "That the Court of Claims shall have jurisdiction to hear and determine claims for damages to oyster growers upon private or leased lands or bottoms arising from dredging operations and use of other machinery and equipment in making such improvements: *Provided*, That suits shall be instituted within one year after such operations shall have terminated."

In *Schroeder Besse Oyster Co.* v. *United States* (1942) 95 C. Cls. 729, which was followed in *H. J. Lewis Oyster Co.*

v. *United States* (1952) 123 C. Cls. 358, the Court said (95 C. Cls. at p. 738):

> "Under the terms of this act the Government has not only given plaintiff the right to sue for damages but it admits its liability for all damages resulting to oyster growers from 'dredging operations and use of other machinery and equipment' for making such improvements.
>
> It is not necessary under the terms of this act to prove negligence in the operation of any instrumentality of the Government but simply to show by the preponderance of the evidence that the plaintiff was an oyster grower who was damaged as a result of dredging operations and the use of machinery and equipment in making the improvements."

The foregoing cases and others cited later show that Congress has frequently used language similar to that employed in the Act of July 14, 1952, to admit, or if necessary to create, a liability. Other Acts have not been similarly construed. The Court of Claims has generally followed the canon of construction which was announced in *Braden* v. *United States* (1880) 16 C. Cls. 389, 411:

> "* * * in each case the court will, from the language of the act, and from the nature of the case, and from the surrounding circumstances, endeavor to ascertain and carry out the legislative intent."

In this instance the language of the Act of July 14, 1952 and its legislative history are consistent with each other and establish that the Act of July 14, 1952 did not have the limited effect of merely lifting the bar of any statute of limitations but confirmed a liability of the Government to any owner or operator of a gold mine or gold placer operation which might be determined by this Court to have incurred losses as a result of Order L-208.

The language of the Act of July 14, 1952.

The intent of the Special Jurisdictional Act of July 14, 1952 is indicated by certain features of the Act:

1. It contains a grant of jurisdiction to render judgment for losses incurred.
2. It does not purport merely to remove the bar of the applicable statute of limitations.
3. It does not disclaim an admission of liability.

The Act contains a grant of jurisdiction to render judgment for losses incurred.

When the Court of Claims is not authorized to render a judgment on the basis of a prescribed showing, it is said to lack *jurisdiction* to enter such a judgment. In *St. Regis Paper Co.* v. *United States* (1948) 110 C. Cls. 271, cert. den. 335 U. S. 815, in which it was held that the plaintiff could not recover damages sustained as a result of the issuance of an Order of the WPB because the plaintiff was unable to establish that the Order resulted in a "taking" under the Fifth Amendment, the Court concluded its opinion by saying (p. 279):

> "This is a case of actual hardship. The damages are both real and substantial. But in the light of the decisions of the Supreme Court, the Tucker Act, and the established rules of law, this court does not have *jurisdiction* to grant the relief sought."

Before the enactment of the Act of July 14, 1952 the gold mine owners were required to prove a compensable taking of their property in order to bring their cases within the jurisdiction of the Court of Claims. However, the Act of July 14, 1952 conferred a *new jurisdiction* on the Court of Claims to render judgment whether or not the claimants could prove a taking compensable under the Fifth Amendment.

By the Act of July 14, 1952 the Court of Claims was

> "* * * given *jurisdiction to hear, determine, and render judgment* * * * on the claim of any owner

> or operator of a gold mine * * * for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine * * * as a result of the restrictions imposed by War Production Board Limitation Order L-208 during the effective life thereof * * *".

The grant of jurisdiction in the Act indicates that it was the intention of the Congress to require no more than a showing that the plaintiffs incurred losses as a result of the issuance of Order L-208.

If the Congress had intended to have a right of recovery depend upon a showing that there was a "taking," it would presumably have referred in the Act to a "taking".[68] The *Idaho Maryland* opinion spoke of a "taking", not of "losses incurred" as a result of the issuance of the Order; the Act of July 14, 1952 was adopted shortly after the *Idaho Maryland* opinion and the Committee Reports incorporated the *Idaho Maryland* opinion in full, as we show later in our review of the legislative history. Yet, instead of referring to a "taking", as the *Idaho Maryland* opinion did, the Congress granted the Court of Claims jurisdiction to render judgment for "losses incurred" as a result of the issuance of the Order.

The Act does not purport merely to remove the bar of the applicable statute of limitations.

If the Congress had intended merely to extend the time to file claims, it would presumably have indicated that intent in the title and also in the text. Another Act passed by the same Congress and approved on July 17, 1952—just three days after the passage of the Special Jurisdictional

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[68] Compare Private Law 1015, Ch. 934, 66 Stat. A209, quoted on the next page, where Congress authorized suits "by all persons who claim that their property, easements, rights in land, mineral interests, rights of ingress and egress, or other rights or interests were *taken* and not paid for."

Act with which we are concerned—affords an example of the type of title and text which are suitable where Congress intends only to extend time for filing certain claims (Private Law 1015, Ch. 934, 66 Stat. A209):

"AN ACT

To extend the time for filing claims on behalf of certain persons, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That notwithstanding any statute of limitations or lapse of time, suits may be instituted within one year after the enactment of this Act, in the appropriate United States district court, under the provisions of subsection (a)(2) of section 1346, title 28, United States Code, or in the United States Court of Claims, in accordance with the provisions of section 1491, title 28, United States Code, by all persons who claim that their property, easements, rights in land, mineral interests, rights of ingress and egress, or other rights or interests were taken and not paid for by, or as a result of, the construction of the Denison Dam or the impounding of the waters of Lake Texoma: *Provided,* That any such claim shall be barred forever unless suit thereon is instituted within one year from the date of enactment of this Act: *Provided further,* That nothing in this Act shall be construed to create any liability against the United States not existing prior to the enactment of this Act."

It will be noted that in the Act of July 17, 1952:

1. The title stated that the purpose of the Act was to extend the time for filing claims.

2. The Act conferred no new jurisdiction but simply provided for suits in the District Court or the Court of Claims.

3. It was provided that the recovery should depend upon whether property or other rights or interests "were taken and not paid for".

4. It was further provided specifically that the Act should not create a liability which did not exist prior to its enactment.

None of these four features will be found in the Act of July 14, 1952.

The Special Jurisdictional Act of July 14, 1952 does not disclaim an admission of liability.

A great many Special Jurisdictional Acts have been construed as creating causes of action which did not exist before the Acts were passed.[69]

It has now become the common practice, if the Congress does not intend to admit or create a liability, to include in the Act a proviso expressly so stating. For example, the 82nd Congress, which enacted the Act of July 14, 1952,

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[69] *Cross* v. *United States* (1872) 81 U. S. 479;
Roberts v. *United States* (1876) 92 U. S. 41;
Pope v. *United States* (1944) 323 U. S. 1;
Braden v. *United States* (1880) 16 C. Cls. 389;
Boudinot v. *United States* (1883) 18 C. Cls. 716;
Carroll v. *District of Columbia* (1887) 22 C. Cls. 104;
Irby v. *United States* (1922) 57 C. Cls. 60;
Southern Pacific Co. v. *United States* (1929) 68 C. Cls. 223;
Alcock v. *United States* (1932) 74 C. Cls. 308;
Radel Oyster Co. v. *United States* (1934) 78 C. Cls. 816;
Thomas C. Edwards v. *United States* (1934) 79 C. Cls. 436;
Duke E. Stubbs and Elizabeth S. Stubbs v. *United States* (1937) 86 C. Cls. 152;
Norfolk Southern Railroad Company v. *United States* (1942) 96 C. Cls. 357;
Mack Copper Co. v. *United States* (1942) 97 C. Cls. 451;
Nolan Bros. v. *United States* (1942) 98 C. Cls. 21;
Creech, et al. v. *United States* (1944) 102 C. Cls. 301; cert. den. 325 U. S. 870.

also passed eight Special Jurisdictional Acts containing a proviso disclaiming any admission of liability.[70] One of the eight was was Private Law 1015, which we have just quoted in full.

While the absence of such a proviso would not alone establish an intent to admit or create a liability, it is highly significant when considered in connection with other features of the Act of July 14, 1952 and its legislative history.

The legislative history of the Act, including the Committee Reports.

The Act was introduced as S. 3195 and favorably reported by the Senate Committee on the Judiciary on May 28, 1952 (Senate Report 1605). The bill passed the Senate without debate on June 2, 1952 (Congressional Record, Volume 98, p. 6322). It was transmitted to the House of Representatives on June 3, 1952 (Congressional Record, Volume 98, p. 6482), and favorably reported by the House Committee on the Judiciary on June 19, 1952 (House Report No. 2220). It was passed by the House without debate on July 2, 1952 (Congressional Record, Volume 98, p. 8920, 8931),[71] and approved by the President on July 14, 1952.

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[70] Private Law 488, 66 Stat. A27;
Private Law 765, 66 Stat. A118;
Private Law 778, 66 Stat. A124;
Private Law 785, 66 Stat. A127;
Private Law 826, 66 Stat. A146;
Private Law 1009, 66 Stat. A206;
Private Law 1015, 66 Stat. A209;
Private Law 1018, 66 Stat. A210.

[71] When the bill was called on the House calendar for the first time, Representative Ford had the bill placed at the foot of the calendar so that he might have "some further explanation of this legislation" (p. 8920). On the second call of the bill, Representative Ford stated "that the objection I have has been overcome" and withdrew his reservation (p. 8931). The bill then passed the House without objection.

It follows that the significant legislative history will be found in the Senate and House Committee Reports. They are identical. The Report of the Senate Committee on the Judiciary, dated May 28, 1952, is Plaintiff's Exhibit 178 (R. 855, 1559-1572).

We have quoted pertinent portions of that Report above at pages 40-42, but we refer to the Report in its entirety.

The two Reports indicate that the Committee determined that compensation should be awarded to those who could establish that they incurred losses as a result of the issuance of the Order. They do not read as if the intent of the statute was merely to remove the bar of the applicable statute of limitations.

The petitioner's brief attempts to dispose of the Act of July 14, 1952 by the bald assertion that the Act "shows on its face that it is nothing more than a Congressional waiver of the statute of limitations or the defense of laches which would otherwise be applicable" (p. 44, Note 29). The only authority cited by the petitioner for this assertion consists of two sentences from the Report of the Senate Committee, which comprises 11 printed pages of the record (R. 1559-1572).

If the Committees which sponsored the Act of July 14, 1952 had intended only to lift the bar of the applicable statute of limitations, it would have been completely adequate for them to point out that the *Oro Fino* decision, which was handed down on October 2, 1950, had been widely interpreted as making it futile to assert any claims based on Order L-208; that nevertheless some owners and operators of gold mines had actions pending before the Court of Claims; that the *Idaho Maryland* opinion of May 6, 1952 indicated that judgments for owners and operators of gold mines would be entered if they could establish "takings" that were compensable under the Fifth Amendment; and that fairness required that owners and operators

who had failed to file suits should not be prejudiced. In other words, each of the reports would have told the whole story if it had contained the preliminary paragraph (R. 1559), the short explanation of the purpose (R. 1559), and the first, third, fourth, fifth and sixth paragraphs under the heading "Statement" (R. 1559-1561). Such a Report would have taken up less than 3 pages of the record.

Instead, the Senate Committee filed a Report which takes up 11 pages of the record, exclusive of the appended copy of the *Idaho Maryland* opinion. Of the 11 pages, over 9 pages, starting with the sixth paragraph under the heading "Statement" (R. 1561), would seem out of place in the Report if the Committee had not intended that there should be compensation for losses incurred as a result of the issuance of Order L-208 even if it could not be established that there was a "taking" compensable under the Fifth Amendment.

As already stated, the House Committee's Report was identical.

By adopting the earlier Subcommittee Report from which we have quoted at pages 41-42 above, the Senate and House Committees approved of vigorous characterizations of Order L-208 and of the following conclusions quoted in the Committee Reports (R. 1562, 1570):

> "The order completely failed to accomplish its purpose, or any purpose whatever, and inflicted irreparable and unjustified loss on the gold-mining industry. Your committee believes that this order inflicted a sacrifice on the gold-mining industry which the Federal Government in common fairness should try to relieve."
>
> * * * * *
>
> "The conclusion further has been reached that the order should have provided a mechanism for compensation and that, as such was not provided, the Congress should so provide, even while realizing that much of the loss and damage is irreparable."

The pertinent part of the last paragraph of the two Committee Reports reads as follows (R. 1570):

> "The committee has carefully studied the facts relating to the situation that arose as a result of the proclamation of the War Production Board Limitation Order L-208 and is convinced that the gold mining industry was dealt with in a fashion which merits the consideration of the court in the adjudication of the losses which may have been occasioned by this order. The Idaho Maryland Mines Corp. decision is ample evidence of the fact that the least that can be done is to allow those persons affected by Order L-208 their day in court for such recompense as may seem justified."

It will be observed that in stating their respective conclusions the Senate and House Committees made no reference to the Statute of Limitations and made no reference to a "taking". The Committees said that there should be an *"adjudication of the losses which may have been occasioned by this order"*. This implied that the Committees intended the same kind of an adjudication which was called for in *Creech* v. *United States* and *Stubbs* v. *United States*, just discussed, i.e., an adjudication whether the losses were caused by Order L-208.

The Committees also said that "the least that can be done is to allow those persons affected by Order L-208 their day in court *for such recompense as may seem justified.*"

In its brief below the petitioner sought to treat the latter statement as though the two Reports had said only that "the least that can be done is to allow those persons affected by Order L-208 their day in court". The Committees' statement that those affected by Order L-208 were to be allowed "their day in court for such recompense as may seem justified" followed clear indications throughout the Reports of the Committees that recompense would be

justified if a causal connection was shown between losses and Order L-208.

The decision that judgments should be rendered for losses incurred was natural in view of the basic conclusion of the Reports that the summary shut-down of the gold mines without compensation could not be justified.

Conclusion as to the Act of July 14, 1952.

The text of the Act and the legislative history confirm that it was not intended merely to remove the bar of the applicable statute of limitations, but constituted an admission of liability for such losses as are determined to have been caused by Order L-208.

The respondents established liability on the part of the Government by proving that the issuance of Order L-208 prevented them from operating mines which they could have continued to operate but for the issuance of the Order.[72]

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[72] The following table cites the pertinent findings:

Respondent	*Findings*	*Record*
Homestake	53-63, 67, 70, 73-75	111-116
Central Eureka	76-83, 88, 89	116-120
Idaho Maryland	91-104, 107, 108	120-124
Alaska-Pacific	119-131, 135-137	127-135
Bald Mountain	138-145	135-136
Ermont	161-164, 174, 175	140

CONCLUSION

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

December 16, 1957.

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No. 29

THE UNITED STATES,

Petitioner,

vs.

CENTRAL EUREKA MINING COMPANY (a corporation), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENTS

APPENDICES A, B, C AND D

December 16, 1957.

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APPENDIX A

The Background, Purposes, Provisions and Effects of Order L-208

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APPENDIX A

The Background, Purpose, Provisions and Effects of Order L-208.

Appendix A to the petitioner's brief, which is entitled "History and Background of Limitation Order L-208", purports to deal with the background and origin of the Order, its purpose and its effects.

In this Appendix we will treat with the background, purpose, provisions and effects of the Order in the following sequence:

I. The background and origin of the Order (p. 2-33). This will cover largely the same ground as pages 73-104 of the petitioner's Appendix A and also a number of things which are not mentioned by the petitioner.

II. The purpose of the Order (p. 34-39). This will review Finding 46 of the Court of Claims and the support therefor.

III. The provisions of Order L-208 (p. 40-45).

IV. The inadaptability of the Order to serve as a priorities or allocation order relating to critical materials (p. 45-68). This will consider both (1) the reasons why the Order was not adapted to serve as a priorities or allocation order relating to critical materials and (2) the Findings and evidence that it did not function as such. Among other things, it will cover the same ground as pages 104-107 of the petitioner's Appendix A.

V. The practical failure of the Order to serve the purpose for which it was issued: the transfer of a substantial number of hardrock miners to the nonferrous metal mines (p. 68-92). This will review (1) the Court's Findings and the evidence as to the reasons why the Order could not be expected to accomplish its purpose and (2) the Findings and evidence that it was a practical failure.

Preliminary.

The terminology of Order L-208, of the amendments thereof (petitioner's brief, p. 111-125) and of the peti-

tioner's brief may be somewhat confusing. Order L-208 refers in various places to "critical materials"; "any material, facility or equipment"; "machinery and equipment"; "any material or equipment"; "material"; and "materials". The amendment of November 19, 1942 repeated all of these as they were used in Order L-208, and also had a provision relating to "machinery or equipment". The terminology of the amendment of August 31, 1943 followed that of the amendment of November 19, 1942.

As we read the Order and the amendments (see below, p. 40-45):

The words "critical materials" or "materials" did not include "machinery or equipment".

"Machinery and equipment" were embraced by the words "facility or equipment".

Those are the senses in which the words are used herein.

I

The background and origin of Order L-208

The opening section of the petitioner's Appendix A (p. 73-79) deals with the War Production Board, its creation, powers and procedures.

With the petitioner's description of the War Production Board and its "P", "M" and "L" Orders (p. 75-79), we have little fault to find[1] until we reach the last paragraph (p. 78-79), which lists "L" Orders limiting the production

[1] Executive Order 9024 gave authority to "the Chairman of the War Production Board, with the advice and assistance of the members of the Board" (Appendix D, p. 8). Technically, therefore, Order L-208 was the action of the Chairman of the WPB. However, the issuance of the Order was "agreed" upon at the WPB meeting of October 6, 1942 (Findings 41, 42; R. 100-102) and it would not seem to make any practical difference whether the Order is looked upon as an act of the Chairman or as an act of the Board. The petitioner's brief treats the Order throughout as the act of the Board and does not mention the provision of Executive Order 9024 which we have quoted.

of various end products manufactured with critical materials and then at the end of the list puts Order L-208 as if it were the same kind of order (p. 78-79).

By thus trying to link Order L-208 with "L" Orders relating to such end products, the petitioner attempts to support the assertion in the brief that "L-208 is but one of approximately 350 similar L orders and one of thousands of L, M, P and other type orders issued by the WPB and the OPM (Office of Production Management) during the course of the war, resulting in severe financial losses to innumerable businesses" (p. 40). This sentence is to be found in part of an argument that allowance of compensation for losses of the type imposed by Order L-208 "would impose an incalculable and staggering financial burden on the nation" (p. 42).

There is no similarity between Order L-208 and the "L" orders referred to in the petitioner's Appendix A at pages 78-79. The latter were directed against the production of end products which necessarily required the use of critical materials and such "L" orders were true regulations of the use of critical materials. None of them contained a directive such as that in Order L-208 that "each operator of a nonessential mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine" (Finding 43, R. 102).

Moreover, the "L" orders to which the petitioner refers were actually intended to conserve critical materials. Their prohibitory provisions were designed to accomplish that objective. As the Court of Claims found, Order L-208 was not intended to conserve critical materials; its purpose was to shut down the gold mines (see below, p. 34-39).

The Reports of the Judiciary Committees of the House and the Senate said later:[2]

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[2] See pages 40-42 of the main body of this brief.

"No similar order was issued against any other segment of American industry".

Finding 3 of the Court of Claims contains the following paragraphs (R. 63; see also R. 32-33):

> "The 'L' orders were usually issued to prohibit or curtail the manufacture of end products containing critical materials, continued production of which would have necessarily consumed such critical materials. Sometimes an additional purpose of such 'L' orders was to accomplish the conversion of scarce manufacturing facilities to war production.
>
> " 'L' orders were issued prohibiting or limiting the production of end products such as office machinery, furniture, bicycles, stoves, refrigerators, laundry equipment, automobiles, and other products. In most instances a prohibition against the production of a product resulted in the facilities being transferred to war production. Thus, the automobile industry's facilities were largely converted to war purposes although some of the facilities may have become inoperative because of a lack of adaptability to other purposes or to war production."

While referring (p. 78) to the page of the record at which these paragraphs of Finding 3 appear, the petitioner's brief in no way suggests that there was a Finding of Fact on this subject and particularly fails to mention that, as the Court of Claims found, "in most instances a prohibition against the production of a product resulted in the facilities being transferred to war production".

Nor, of course, does the petitioner acknowledge the difference between the purpose of the L orders mentioned in Finding 3 and Order L-208: that the former were intended to conserve critical materials, and that the latter was not issued for that purpose at all but rather to shut

down the gold mines so as to "maneuver our manpower" to the nonferrous metal mines (see below, p. 31).

The "L" orders mentioned in Finding 3 are discussed at pages 28-29 in the main body of this brief.

The continuation of the policy of avoiding unnecessary dislocations in the civilian economy.

Appendix A to the petitioner's brief might be thought to imply that the Government's policies during the War were hostile to nonessential industries generally. That was not at all the case.

Finding 10, which refers to the issuance on December 18, 1941 of Preference Rating Order P-100, says in part (R. 72-73):

> "The stated purpose of Order P-100 was to effectuate the policy of SPAB[3] in maintaining governmental, charitable and industrial property located in the United States, its territories and possession, upon an adequate operating basis, without expansion or improvement of facilities except where duly authorized or approved. Industries coming within the terms of Order P-100 were entitled to an A-10 Preference Rating (the lowest rating used) for their maintenance, repair and operating supplies.
>
> "*P-100 represented a continuation of SPAB's policy of granting some preference rating for maintenance, repair and operating supplies to industries in general without regard to essentiality in the war program, and this policy prevailed throughout the war. This policy was designed to avoid unnecessary dislocations in the civilian economy.*"

[3] The Supply, Priorities and Allocations Board, whose functions and powers were later transferred to the WPB (R. 62).

The progressively more stringent priority regulations between July, 1941, and March, 1942, which eliminated the potential acquisition by the gold mines of critical materials, supplies and equipment.

The first order by a Government agency cited in the Findings (Finding 5, R. 65) and mentioned in the petitioner's Appendix A (p. 79) is Preference Rating Order P-23, which was issued on July 29, 1941.

There are twelve subsequent Findings relating to priority regulations that affected the gold mines (R. 65-75). They end with the second paragraph of Finding 17, which reads (R. 74-75):

> "The gold mines excluded by the above amendments to Order P-56 were reduced to the same priority position as that of the least essential industries in the United States, i.e., they were entitled only to an A-10 preference rating for the acquisition of maintenance, repair and operating supplies under Order P-100. They were excluded from obtaining any critical materials which might have been needed by any of the nonferrous metal mines or by any other industry deemed by WPB to be more essential. While it was possible for gold mines excluded from any benefits under P-56 to apply for equipment under the general repair order P-100, the demand for desired equipment was so far above available supply that the possibility of the gold mines obtaining any was remote. *Thus, by March 2, 1942, a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment.*"

The petitioner's Appendix A devotes almost twelve pages to the period between July 29, 1941 and March 2,

1942 (p. 79-90) and ends by repeating almost verbatim the sentences which we have just quoted (p. 89-90).

The situation which existed on March 2, 1942 continued unaltered:* the potential acquisition by the gold mines of critical materials, supplies and equipment had been virtually eliminated. The Court of Claims found that when the WPB issued Order L-208 it knew that such was the case. Finding 50 reads in part (R. 106-107):

> "50. *On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of L-208 knew (1) that existing priority orders insured that the gold mines would not receive any critical materials needed by more essential users;* * * *"

We do not know why counsel for the petitioner elected to devote twelve pages of the petitioner's Appendix A to the details of the steps by which the potential acquisition of critical materials and equipment by the gold mines was eliminated unless it was thought that the presentation of this mass of subordinate detail would lend credit to more important and more vulnerable sections of the Appendix.

However, we observe one important feature of the narrative in the petitioner's Appendix A (p. 79-91) and the summary thereof in the petitioner's Statement (p. 5-8). An attempt is made to create the impression that from January, 1942 until the issuance of Order L-208 in October, 1942 there was a continuity of the purpose or purposes of the WPB in connection with the gold mines. That attempt is particularly evident at page 91, where it is distinctly implied that in the spring and summer of 1942 the

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* In May, 1942, there was an amendment of one of the priority orders, which is referred to in Finding 17 (R. 74) and in the petitioner's brief (p. 90-91), but, as the petitioner says, it "effected no practical change".

manpower problem and the priorities problem operated together to produce the shut-down of the "nonessential" gold mines. That is not at all true.[5]

What actually happened can be readily ascertained by reading the Findings of Fact covering the period from July 29, 1941 through March 2, 1942 (Findings 5-17; R. 65-75) and then reading the Findings that follow.

By March 2, 1942 the critical materials problem was solved, so far as the gold mines were concerned. In July 1942 a new and distinct problem emerged, involving the shortage of miners in the copper and other nonferrous metal mines.

In the petition for certiorari, the petitioner informed the Court (p. 4-5):

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[5] It is logical to divide the story of the background and origin of L-208 at the point where the objectives of the progressively more stringent priority regulations had been accomplished—March 2, 1942, the date given in Finding 17 (R. 74-75). That is the division which the petitioner made in the petition for certiorari (p. 3-7).

A new part of the story commences in July 1942, when it was first suggested that production of gold "should be curtailed by an order of the War Production Board to free labor which is urgently needed in the nonferrous mines which are essential to the war effort" (Finding 19, R. 76; Petitioner's Appendix A, p. 92).

The petitioner's Appendix A has a heading *"Regulations Adversely Affecting the Gold Mining Industry Prior to Limitation Order L-208"* (p. 79) under which the petitioner deals with the period between May 1941 and December 18, 1941. The Appendix then has a new heading, *"The Evolution of Limitation Order L-208"*, under which the Appendix purports to tell a consecutive story running from January 1942 to the time when Order L-208 was issued and thereafter (p. 86-110). Under the heading *"The Evolution of Limitation Order L-208"*, there are six pages which deal with the successful efforts to eliminate the potential acquisition by the gold mines of critical materials, supplies and equipment that culminated in March 1942 (p. 86-91).

Thus the petitioner abandoned a logical division of its narrative, which it had made in the petition for certiorari, and attempted to create the erroneous impression that there was a continuity of the purpose or purposes of the WPB, with relation to the gold mines, from January, 1942 until L-208 was issued on October 8, 1942.

> "Thus, by granting the lowest possible priority rating in a market where supplies were exceedingly scarce, *the War Production Board had effectively eliminated the possibility of acquisition by the gold mines of critical materials or supplies.*"

Before leaving the period during which the priorities problem was solved, so far as the gold mines were concerned, and proceeding to a review of the later period during which the WPB was persuaded to shut down the gold mines in order to bring about a transfer of underground hardrock miners to the copper and other nonferrous metal mines, we should mention some of the documents quoted in the petitioner's Appendix A at pages 82-87.

At page 82 the petitioner quotes from a memorandum submitted on November 18, 1941 to the SPAB by Mr. Donald Nelson, who was Chairman of the WPB when Order L-208 was issued (Finding 8, R. 66). The most important sentences in the quotation, relating to the consumption of critical materials by the gold mines, are these:

> "It is to be emphasized that *from a consumption of scarce materials standpoint, this whole issue is a minor one.* Only about $7,000,000 of equipment, not including a lesser amount for repairs and maintenance, is involved annually at a maximum. Such importance as the issue possesses is largely political."

This comment by Mr. Nelson was made on November 18, 1941, several months before the progressively more stringent priority regulations had virtually eliminated the potential acquisition of critical materials, supplies and equipment by the gold mines. His characterization of the issue as "a minor one" before it was solved should be contrasted with the repeated suggestions in the petitioner's

brief that seven months after the issue had been solved it remained of major importance.[6]

The period from July, 1942, through October, 1942.

The period from July, 1942, when the Labor Division of the War Production Board, officials of the War Department and the War Manpower Commission were all becom-

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[6] Our other comments are less important.

At page 85, the petitioner's Appendix A quotes from a memorandum of the Chairman of the Board of Governors of the Federal Reserve System, dated December 16, 1941, in which the Chairman said (Finding 9, R. 70):

> "Since new gold output is largely unnecessary and diverts materials, machinery, and labor from production of war supplies, I strongly favor curtailing it so far as is practicable through the priorities system. I would suggest that no machinery be allowed to foreign mines for the expansion of gold output; and that machinery and supplies for the maintenance and repair of gold mines should be restricted to the minimum consonant with the principles adopted by the Supply Priorities and Allocation Board for other nondefense industries."

It will be noted that the Chairman made two suggestions: (1) "that no machinery be allowed to foreign mines for the expansion of gold output" and (2) that materials and supplies for the maintenance and repair of domestic gold mines should be further restricted. His suggestion with respect to foreign gold mines was not followed; throughout the War "critical materials, machinery and equipment subject to allocation and control by the WPB were shipped in substantial quantities to foreign countries for use in their gold mining industry" (Finding 49, R. 106). On the other hand, further restrictions on the domestic mines were applied and "insured that the gold mines would not receive any critical materials needed by more essential users" (Finding 50, R. 107).

At pages 86-87 the petitioner quotes from a letter to the Chairman of the War Production Board written on January 20, 1942 by Wilbur Nelson, Administrator of the Mining Branch of the WPB. Mr. Nelson's letter said that he was speaking "particularly with reference to foreign mines outside of North and South America (e.g., South Africa)" (R. 1178). That portion of the letter is omitted by the petitioner.

ing concerned about the shortage of miners in the non-ferrous metal mines, until shortly after Order L-208 was issued on October 8, 1942, is covered by Findings 18-52 (R. 75-111) and may well be subdivided into two parts.

In the Findings relating to the period from the beginning of July through September 15, 1942, there are some mentions of the conservation or allocation of critical materials, although those Findings leave no doubt that the manpower purpose of the proposed closing of the gold mines was so dominant even at that time as virtually to exclude anything else (Findings 18-31, R. 75-95). *In the voluminous Findings covering the events during the period between September 17 and October 10, 1942, both inclusive, which set forth the significant documents of that period, including the minutes of the WPB meeting at which the issuance of L-208 was agreed upon (Findings 32-45, 52; R. 96-105, 107-111), there is no reference whatever to the conservation or allocation of critical materials except in the wording of Order L-208 (Finding 43, R. 102-105).*

July, 1942 through September 15, 1942

Findings 18-31, covering the period from the beginning of July, 1942 through September 15, 1942 are quite voluminous (R. 75-95). Some portions of them are particularly pertinent on the question as to the effectiveness of Order L-208 as a manpower measure and especially relevant in considering the assertions in the petitioner's brief that the WPB acted "on the basis of repeated and careful studies" (p. 16, 25). At this juncture, however, we will discuss Findings 18-31 primarily in connection with the issue as to the purpose of Order L-208.

On July 8, 1942 a War Department Committee recommended to the WPB that (Finding 19, R. 76):

> "2. *Production of gold,* with the exception of required amounts of essential silicious gold ores, *should be curtailed by an order of the War Production Board to free labor which is urgently needed in the nonferrous mines* which are essential to the war effort."

This recommendation was the first specific proposal of a curtailment of the operation of the gold mines to "free labor which is urgently needed in the nonferrous mines".

On July 4, 1942 the Priorities Branch of the Labor Production Division of the WPB had sent a memorandum to the Director of Operations of the War Manpower Commission which concluded as follows (Finding 20, R. 76-78):[7]

> "Steps should be taken to remedy the critical labor situation in nonferrous metal mining, including arrangements for the transfer of miners from gold and silver mining to copper, lead, zinc, tungsten, chrome, and molybdenum mining. This can be done through curtailment of gold and silver production, but it would be necessary to make sure that the workers released went into nonferrous metal mining and did not go into war plants in the vicinity or on the West Coast. It has been customary for metal miners in the mountain states to move considerable distances with the opening and closing of mines and ordinary turnover."

The plan to camouflage a gold mine closing order as a War Production Board regulation of critical materials apparently had its beginning in a memorandum sent on

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[7] The petitioner's brief summarizes (p. 93) statements made in this memorandum about the number of employees of the "15 largest producers of gold in seven Western states". We refer later (p. 72-73) to what the Court of Claims found as to these statements.

July 9, 1942 by the General Counsel of the War Manpower Commission to a member of his staff (Finding 21, R. 78; petitioner's brief, p. 94):

> "At a meeting of the War Manpower Commission yesterday, the following problem was referred to this office.
>
> "General McSherry [Director of Operations of WMC] wishes to secure the release of men employed in the gold mining industry for transfer to the copper mining industry. Concededly the War Manpower Commission cannot accomplish this result directly. May the result be accomplished (1) by the War Production Board refusing to the gold mine operators critical materials used in their operations thus compelling the closing of the mines; (2) may the Chairman of the War Manpower Commission direct the War Production Board to take that action?
>
> "The specific situation suggested is simply illustrative of the general problem in this field."

Finding 22 starts with the following (R. 78):

> *"The proposal for closing the gold mines in order to divert their miners to nonferrous metal mines was gaining momentum in August 1942."*

The petitioner's brief says merely (p. 94): "By August 1942, the proposed curtailment of nonessential gold mines was gaining momentum". The brief does not mention that there is a Finding and the words *"in order to divert their miners to nonferrous metal mines"* are simply omitted.

Finding 23 starts with the following (R. 79):

> "Late in August 1942, Guy N. Bjorge, General Manager of plaintiff Homestake Mining Company, the largest gold-mining company in the United States, learned that consideration was being given by the Government to *a proposal to close domestic gold mines in order to divert their miners to the nonferrous metal mines.*"

The Finding then tells of the trip made by Mr. Bjorge to Washington for conferences with the WPB.

The petitioner's brief says (p. 94-95):

> "Later in August, the General Manager of the Homestake Mining Company conferred with several officials of the WPB and expressed his opposition to the closing of the mines, basically for the same reason as that given by Wilbur Nelson."

Thus the petitioner makes no reference to the fact that Mr. Bjorge had learned that consideration was being given by the Government to "a proposal to close domestic gold mines in order to divert their miners to the nonferrous metal mines."

Finding 24, more than a page long, covers a significant correspondence between Senator McCarran of Nevada and Donald Nelson, Chairman of the WPB (R. 80-81). The Finding states that on August 26 Senator McCarran wrote Chairman Nelson "setting forth various reasons why he believed the proposed closing of the gold mines would not accomplish its purpose of obtaining any considerable number of miners for the nonferrous metal mines" and the Finding cites some of the reasons which the Senator gave. The Finding also quotes part of Chairman Nelson's answer of September 1, which accepted Senator McCarran's assumption that the purpose of the proposed closing of the gold mines was to obtain miners for the nonferrous metal mines, and, among other things, said (R. 81):

> "We quite agree that no legal power exists today by which workers may be forced to transfer to other mines. This accentuates the mine labor problem which faces us today."

All that the petitioner's Appendix A says on this subject is that Senator McCarran "in a letter to Donald Nelson set forth his reasons why the curtailment of gold mining,

operations would not be effective for the purpose of obtaining any considerable number of miners for the nonferrous mines" (p. 95).

On September 1, 1942 the War Production Board had a meeting covered by Finding 25 (R. 81-84). This Finding contains extensive quotations from the minutes of the meeting. The petitioner's brief incorporates major portions of the quotations which are in the Finding (p. 95-98). However, if the Finding (R. 81-84) and the petitioner's quotations (p. 95-98) are laid side by side, it will be found that the petitioner has omitted four paragraphs which are in the Finding. We do not contend that the petitioner's omission of these four paragraphs has resulted in a distorted picture of what took place at the WPB meeting of September 1, but the picture is incomplete without them.[8]

On September 4, 1942 a direction was given that an order shutting down the gold mines be drafted by the Miscellaneous Minerals Branch of the WPB (Finding 26, R. 84-85).

Finding 27 covers a long memorandum sent on Septem- 9, 1942, by R. J. Lund, Chief of the Miscellaneous Minerals Branch of the WPB, to the Deputy Director General for Industry Operations of the WPB when transmitting to him a draft of the shutdown order. This memorandum takes up more than five pages of the record (R. 85-90). The treatment of the memorandum in the petitioner's Appendix is astounding.

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[8] The first omitted paragraph set forth the purpose of the meeting, which was to hear a report of the Labor Production Division and the Copper Branch "on the Manpower problem in the nonferrous metals industries" (R. 81). The next two omitted paragraphs gave reasons for the shortage of miners in the nonferrous metal mines (R. 82); they afford support for Findings 47 and 50 (R. 106, 107). The fourth omitted paragraph included a statement by the Chairman of the WPB that the WPB "must take an active and leading role in assuring an adequate supply of copper" (R. 83-84).

The second paragraph of the memorandum says (R. 85):

> *"It was understood that the purpose of the order was to make mining labor now producing gold available to copper and other strategic nonferrous metal mines. This end can be attained by WPB only through its authority to control materials."*

This simple and explicit statement of the purpose of L-208 is not referred to anywhere in the petitioner's brief.

The petitioner's Appendix makes a few generalizations about the contents of the Memorandum and then quotes a 9-line paragraph under the heading "Critical materials saved" (p. 98, R. 87). The impression is created that the quoted paragraph was one of the most important parts, if not the most important part, of the memorandum. That is emphatically not true.

When the Chief of the Miscellaneous Minerals Branch prepared the memorandum, he undertook to treat therein with eight subjects (followed by a "Concluding Statement"), the discussion of which takes up almost five pages of the record. "Critical materials saved" constituted subject (6).

It will be immediately apparent that, by omitting the paragraph in the memorandum which set forth the purpose of the proposed closing of the gold mines and emphasizing the 9-line mention of critical materials, the petitioner has presented a distorted picture.[9] Indeed, that is so apparent that further mention of Mr. Lund's memorandum of September 9, 1942 would hardly seem worthwhile were it not the fact that in all of Findings 18-42 (in which the con-

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[9] The seventh subject was "Effect on economy of states and communities" (see the main body of this brief, p. 53, 93-94). There is four times as much in the memorandum about the adverse effect of a shutdown of the gold mines on communities and states as there is about critical materials, but the petitioner's brief does not mention the former.

temporary documents are set forth), covering the period between the beginning of July, 1942 and the decision on October 6, 1942 to close the gold mines, there are only three suggestions that the shutdown of the gold mines might be even incidentally effective to conserve critical materials and one of the three is the quoted paragraph of the memorandum of September 9, 1942. So we will examine that paragraph to see whether it could reasonably have influenced the thinking in the WPB when it was issued on September 9.

It reads (R. 87):

> "Sizable amounts of critical materials will be saved in closing these gold mines. Estimates as to total current consumption of such materials are not available but the general order of magnitude of such consumption is indicated by the fact that in 1939 gold mines in the United States (excluding Alaska) spent about $17,000,000 on supplies and materials, $2,000,000 for fuel and about $5,000,000 for purchased electric energy."

The paragraph completely disregards the fact that six months before "progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment" (Finding 17, R. 75).

Even if there had been no effective priorities regulations, the expenditure by gold mines of $17,000,000 on "supplies and materials" in 1939 would have been no indication of the amount of critical materials which the gold mines surviving in October 1942 would acquire or use if they were not shut down. The term "supplies and materials" includes all kinds of supplies and materials, whether critical or not. By the fall of 1942 gold mining had already declined drastically under the pressure of manpower shortages and materials restrictions and 1939 statistics were long out of date

(Appendix C to Plaintiff's Exhibit 1, R. 149, 1163, 1244A). Many mines producing gold would not be shut down as "nonessential," as they produced substantial amounts of critical materials. In the case of the mines which were closed down, "supplies and materials" would have to be consumed to keep the mines from flooding and in other permitted maintenance operations.

It is not reasonable to suppose that this casual paragraph in the long memorandum of September 9, 1942, influenced the thinking of the WPB.

The next document referred to in the petitioner's Appendix A (p. 98-99) is a memorandum which an assistant to the Deputy Director General for Industry Operations sent to the Chairman of the WPB on September 11, 1942 with "a copy of the proposed curtailment order on gold" (Finding 28, R. 90-91). The draft order is Defendant's Exhibit 46 (R. 962, 1594-1597). It differs vitally from Order L-208 as finally issued; among other things, it did not contain the key paragraph of Order L-208 (Finding 43, R. 102):

> "(1) On and after the issuance date of this order, each operator of a nonessential [gold] mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine."

Attached to the memorandum which accompanied the draft order was a draft of an SEC-4, from which the petitioner quotes (R. 1595). The SEC-4 form was used for brief explanations of WPB orders (see e.g. Plaintiff's Exhibit 74, R. 383, 1438A; Defendant's Exhibit 2, R. 1574A-1574B; Defendant's Exhibit 3, R. 479, 1574C-1574D, 1575). The petitioner's brief quotes a paragraph from the draft SEC-4 which accompanied the draft order of September 11, 1942 and refers to the draft SEC-4 as if it were a finalized document (p. 98-99). It was not. It was simply a draft prepared by an assistant to the Deputy Director General for

Industry Operations and it was not used. A draft statement prepared by an assistant on September 11, which was rejected, certainly has little significance in considering the purpose of an order which was issued on October 8. Interestingly enough, Order L-208 itself was not accompanied by any "brief summary of action recommended", called for by the SEC-4, except this: "That attached order be issued by the Director General for Operations". No explanation was given. This appears from Defendant's Exhibit 2 (R. 1574A-1574B).

Finding 29 (R. 91-92) quotes from a memorandum which was presumably written about September 11, 1942, although it is not known when it was written or who wrote it. While the petitioner's brief does not quote this memorandum in full, its quotation of an excerpt is a fair one (p. 99).

The first sentence of the petitioner's quotation reads:

> "The basic purpose of this curtailment of gold mining is, of course, to free manpower for the mining of essential minerals, particularly nonferrous metals such as copper, zinc and lead."

The last sentence is this:

> "Besides diverting manpower to essential industries, this order, when in effect, will also conserve some materials and supplies used in gold mining, such as mercury, drill steel, etc."

For whatever it may be worth, it thus appears that whoever wrote the memorandum knew at the time when it was written that "the basic purpose" of the proposed curtailment of gold mining was what the Court of Claims later found was the only real purpose (see p. 34-39 below), "to free manpower for essential mining", but the writer thought that the shutdown of the mines "would also conserve *some* materials and supplies used in gold mining, such as mercury, drill steel, etc."

Finding 30 sets forth that on September 15, 1942 there was a meeting of the Inter-Departmental Committee on Non-Ferrous Metals and the Finding contains rather full quotations from the minutes of that meeting (R. 93-94). This meeting and Finding are not mentioned by the petitioner at all.

It would unduly lengthen this appendix to quote Finding 30 in full, but we will quote three consecutive paragraphs:

> *"Mr. Harbison [Army representative] expressed some concern over the delay in issuing the gold order. He outlined the steps that various agencies had taken to meet the manpower shortage in nonferrous metal mines, and pointed out that the transfer of gold miners to essential mining was being held up by the lack of a gold curtailment order.* He pointed out that the U. S. Employment Service had been unable to obtain many[10] recruits at Rapid City, South Dakota, because the gold mines had not been closed down, although Anaconda Copper Mining Company had agreed to pay transportation costs. *He made it clear that the War Department was impatient at the delay.*
>
> "Mr. Lester of the War Manpower Commission asked that his organization be kept informed of what mines would be affected by the directive, in order that representatives of the Employment Service might be on the spot beforehand.
>
> "In this connection, since *the primary purpose of the order was to free manpower rather than to curtail materials,* Mr. Lipkowitz suggested that an advisory committee be established with representatives from Labor Production Division and War Manpower Commission."

This meeting of September 15 was the first occasion mentioned in a Finding when the Army (through the Services of Supply) or the War Department, engaged in what

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[10] The Finding reads "obtained any" (R. 93). That is a typographical error; the Exhibit contains the wording given above, "obtain many" (Plaintiff's Exhibit 82; R. 1456).

the petitioner calls "urging" (p. 21, 55) and the Court of Claims called "pressure" (R. 18). There were later occasions, more significant and more dramatic, on October 2, October 5 and October 6, which are mentioned below.

Finding 31 relates to a memorandum submitted to Chairman Nelson of the WPB by Mr. Morris Creditor, Special Assistant to the Chairman on September 15, 1942 (R. 94-95; Plaintiff's Exhibit 21, R. 400, 1313-1314). This memorandum raised a number of pregnant questions. The petitioner's Appendix A does not mention it at all. It is worth quoting in full:

> "I have reviewed the proposed limitation order for the gold mining industry and I wish to raise certain points as to the soundness of such an order.
>
> "You will recall that we received a letter from Senator Gurney on August 31 in which he set forth the harmful effects that such an order would have on the economy of the State of South Dakota. In your reply you stated in effect that we were confronted with the manpower problem and something had to be done to overcome the losses of production which are being experienced in the mining of copper and other strategic materials through the shortage of experienced miners.
>
> "In the preamble of the limitation order no mention is made of manpower requirements. It simply states that the order is made necessary because of the shortage in the supply of critical materials which are used in the maintenance and operations of gold mines.
>
> "It would seem to me that if the order is based on the premise of critical materials alone, the question might be raised as to why such an order would not apply to materials being sent by this country to other gold mines in Canada, South America, and South Africa.
>
> "If the main purpose of this order is to divert miners from the gold mining industry to copper and

other mining industries, it seems to me that there is no assurance that this order would accomplish the desired results. As Gustav Peck pointed out to you in his memorandum of September 9, it would be too bad to close the Homestake Mine, for instance, without the assurance that most of the miners will continue to practice their trades in the copper mines.

"Would it not be more practical to accomplish the purposes by a freeze order similar to that which is now in effect for workers in the copper mines and the lumber industry. This may be more drastic but, on the other hand, may give better assurance that the miners in the gold mines would eventually find their way into the copper mines. Consideration might also be given to the idea of having the Army give indefinite furloughs to Service men who in the past were engaged in the mining of non-ferrous materials.

"Even aside from the possible dissipation of these skilled miners into other occupations, there is question whether the closing of all the gold mines will release any relatively large number of workers. As I understand it, in the case of Homestake Mine the proposed order would affect only about 450 miners. This is the largest gold mine and has from a third to a half of all the miners to be released. The Alaska-Juneau miners, incidentally, will be stuck in Alaska. Where are they expected to go?

"I am sure that a great deal of thought has been given to the proposed limitation order on gold mining, but unless there is a high degree of assurance that the main purpose will be accomplished; namely, the diversion of these miners to the non-ferrous mines, I feel it is important to weigh the adverse effects it might have in other directions.

"Actually, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, the preamble should give the real reason; which is to divert this labor to more necessary industries."

September 17, 1942 through October 12, 1942

The Findings covering the period from September 17, 1942 through October 6, 1942, the date of the WPB meeting when it was formally agreed to issue L-208, contain no reference whatever to priorities or the allocation of critical materials. On the other hand they contain pervasive and dominant references to mine labor, particularly hardrock miners (Findings 32-42, R. 96-102). Nor is there any reference to priorities or the allocation of critical materials in the Findings covering the period subsequent to October 6, 1942 except those relating to the wording of Order L-208 itself.

On September 17, 1942 a memorandum was issued, quoted in Finding 32 (R. 96), which related to the procedure to be followed in the clearance of the shutdown Order. The memorandum sheds no light on the purpose of the Order.

On September 25, 1942, representatives of the branches of the WPB which were concerned with mineral production passed a resolution urging that representatives of the gold mining companies be called to Washington to discuss the proposed gold order so that:

> "A. Where possible, existing organizations may be utilized for important mining operations, or prospective operations, necessary in the war effort.
>
> "B. Labor, and especially experienced miners, can be made available to the mining industry, rather than lost to vital metal production."

This meeting, covered by Finding 33 (R. 96), which is not mentioned in the petitioner's Appendix A, is important because it led to the meeting of October 1, 1942 at which

representatives of the gold mining industry met with WPB officials and others. The October 1 meeting is referred to in some detail later and we show that the petitioner's Appendix A makes only an extraordinarily brief and cryptic reference to it.

On September 25, 1942, Vice Chairman Batt of the WPB sent a memorandum to the Director General for Industry Operations of the WPB, two paragraphs of which are quoted in Finding 34 (R. 96). The second of those two paragraphs reads as follows:

> "It seems to me imperative that we very carefully word our press release so that the predominant objective, namely of releasing less essential labor for more essential requirements, shall be clearly evident. And I particularly direct the attention of those who have to do with this matter at this point."

This significant statement by the Vice Chairman of the WPB is not mentioned anywhere by the petitioner.

On September 30, 1942 a conference was held at the office of Vice Chairman Batt of the WPB, covered by Finding 35 (R. 97). All that the petitioner says about this conference is that "Senators McCarran and Gurney and Representatives Case and Englebright * * * voiced the hardships that would be imposed on the inhabitants of gold mining communities and the detrimental effect on morale if the order were issued" (p. 100). The petitioner completely omits two significant sentences in Finding 35 (R. 97):

> "The WPB representatives, except Wilbur Nelson, countered with statements emphasizing the need for labor in copper mines. Some discussion arose as to the number of gold mine employees who would be released by such a closing order."

Those sentences show, as does every Finding relating to the period from September 17 through October 12, that

everyone knew that the purpose of the proposed shut-down order was to release miners for the copper mines.

On October 1, 1942, a meeting was held in Washington (Finding 36, R. 97-98) which, as the petitioner says (p. 100), was "attended by WPB officials, representatives of the gold mining industry, the War Department, the War Manpower Commission and Senator Gurney and Representatives Case and Englebright." So far as appears, this was the only meeting at which the gold mining industry was afforded an opportunity to make any representations to the WPB about its proposed action. The meeting lasted "for approximately five hours" (R. 97). The Finding which relates to it takes up more than a full page of the record.

The outstanding feature of the long, detailed Finding relating to this five-hour meeting is that it indicates throughout that the purpose of the proposed order was to shut down the gold mines in the hope of transferring the "released labor to the copper mines".

After setting forth who called the meeting and who was there, the Finding says (R. 98):

> "At the opening of the meeting Mr. Batt [the Vice Chairman of the WPB] stated that he had brought the gold mine operators to Washington to tell them that *a decision had been made to close the gold mines in order to transfer the released labor to the copper mines.*"

A vigorous controversy developed at the meeting as to (1) the number of hardrock miners and muckers[11] who would actually be released by a closing order, and (2) whether

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[11] The references in the record to "hardrock miners", "hardrock miners and muckers" and "miners and muckers" all mean the same thing. They refer to underground miners in the gold mines, which are hardrock mines (see p. 70-71 below).

the released miners and muckers would go to the copper and other nonferrous metal mines. There was an open division within the WPB as to the possible effectiveness of the proposed order; several men in the WPB doubted that it would be effective (R. 98). On the other hand, the representative of the Army "spoke strongly in support of a closing order" (*id.*). Late in the meeting Dr. Wilbur A. Nelson, who was the Chief of the Mining Branch of the WPB (Finding 23, R. 79), "undertook to determine how many miners and muckers would actually be released by a closing order" (R. 98).

All that the petitioner's Appendix A says about this vastly important meeting is that: "Arguments for and against the order were advanced, and its possible effectiveness as a partial solution to the manpower problem was questioned" (p. 100). Certainly that is a pretty bald effort to slide over a most significant Finding, which is highly pertinent on the issue as to the purpose of Order L-208 and in addition is most relevant in connection with the petitioner's argument that the WPB acted "on the basis of repeated and careful studies" (p. 16, 25).

The study undertaken by Dr. Wilbur A. Nelson of the WPB on October 1 was the *first* as to the number of hard-rock miners and muckers who would be released by a closing order and it is to be contrasted with previous unsupported and usually ambiguous assertions (see below, p. 80-81). This *first study* was undertaken at the close of a meeting which the Vice Chairman of the WPB had opened by announcing that *a decision had already been made "to close the gold mines in order to transfer the released labor to the copper mines"* (R. 98).

On October 1 Mr. Batt, Vice Chairman of the WPB, sent a memorandum to Donald Nelson, the Chairman, saying:

> "The more I study the gold mining situation, the more uncertain I am as to the form which a restriction of operations should take. *Complete closing without exceptions will produce very serious economic dislocations, and the total possible gain in men is a small figure.* If the question comes up in your press conference, I would suggest that you refer to the need for miners and the lack of need for gold, and say that the matter is being studied from all angles."

Mr. Batt's memorandum is covered by Finding No. 38 (R. 99). It is not mentioned by the petitioner anywhere.

On October 2 the Under Secretary of War sent Mr. Batt the following letter (Finding 39, R. 99):

> "I hope that prompt and effective action will be taken with regard to gold mining. I need not call your attention to the urgent need for more miners in the production of copper and other nonferrous metals as you know the situation as well as I do. The longer the delay in shutting down gold mining, the further off will be the relief of the copper shortage. The matter has hung fire for some time, and I trust that there will be no further delay.
>
> "If it is thought best to have the order approved by the War Department and the Navy Department, I will be glad to give the War Department's approval, and I believe that Mr. Forrestal will do the same for the Navy."

The next day, October 3, Dr. Wilbur Nelson reported to the Vice Chairman of the WPB that there were only 896 hardrock miners and muckers among the employees of the gold mining companies which would be affected by the proposed Order, and that since approximately 300 would be needed for maintenance if there were a shutdown, the closing of the mines "would make available *only about 600 miners and muckers for other mining enterprises 'pro-*

vided they [could] all be induced to go into other mines' " (Finding 37, R. 98-99).[12]

This estimated maximum of 600 can be contrasted with the wildly inaccurate or inapplicable figures which had previously been advanced (see below, p. 80-81). Moreover, *there were many factors, known at the time to the WPB and set forth in Finding 50, which could be expected to keep all but a small percentage of the 600 from transferring to the nonferrous metal mines* (Finding 50, R. 106-107).

Nevertheless, the forces which led to the issuance of Order L-208 continued to gather momentum.

On October 5 the Under Secretaries of War and the Navy sent the following memorandum to the Chairman of the WPB (Finding 40, R. 99-100), which the petitioner quotes (p. 101):

> "The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.
>
> There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production. These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.
>
> The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step and others will not give complete relief if nothing is done to transfer gold miners to copper mining.

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[12] The third line on R. 99 is a misprint; it repeats the twelfth line in Finding 35 (R. 97). The following should be substituted:

"order. His report concluded that if all the gold mines and"

The correct text of the Finding will be found at p. 83 of the Appendix to the petition for certiorari.

> The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided."

As already noted, it had previously been determined that a shutdown of the gold mines "would make available only about 600 miners and muckers for other mining enterprises, 'provided they [could] all be induced to go into other mines'" (R. 99). At the trial, counsel for the Government made no effort to show the origin of the Under Secretaries' statement that there were "two thousand to three thousand hard-rock miners engaged in gold mining".

On October 6, 1942 a WPB meeting was held at which the formal decision to issue Order L-208 was reached (Finding 41, p. 100-101). Pertinent portions of the minutes of the meeting are set forth in the petitioner's Appendix A (p. 101-103). There are three significant things about the meeting:

First, there is no reference in the minutes to the acquisition or consumption by the gold mines of any critical materials or to any desire on the part of the WPB or the Army to requisition or allocate any critical materials, machinery or equipment already owned by the gold mines.

Second, the WPB apparently accepted Dr. Wilbur Nelson's figures that at that time there were only 896 hardrock miners and muckers in the gold mines which would be closed down and that approximately 300 of them would be needed for maintenance and other necessary work, so that only about 600 would be available if they could all be induced to go into other mines (Finding 37, R. 98-99; Finding 41, R. 100). There is no reference in the minutes to the very large difference between Dr. Nelson's figures and the figures given on October 5 by the two Under Secretaries.

Third, General Somervell, who was Commanding General of the Services of Supply of the War Department (R. 1466), made a statement for the Army (R. 101):

> "*General Somervell stated that* because of the critical shortage of copper, which is drastically curtailing ammunition production, the Army has taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines and that, under these conditions, *failure to stop gold production immediately would be inexcusable.*"

Later the WPB's own Policy Analysis and Records Branch Office said (Plaintiff's Exhibit 1, R. 149, 1163, 1218, *italics in the original*):

> "*General Somervell's position, however, amounted almost to an ultimatum, which permitted no alternatives.*"

The action agreed upon, as set forth in the minutes of the meeting, was that (R. 101):

> "'An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within 60 days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition.'"

Order L-208 was actually issued on October 8, 1942 (R. 102).

On October 7, 1942, even before Order L-208 was issued, Chairman McNutt of the War Manpower Commission issued a directive intended to channel any person who "ceased to be employed as a production or maintenance worker in connection with gold mining" into "work in essential nonferrous metal mining, milling, smelting, and refining activities" (Finding 44, R. 105). This Finding is not referred to in the petitioner's brief.

The petitioner's brief also omits mention of Finding 45 (R. 105), which relates to the issuance immediately after October 8, 1942 of a statement by the Chairman of the War Manpower Commission and the Chairman of the WPB "appealing to all workers in gold mines to transfer to non-

ferrous metal mines and not to other war industries". In this joint statement these officials were most explicit in their characterization of the objective of Order L-208. Among other things, they said (Plaintiff's Exhibit 34, R. 430, 1323):

> "To meet our war production program with respect to these [non-ferrous] metals, *it becomes necessary now to maneuver our manpower so that less essential mining can be diverted to vitally important operations. With this as our objective it has been determined that all gold mining shall be discontinued at the earliest possible moment.*"

On October 10, 1942, 21 United States Senators from 12 gold-producing Western States sent a long written detailed protest to the President (Finding 52, R. 107-111), in which it was stated that the making of the Order "is supported by the theory that the labor employed in these gold mines will go into mines of copper or lead or zinc" (R. 109). Seven paragraphs of the protest, taking up a full page of the record, were then devoted to an effort to convince the President that only a small number of hardrock gold miners could be expected to go into the copper, lead and zinc mines (*id.*). The protest concluded with the following paragraph (R. 110-111):

> "We respectfully bring this matter to your attention with the request that you stay the order made by the War Production Board affecting the gold mine operations of the United States, at least until the whole subject of marshalling of manpower and the allocation of labor may be considered, and the vital questions involved, concluded; thus that the gold mining industry of the United States may not be subjected to unwarranted and unusual hardship and injury which may not eventually be considered necessary, and which may not be equitably borne by other industries."

The 21 Senators clearly understood that the purpose of Order L-208 was to channel miners and muckers into the nonferrous metal mines (R. 109).

The Government's brief recognizes that the President's rejection of the Senators' protest and request for a stay constituted an approval of the Order by the President (p. 21, 55).

There is additional documentary evidence which is not covered by Findings or referred to in the petitioner's brief:

On October 10, 1942, the Under Secretary of War sent the President of the Homestake Mining Company a telegram reading as follows (Plaintiff's Exhibit 132, R. 612-613, 1516):

> "FACED WITH A SERIOUS SHORTAGE OF COPPER AND MOLYBDENUM FOR OUR ARMAMENT PROGRAM STOP THE WAR PRODUCTION BOARD HAS ORDERED THE CLOSING OF GOLD MINES TO PROVIDE ADDITIONAL TRAINED LABOR FOR THE NON FERROUS METAL MINES STOP THE SECRETARY OF WAR HAS ALSO TAKEN THE UNPRECEDENTED ACTION OF FURLOUGHING MINERS IN MILITARY SERVICE STOP I HAVE DIRECTED IMMEDIATE ACTION TO BRING OFFICIALS OF THE WAR DEPARTMENT AND OF THE ANACONDA COPPER MINING CO IN COOPERATION WITH YOUR LOCAL MANAGEMENT AT LEAD COMMA SODAK STOP I AM ASKING YOU TO TAKE THE LEADERSHIP IN EFFECTIVE (*SIC*) THE QUICKEST AND LEAST DISTURBING TRANSFER OF WORKERS FROM THE NATIONS GOLD MINES TO NONFERROUS MINES STOP I WILL APPRECIATE PROMPT MEASURES ON YOUR PART TO INSURE FULL COOPERATION OF YOUR LOCAL MANAGEMENT AT LEAD STOP.

The Under Secretary's statement that the War Production Board had ordered "the closing of gold mines *to provide additional trained labor for the nonferrous metal mines*" was certainly the statement of one who knew why the WPB had acted. For, not only was the Under Secretary at the

WPB meeting at which Order L-208 was agreed upon (Plaintiff's Exhibit 92, R. 426, 1466), but, as the petitioner's brief says (p. 21, 55), the WPB had acted "at the urging of the War Department".

On October 11, 1942, General Somervell, who (with the Under Secretary of War) had represented the War Department at the October 6 meeting of the WPB (Plaintiff's Exhibit 92, R. 426, 1466), wrote to Senator Gurney a letter, in which the concluding paragraph read as follows (Plaintiff's Exhibit 127, R. 520, 1510-1511):

> "In the light of the facts set forth above, I know that you will understand why the War Department feels that military necessity demands the immediate curtailment of the gold mines. *The gold mining industry has been singled for curtailment only because it constitutes the most readily available pool of 'hard rock' miners who are so urgently needed to further the war effort.*"

The second sentence of this paragraph is a notably succinct statement of what happened. The gold mining industry was *singled out.* It was singled out for *one reason only.* That reason was that the War Department wanted *hardrock miners for the nonferrous metal mines.*

On October 12, 1942, the Chief of Staff of the Army wrote to Senator Gurney a letter in which he said, among other things (Plaintiff's Exhibit 128, R. 523, 1511-1512):

> "It is my understanding that *the War Production Board has ruled that the gold mining industry be closed down in the hopes that this action will release experienced mine labor for employment in the mining of the basic strategic materials essential to our war production program.* I am sure that this action was taken only after careful consideration of all the factors involved."

II

The purpose of Order L-208

The most important issue considered by the Court of Claims was whether the real purpose of Order L-208 was to close down nonessential gold mines in order to effect a transfer of mine labor to the nonferrous metal mines, or whether the Order was intended to regulate the allocation and use of critical materials, machinery and equipment.

The Commissioner made a Finding consisting of three sentences. The respondents objected to the second and third sentences and they were rejected by the Court (R. 7-8, 105-106):[13]

> "The dominant consideration by Chairman Donald Nelson[14] of WPB in the issuance of Limitation Order L-208 was the releasing of mine labor from the gold mines for employment in mines that were producing other metals, such as copper, which were in short supply and urgently needed in the war program. [Another consideration in the issuance of the order was as stated in the preamble that the fulfillment of requirements for the defense of the United States had created a shortage in the supply of critical materials which had been used in the maintenance and operation of gold mines.
>
> Both objectives were in some measure accomplished with the closing of the plaintiffs' gold mines pursuant to the order.]"

The sentences which the Court of Claims rejected are underlined in the quotation.

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[13] The Commissioner's Finding was numbered 44. The Court's Finding is numbered 46.

[14] It will be recalled that Executive Order 9024 gave authority to the Chairman. See Note 1 above.

The Court of Claims thus expressly found that "The dominant consideration" was the releasing of mine labor and expressly rejected the Commissioner's view with respect to critical materials.

The word "dominant" is defined in Webster's International Dictionary (Second Ed.) as follows:

> "1. Having the ruling or controlling influence; prevailing; predominant. * * *"

As we show below, there cannot be the slightest question that when the Court spoke of "The dominant consideration", and excluded any reference to any other consideration, it meant that the Order had only one real purpose, the releasing of mine labor.

The petitioner's brief concedes that "*a* dominant consideration underlying its issuance was the release and expected diversion of labor from the gold mines to nonferrous metal mines" (p. 11). It says later that "the diversion of manpower to essential mines was *a* motivating factor in the issuance of L-208" (p. 60). These changes of the word ***"the"*** to the word ***"a"*** are hardly accidental. The petitioner has simply tried to reinstate the Commissioner's finding, without stating what the Court's Finding was or even indicating that the Court made a Finding as to the purpose of the Order.

There can be no doubt as to what the Court meant when it referred to *"The dominant consideration"*. The Court said in its opinion (R. 19):

> "The record establishes that no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders

had solved that problem in connection with the gold mines.

* * * * *

"The record establishes that the purpose and intent of WPB in issuing L-208 was to deprive the gold mine owners and operators of the right to use their properties in the only way they could be beneficially used, i.e., to mine and sell gold for a profit, and that this was done in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines."

In denying the motion for a rehearing the Court restated its original holdings (R. 145):

"The court held that what WPB said it was doing and what it in fact and law did, were two different things and that the Government could not escape the obligation of paying just compensation for what it had the authority to take and in fact took, simply by calling its action of taking a 'priorities order' or an 'allocation order'."

If there were any question as to the meaning of the words "The dominant consideration" in the lower Court's Finding 46, this Court can resort to the lower Court's opinion to determine the meaning of the Finding.[15]

Although Judge LARAMORE dissented, he agreed with the majority as to the purpose of the Order. He said (R. 61):

"The majority opinion points out that L-208 was not an allocation order, as it purported to be, but rather was clearly an order closing gold mines deemed nonessential to the war effort; i.e., those mines whose gold production in dollar value exceeded 30 percent of their total production."

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[15] See pages 64-65 in the main body of this brief.

Moreover, the petitioner itself agrees that the Court of Claims concluded "that L-208 was not devised for the purpose of conserving or allocating materials" (p. 53).

Nevertheless, the petitioner's argument is an attack on the Findings of Fact of the Court of Claims, although not stated to be such. If the petitioner has any right to challenge those Findings, which is doubtful for the reasons pointed out at pages 58-60 of the main body of this brief, it may challenge them only on the ground "that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any fiinding of fact on a material issue" (see the main body of this brief at p. 63-64).

The Findings of evidentiary or primary facts pertain largely to documentary evidence. The petitioner does not assert that any of the Findings, whether or not relating to documents, is not supported by substantial evidence. And it would be preposterous to assert that the Findings of evidentiary and primary facts do not sustain the Court's ultimate Finding, No. 46, as to the purpose of the Order.

Indeed, the record heretofore summarized in this Appendix, particularly the portions thereof pertaining to the period from September 17, 1942 to October 12, 1942, can lead to only one reasonable conclusion: that the purpose of the Order, which was issued at the instance of the Army and the War Department, was the purpose that was stated at the time by the Army and the War Department in the Under Secretary of War's telegram of October 10 and General Somervell's letter of October 11. They were the spokesmen for the War Department and the Army in the crucial memoranda which are quoted in Findings 39 and 40 (R. 99-100) and at the WPB meeting of October 6 where

General Somervell said that "failure to stop gold production immediately would be inexcusable" (Finding 41, R. 100-101).

No one can read the documentary record of the October days and have any question as to what happened (see above, p. 25-33). The Vice Chairman of the WPB began the month with serious misgivings about the proposed closing of the gold mines (Finding 38, R. 99). But a strong memorandum was sent to the Vice Chairman on October 2 by the Under Secretary of War (Finding 39, R. 99). It was followed by a still stronger one on October 5, signed by the two Under Secretaries (Finding 40, R. 99-100). Both the Under Secretary of War and the Commanding General of the Services of Supply of the Army were at the October 6 meeting, at which General Somervell said that "failure to stop gold production immediately would be inexcusable" (Findings 41, 42; R. 100-102). Following the issuance of Order L-208, there were the Under Secretary's telegram, General Somervell's letter and the letter of the Chief of Staff (see above, p. 32-33).

Moreover, immediately after the issuance of L-208 Chairman Nelson of the WPB himself announced that the objective of the Order was "to maneuver our manpower so that less essential mining can be diverted to vitally important operations" (see above, p. 30-31).

If there had been any real intent to have Order L-208 serve as a priorities or allocation order, the Government would surely have called as witnesses several of the many men who had to do with Order L-208 at the top level and who were still alive at the time of the hearing before the Commissioner. The only top level official called by the Government was General Somervell, and nothing he said tended to cast any doubt on the correctness of the Finding of the Court of Claims (Finding 46, R. 105-106). On the

contrary, his testimony affords additional support for the Finding.[16]

The Government's failure to call any of the other top level men speaks for itself.[17]

The one top level witness whom the Government did call, General Somervell, said nothing to impeach the shortest and best statement of the purpose of Order L-208, which had been made by him in his letter of October 12 (Plaintiff's Exhibit 127, R. 520, 1510-1511):

> "The gold mining industry has been singled for curtailment only because it constitutes the most readily available pool of 'hard rock' miners who are so urgently needed to further the war effort."

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[16] He testified on direct examination (R. 1134-1135):

> "Q. General Somervell, do you recall at any time during the war having the question of gold mining come to your attention?
>
> A. Yes, it was widely discussed at one stage of the game.
>
> Q. Can you fix the approximate date when it came to your attention?
>
> A. I think it was in 1942.
>
> Q. Can you recall how it came to your attention?
>
> A. No, I don't. The matter was widely discussed, as I said, with our staff, and most likely with the General Staff and with the WPB.
>
> Q. What were the—in what connection did it come to your attention, the question of gold mining?
>
> A. The shortage of miners needed for critical materials, particularly copper."

[17] The Commissioner charged the Government with "breaking faith with the court", because it did not produce Vice Chairman Batt as a witness (R. 1144). Counsel for the Government considered the charge unwarranted (R. 1146) and we do not ask this Court to find that it was justified. We bring up the subject merely to point out that the matter of having as witnesses men who had to do with L-208 at the top level was raised at the hearing and that counsel for the Government called no one other than General Somervell.

III

The provisions of Order L-208.

On analysis, it will be found that

1. The key paragraph of Order L-208, paragraph (b)(1), which directed the shutdown of nonessential mines, was implemented by paragraphs (b)(2) and (b)(3), which prohibited the acquisition, consumption or use of *any* materials, facilities or equipment in specified mining activities.

2. No direction in the Order related to *critical* materials.

3. The preamble to the Order, which did speak of critical materials, was the conventional "L" order preamble.

4. The references in paragraphs (b)(2), (b)(3) and (c) to "material" were presumably intended to give superficial support to the impression, which the preamble was designed to create, that Order L-208 was a true regulation of critical materials.

The key paragraph of Order L-208 was paragraph (b)(1), which read (R. 102):

> "On and after the issuance date of this order, each operator of a nonessential[18] mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine."

It was implemented by paragraph (i), which provided (R. 104):

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[18] Order L-208 defined a "nonessential mine" as a mining enterprise, whether lode or placer, in which gold was produced, unless the operator held a serial number under Preference Rating Order P-56 (R. 102). After March 2, 1942, serial numbers were not granted to gold mines unless they produced substantial amounts of critical materials (Finding 17, R. 74).

"(i) *Violations.* Any person who willfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance."

No other "L" order contained a provision like the "close down" directive in paragraph (b)(1), which deprived the owners of the nonessential mines of the only beneficial use which could be made of them (R. 19).

Paragraph (b)(2) provided (R. 102):

"In no event on or after 7 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment *to break any new ore or to proceed with any development work or any new operations* in or about such mine."

Thus paragraph (b)(2) implemented the broad directive in paragraph (b)(1) by putting a 7-day deadline on *any extension* of mining operations.

Paragraph (b)(3) provided (R. 102-103):

"In no event on or after 60 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment *to remove any ore or waste* from such mine, either above or below ground, *or to conduct any other operations in or about such mine*, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair, and its access and development workings safe and accessible."

Thus paragraph (b)(3) implemented the close down provision of (b)(1) by putting a 60-day deadline on the continuance of *all mining activities, other than necessary maintenance.*

The close down action "agreed" upon at the October 6 meeting of the WPB was set forth in the minutes as follows (R. 101):

> "An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within 60 days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition."

Paragraph (b)(3) of L-208 was simply a more detailed statement of this.

Chief Judge JONES said that paragraphs (b)(2) and (b)(3) "forbade the use of *critical* materials in nonessential industry", that "they would have produced the closing down of the mines whether or not paragraph (b)(1) had been included" and that paragraph (b)(1) should "be construed as mere surplusage" (R. 58-59). That view reflects a misunderstanding of the Order and disregards its purpose.

In the light of the direction in paragraph (b)(1) that the affected gold mines "close down", nothing whatever was added to Order L-208 by the provisions in paragraphs (b)(2) and (b)(3) prohibiting the consumption, acquisition or use of "*any* material, facility, or equipment" *in the conduct of the operations of the mines* thus ordered to be closed down. The only significance of the provisions of paragraphs (b)(2) and (b)(3) lies in the 7-day and 60-day deadlines imposed by their terms on the mining activities therein specified which would have required the continued use of mine labor.

Paragraphs (b)(2) and (b)(3) did not relate to "*critical* materials" as Chief Judge JONES supposed. The refer-

ences therein were to "*any* material, facility, or equipment", whether needed in the war effort or not. The prohibitions of the acquisition, consumption or use of "*any* material, facility, or equipment" in any of the several mining activities mentioned in (b)(2) and (b)(3) were obviously adopted as a device to make L-208 superficially similar to an order relating to the acquisition, consumption and use of critical materials. The fact is that the Order contained no mention of critical materials except in the preamble.

Moreover, as we point out in more detail later (p. 50-52), paragraph (b)(3) shows that the provisions of the Order relating to the use of "any material, facility or equipment" contemplated that the owners of the nonessential mines would keep their materials, facilities and equipment for use when gold mining was resumed. The Court below said (R. 34):

> "Any actual conservation intended and brought about by that part of L-208 which prohibited the use of the gold mine owners' equipment and machinery for the mining of gold was for the purpose of conserving that equipment and machinery for future use by the nonessential gold mines in the production of nonessential gold."

Judge LITTLETON's opinion for the Court below contains a realistic analysis of the Order, particularly paragraphs (b)(2) and (b)(3) (R. 44-45):

> "*The real substance and intent of the order was embodied in the prohibition directed at the continued operation of the gold mines. The so-called limitation on the gold mine owners' use of the equipment and supplies and facilities which they owned was not intended to make those items available to the Government or to the war effort but was expressly included in the order to insure that they would not be used*

> *in the mining of gold, and was part and parcel of the express order to cease doing business.''*

Paragraph (c), which was not mentioned by Chief Judge JONES, related to the application of preference ratings "to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine" (R. 103). This provision of the Order was clearly surplusage since the gold mines had already been denied access to critical materials (Finding 17, R. 74-75; Finding 50, R. 106-107).

The preamble of the Order read (R. 102):

> "The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and or export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense."

This was the conventional "L" order preamble[19] and it tended to give L-208 the appearance of an "L" Order. It was camouflage, since the critical materials problem had been solved seven months before, so far as the gold mines were concerned, and the WPB knew that such was the case (Finding 17, R. 75; Finding 48, R. 106; Finding 50, R. 106-107; see above, p. 6-9; see below, p. 45-46).

The impression intended to be created by the preamble, that L-208 was a true regulation of critical materials, received superficial support from the references in paragraphs (b)(2), (b)(3) and (c) to "material". However, an analysis of those paragraphs would disclose that they

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[19] See, e.g., L-58, 7 F. R. 1856; L-64, 7 F. R. 2454; L-71, 7 F. R. 2392; L-79, 7 F. R. 2867; L-85, 7 F. R. 2722; L-116, 7 F. R. 3475; L-120, 7 F. R. 5119; L-136, 7 F. R. 4477; L-150, 7 F. R. 4482; L-157, 7 F. R. 5557.

did not relate to critical materials. Order L-208 was imperfectly camouflaged.

It will be recalled that on September 15, 1942, Mr. Morris Creditor, Special Assistant to the Chairman of the WPB, wrote to the Chairman about the preamble of a draft of the Order which was under discussion at the time (Finding 31, R. 94-95; see above, p. 21-22). That draft of the Order did not contain the "close down" direction which was in Order L-208 as issued, but the preamble of the draft order was identical with that of Order L-208 (Defendant's Exhibit 46; R. 962, 1594, 1595-1597). Mr. Creditor said (R. 95):

> "Actually, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, the preamble should give the real reason; which is to divert this labor to more necessary industries."

This straightforward recommendation was not adopted.

The Court below held that "what WPB said it was doing and what it in fact and law did, were two different things" and that the Government could not escape liability "simply by calling its action of taking a 'priorities order' or an 'allocation order'" (R. 145).

There can be no question that L-208 was camouflaged. The Government has offered no explanation of the reason for the camouflage, but instead has persevered in the attempt to make L-208 seem like a true "L" order, designed to conserve and allocate critical materials.

IV

The inadaptability of the Order to serve as a priorities or allocation order relating to critical materials, machinery or equipment.

There are only two ways in which a priorities or allocation order could serve any function: (1) to prohibit or

control the movement of critical materials, machinery or equipment *to* the gold mines—that is to say, to prohibit or control the acquisition of critical materials by the gold mines—or (2) to bring about the movement of critical materials, machinery or equipment *from* the gold mines.

The Court below analyzed Order L-208 on both these points.

Acquisitions by the gold mines.

We have noted at pages 41-43 of this Appendix that paragraphs (b)(2) and (b)(3) related to the acquisition of "*any* material, facility, or equipment"; that paragraph (c) referred to the acquisition of "*any* material or equipment"; and that none of those paragraphs was intended to control use or allocation of *critical* materials. They merely implemented the "close down" directive in paragraph (b)(1).

If the paragraphs had referred to critical materials, they would have been surplusage, because the purpose of the Order was to shut down the gold mines to "maneuver our manpower" (R. 1323) and there was no need for any further restriction on the acquisition of critical materials by the gold mines (see above, p. 33-44).

The second paragraph of Finding No. 17 is decisive on this point (R. 74-75). We repeat the last sentence of that paragraph (R. 75):

> "Thus, by March 2, 1942, a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment."

Finding 48 says further (R. 106):

> "Although the preamble to the order stated that it was issued to conserve critical materials, supplies and equipment needed for defense and in short supply, the only part of the order itself which attempted to effect such a conservation was that part which prohibited the gold mines from acquiring such materials, and that acquisition had already been effectively curtailed and in large part cut off by existing priority orders (finding 17)."

Finally, Finding 50 starts with the following (R. 106-107):

> "50. On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of L-208 knew (1) that existing priority orders insured that the gold mines would not receive any critical materials needed by more essential users; * * *"

The Statement in the petitioner's brief (p. 7) gives a good part of Finding 17 without quoting or summarizing the last sentence which we have quoted above. However, the substance of that sentence is given, without reference to the Finding, in the petitioner's Appendix A (p. 90) and it must be safe to assume that the petitioner does not challenge the Finding. The petitioner does not refer to, much less challenge, the portions of Findings 48 and 50 which we have quoted.

Nevertheless, we find in the petitioner's Summary of the Argument a most extraordinary statement (p. 22):

> "And L-208 prohibited the consumption of material, facilities, and equipment by nonessential mines. By these devices, demand upon manufacturers and suppliers of mining supplies was thereby reduced; demand was thus brought more nearly in line with supply and facilities, manpower and equipment were released for the production of products essential to the war effort. In these respects, L-208 was a typical exercise of the allocation authority of WPB."

And at page 59 the petitioner says:

> "By its terms, L-208 prohibited the acquisition of new material essential to maintenance and operation. The demand for such material was thereby reduced, thus bringing demand more nearly in line with supply.[40]

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[40] "• • • Through the L orders the Board took direct action to cut down on the authorized demand for materials for the purpose of bringing that demand somewhere near the available supply of materials. And this was precisely what had to be done, for to make it possible for a system of materials allocation to work it was essential to lop off the excess demand for materials. This the Board did by banning the manufacture of nonessential products. • • •" *Industrial Mobilization For War, op cit.*, page 309."

The argument that by Order L-208 "the demand upon manufacturers and suppliers of mining supplies was thereby reduced" and that "demand was thus brought more nearly in line with supply" is a sort of disassociated concept bearing no relation to the Findings or the facts. The potential demand for critical materials had already been eliminated. It accomplished nothing, so far as critical materials are concerned, to prohibit the acquisition of *any* material, whether needed in the war effort or not.

The ultimate is reached in the brief when the contention is made that "L-208 was a typical exercise of the allocation authority of the WPB" (see above, p. 2-5).

Movement of critical materials, machinery or equipment from the gold mines.

If the gold mines which were shut down by Order L-208 had had critical materials, machinery or equipment for which there was a real need, the logical step for the Gov-

ernment would have been to requisition them. That would have insured their movement to the places where they were needed.

The Government did not requisition materials, machinery or equipment from the gold mines, either at the time when Order L-208 was issued or later. The petitioner's brief emphasizes this when it argues that there was no taking (p. 20).

As to the respondent Homestake Mining Company, the Court found[20] (Finding 65, R. 114):

> "At no time did WPB requisition or order Homestake to surrender or transfer any of its supplies, equipment or machinery, nor did it make any inquiries regarding the amount, nature or availability of Homestake's supplies, equipment and machinery, although the Board was furnished with an inventory of supplies on hand and other information relating to equipment and machinery."

As to the terms of the order, Finding 48 includes the following (R. 106):

> "That part of the order which prohibited the use by the gold mines of the supplies, materials and equipment and facilities they owned and had on hand did nothing to assure that those materials, etc., would be available for use by more essential industries or by the Government."

The Court of Claims obviously considered it most significant that materials, supplies and equipment in the gold mines were never requisitioned. The Court said, in its opinion (R. 19):

> "Although WPB had full power to requisition any large inventories of supplies, materials, and equip-

[20] The Homestake mine was much the largest mine shut down (R. 95). No evidence was offered that anything was requistioned from other mines.

ment owned by the gold mines, or to authorize more essential users of such materials to place mandatory orders with the gold mines, no such power was ever exercised."

And at R. 27:

> "The record establishes that the Government did not intend to, nor did it ever, requisition any of this personal property or direct the mine owners to sell it to anyone else. From the language of the order itself and from the circumstances surrounding its promulgation, it is apparent that its only purpose was to deprive the gold mine owners and operators of their right to make use of their mining properties."

And at R. 32:

> "Insofar as L-208 prohibited the mine owners from using any of the materials, supplies, equipment, machinery and facilities owned by them and on hand, that prohibition allocated nothing, i.e., it distributed nothing because the order contained nothing which required the gold mine owners to sell those items to the more essential users."

Finally, at R. 45:

> "The so-called limitation on the gold mine owners' use of the equipment and supplies and facilities which they owned was not intended to make those items available to the Government or to the war effort but was expressly included in the order to insure that they would not be used in the mining of gold, and was part and parcel of the express order to cease doing business."

* * * * *

Order L-208 expressly permitted the closed gold mines to "acquire, consume, or use any material, facility, or equipment * * * to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair,

and its access and development workings safe and accessible" (Finding 43, R. 102-103). This provision of the Order was not changed by either of the amendments on which the petitioner now relies (petitioner's brief, p. 115, 119). The theory of the Order, throughout, was that any closed mining enterprise would be kept in suitable condition for the prompt resumption of operations when permitted.

It will be recalled that when the estimate was made by Dr. Wilbur Nelson, Chief of the Mining Branch, of the number of hardrock miners who would be "released" by the closing of the mines, it was assumed that men could be kept to keep the mines "on a stand-by basis" (Finding 37, R. 99). And the minutes of the October 6, 1942 meeting of the WPB show that the WPB contemplated that there would be "standby operations" (Finding 41, R. 100).

Moreover, paragraph (b)(3), in permitting the use of any material, facility or equipment in the maintenance of respondents' properties, was intended to conserve such equipment and materials only for future use in gold mining. As the Court below said in its opinion (*italics in original,* R. 33-34):

> "L-208 made specific provision for the gold mine operators to preserve their own critical machinery and equipment so that they, i.e., the nonessential owners, would have that equipment and machinery in good condition for use in gold mining when the limitation order was finally lifted.
>
> "Paragraph (b)(3) of L-208 provided that no gold mine operator might acquire, consume or use any critical material, facility or equipment *except to the minimum amount necessary to maintain the gold mine's buildings, machinery and equipment in repair and its access and development workings safe and accessible.* Paragraph (c) of the order authorized the Director General for Operations of WPB to assign such preference ratings as

might be required to gold mine operators to enable them to obtain the minimum amount of critical materials necessary to maintain their nonessential mines on the basis set forth in subparagraph (b)(3), i. e., to keep their machinery and equipment in repair, *inter alia.*

"The above makes it quite clear that the 'conservation' brought about by L-208 with respect to the mining machinery and equipment owned by the mine operators was not the usual conservation purpose of a limitation order of WPB, i. e., conservation so that the equipment, machinery and materials owned by a manufacturer of nonessential products might be converted to the manufacture of essential end products either by the owner or by some manufacturer of an essential end product. Any actual conservation intended and brought about by that part of L-208 which prohibited the use of the gold mine owners' equipment and machinery for the mining of gold was for the purpose of conserving that equipment and machinery for future use by the nonessential gold mines in the production of nonessential gold."

In short, when the WPB issued L-208 it did not have in mind the permanent stoppage of gold mining as a result of which used machinery and equipment would be thrown on the market—it had in mind a temporary cessation of mining operations with the used machinery and equipment remaining, at least for the most part, right where it was.

The failure of the WPB to requisition any of the materials, machinery and equipment confirms this view of L-208. The WPB intended that, at least in the main, the gold mines would keep what they had. Any trickle from the mines was bound to be incidental and haphazard.

Chief Judge JONES of the Court of Claims took exception to the emphasis which the majority gave to the failure of the Government to requisition the materials, machinery and equipment. He said (R. 59):

"The majority concludes that those operators who had critical materials on hand are entitled to recover for the time that these materials would have allowed them to continue operation. In this respect the court seems to rely mostly on its conclusion that in so far as L-208 prohibited the use of critical materials on hand, it was arbitrary. The court bases this conclusion in turn primarily on the fact that the Government took no affirmative steps to allocate the materials 'away from' the gold mine operators into more essential uses.

We do not think this was necessary under the circumstances. If indeed these materials were critical, then it is natural to expect that, under the operation of supply and demand, such materials would find their way into essential uses. In fact it would have been wholly impracticable in a great national emergency for any agency of government to allocate and assign every bolt, nut, and piece of critical materials."

The fact that it would not have been practicable to requisition "*every* bolt, nut, and piece of critical materials" does not detract from the significance of the fact that *nothing* was requisitioned. If the need for critical materials, machinery or equipment had been a real factor in the issuance of L-208, at least *some* of the things which the closed gold mines had would have been requisitioned.

* * * * *

In considering what incidental effects Order L-208 may have had, in the absence of any requisitioning, it is necessary to distinguish between (1) critical materials, and (2) used mining machinery and equipment (see above, p. 1-2).

As to critical materials, Chief Judge JONES argued that some critical materials were sure to be sold by the gold mines and that they were bound to find their way into the hands of essential industries (R. 59). The Chief Judge did not suggest that there is any evidence in the record as

to what incidental and haphazard effects L-208 may thus have had in diverting critical materials to essential industries.

The discussion of critical materials in the petitioner's brief is most ambiguous, because it fails to distinguish between (1) critical materials, and (2) "used mining equipment and machinery" (p. 61-69). Under the heading "*Results*" it refers to "used mining equipment and machinery" as "material" (p. 61). However, in a footnote it is admitted that (p. 64, Note 45):

> "Neither the record nor the history of L-208 reflects data on the quantum or value of war material other than machinery and equipment which may have been channeled from idle inventories of L-208 mines into essential war enterprises."

The footnote then goes on to quote the statement by Chief Judge JONES to which we have just referred.

In short, there is nothing in the record on which to base even a guess as to the amount of critical materials which may have trickled from the closed mines to essential industries. Order L-208 was not intended to divert critical materials to more essential industries and there is no basis for an assumption that it had any significant effect in that connection.

As to used machinery and equipment, the petitioner says that "as a result of L-208, a reservoir of used mining equipment and machinery estimated to exceed $75,000,000 became available for transfer to other mining activities and other enterprises of wartime value" (p. 22, 61). The original source of this estimate is a report by Edward H. Rott, dated May 23, 1943, entitled "Report on Gold Mine Order L-208" (Plaintiff's Exhibit 13, R. 857, 964, 1292-1301). The estimate included not only what was "normally recognized as essentially mining equipment" but also "tractors, draglines and trucks" (R. 1301).

The petitioner says (p. 61) that "This material was 'pitifully short of requirements' (R. 1777)". But there is no page 1777 in the record; we have not been able to find what is quoted; and we do not know what the statement means.

The petitioner then says that "as of November 19, 1942, when L-208 was first amended, this material was moving into channels leading into essential work at the rate of $82,600 per week" and that by April and May of 1943 "this transfer of material accelerated to the rate of $100,000 per week" (p. 61-62). The original source of these statements is also Mr. Rott's report of May 23, 1943 (R. 1301).

The petitioner next projects the $100,000 a week figure over the period to June 30, 1945, when Order L-208 was revoked, and on the basis of the projection the petitioner asserts that it is "a fair approximation that equipment of over $12,000,000 in used value ultimately found its way from the nonessential gold mines into essential operations" (p. 62). The petitioner's brief then devotes almost three pages to comments on this asserted accomplishment of Order L-208 (p. 62-65).

Of course, the projection of the $100,000 per week figure from May 24, 1943 to June 30, 1945 is the rankest sort of arbitrary assumption with respect to a matter on which it was certainly possible for the petitioner to obtain competent evidence.

Moreover, it would be plainly wrong to give Order L-208 all of the credit for whatever movement of machinery and equipment from the gold mines took place. The report of Edward H. Rott, the original source of all the petitioner's figures, with respect to equipment transferred from the gold mines, said (R. 1301-1302):

> "However, very little of this was transferred from the three principal operators from which manpower was released by the order. How rapidly this equip-

ment would have moved into strategic metal production if Order L-208 had not been issued is pure speculation, but we know it was under way. How much of the millions in used equipment still idle will remain so, cannot be estimated. This would largely be dependent on the length of the war."

In this entire discussion of the "reservoir of used mining equipment and machinery estimated to exceed $75,000,000" which is asserted to have become "available for transfer to other mining activities and other enterprises of wartime value" (p. 22, 61-62), the petitioner has simply incorporated in its brief as statements of fact the substance of proposed findings which the petitioner asked both the Commissioner of the Court of Claims and the Court of Claims itself to make and which both declined to make after considering the objections thereto made by the respondent Homestake Mining Company. We quote in a footnote the Government's proposed findings of fact Nos. 48 and 49 as submitted to the Commissioner.[21]

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[21] "48. Upon the issuance of L-208 and the closing of the gold mines, over $75 million worth of mining equipment previously used in gold mines, became available for other uses and this equipment, as well as idle inventories of material, began to move into channels leading to essential war effort usage. Such transfers appreciably accelerated strategic metal development although because of inadequate data and numerous variable factors, the degree of this acceleration was not and is not determinable.

The consumption of critical materials and supplies by the gold mines for repair, maintenance, and operating supplies was terminated. Purchases of materials and supplies, already reduced heavily by priority restrictions, were almost completely eliminated. (Pltfs'. Ex. 13A).

49. Strategic materials and supplies, the total value of which was estimated in 1943 at amounts from $10,000,000 to $20,000,000, were released from expected consumption by the gold mines closed by L-208. Approximately $1,500,000 in equipment was transferred from the gold mines to essential nonferrous mines in the first few months after the issuance of L-208. These transfers accelerated strategic metal development (Deft's. Exs. 50 and 51; Pltfs'. Exs. 13A, 52 and 125)."

If that footnote is laid beside the discussion at pages 61-62 in the petitioner's brief (and the summary at p. 22), it will be seen that they are substantially the same. The respondent Homestake Mining Company made detailed and specific objections to the defendant's proposed findings 48 and 49 (Objections of Plaintiff Homestake to the Findings of Fact Proposed by Defendant, p. 97-102) and the Commissioner declined to make the requested findings.

In the Defendant's Exceptions and Brief filed November 5, 1954 with the Court of Claims, the petitioner tried to have the Court of Claims make the same Findings which the Commissioner had declined to make (p. 360-361). The respondent Homestake Mining Company objected in its Reply Brief dated December 20, 1954 (p. 521-522, 548-553) and the Court refused to make the requested Findings.

We cannot think that it is in order for us further to lengthen this brief by discussing in detail for the third time the proposed findings which the Commissioner and the Court of Claims were both asked to make and declined to make—the substance of which is now embodied in the petitioner's brief as if they had been made.

If it was the petitioner's purpose to make an argument about the "reservoir of used mining machinery and equipment", the petitioner's contention should have been that the Court of Claims had failed to make a Finding of Fact on a material issue (see the main body of this brief, p. 58-60, 63-64), and in that connection the petitioner should certainly have referred to the objections which were made before the Commissioner and the Court of Claims to the findings which the petitioner proposed.

The majority of the Court of Claims was not impressed by the incidental, speculative and haphazard consequences of L-208 which were disclosed by the record. The majority opinion said (R. 32):

> "The fact that occasional voluntary sales of idle gold mining machinery were made to some more essential mines does not give to that part of L-208 prohibiting the owners from using those items to mine gold the character of an allocation order; it merely emphasizes the fact that those items were not 'taken.'"

As Judge LITTLETON indicated for the Court below (R. 19, 27), if machinery and equipment used by the gold mines were needed by the nonferrous metal mines, they could have been requisitioned.

* * * * *

The petitioner contends that the Court below fell into error because it did not consider the effects of Priorities Regulation 13 and the amendments of Order L-208 which were made on November 19, 1942 and August 31, 1943. Mention is made *specifically* of Regulation 13 and of one or the other of the two amendments in at least at twelve places in the petitioner's brief (p. 10-11, 14 [Note 9], 16, 20-21, 22, 25, 50-53, 59, 60, 61, 104-107, 114-125), not including many places where they are referred to by implication without specific mention. Indeed, the petitioner's assumptions with respect to Regulation 13 and the two amendments pervade the petitioner's presentation of the alleged facts and its argument to such an extent that it would be most drastic surgery to eliminate them.

The petitioner's position with respect to Regulation 13 and the two amendments is extraordinary, to say the least.

In the first place, Priorities Regulation 13 and the amendment of Order L-208 on August 31, 1943 were not even made a part of the record in the Court below. A memorandum summarizing the amendment of November 19, 1942 is in the record (Defendants' Exhibit 3, at R. 1574C, 1574D and 1575), but there was no suggestion when the memorandum was introduced (R. 478-479) that it was of

any importance and a reading of the memorandum would not have indicated that it was.

In the Defendants' Exceptions and Brief in the Court of Claims, filed November 5, 1954, comprising 148 pages, there was no reference to Priorities Regulation 13 or to either of the two amendments.

Yet the petitioner makes this astonishing statement (p. 14, Note 9):

> "In this connection, it is appropriate to note that, although the record discloses references to the November 19 amendment to L-208 (R. 479-482; 1574 C-D, 1575), neither the findings of the Court of Claims nor its opinions make any reference to the November 19 and 25,[22] 1942 and August 31, 1943 amendments to L-208."

This certainly implies that the Court below was at fault in not taking notice of the amendments of Order L-208 and in not including any references thereto in its Findings. Why should the Court have been expected to do so, since no reference was made to either of them in the Commissioner's Findings, in the Defendants' Exceptions and Briefs or on the oral argument, and one was not even in the record?

The petitioner's repeated references to Priorities Regulation 13 and the amendments would suggest that the alleged error of the Court below with respect thereto was a major factor in its decision. The petitioner's brief summarizes the decision of the Court of Claims in such a way (p. 13-14) as to prepare the ground for a bold assertion at page 20 that the "decision of the Court of Claims that L-208 results in a 'taking' rests largely upon the mistaken belief that L-208 placed no restriction upon the disposition of idle

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[22] Note 6 in the petitioner's brief, at page 10, explains that the amendment of November 25, 1942 merely changed the time within which the inventory of equipment and machinery was to be submitted to the WPB.

material and equipment by operators of nonessential mines subject to L-208."

If the Court below had made a major error on a point of fact—an error resulting from an ignorance about, or failure to consider, Orders printed in the Federal Register —the Government could, and should, have called the error to the Court's attention on its motion for a new trial. On that motion the Government made no reference to the alleged errors of fact to which it now gives such prominence (R. 142-147).

The only reasonable explanation is that the able and experienced counsel for the Government before the Court of Claims did not believe that the error of fact, if there was one, was of any significance.

The petitioner's petition for certiorari did not fairly cover anything to do with the two amendments of L-208 (see the main body of this brief, p. 60-62). Apparently counsel for the petitioner decided after the writ was granted to try to bolster the petitioner's case by arguments and speculation relating to the amendments.

Let us now consider the alleged error with which the petitioner now charges the Court. It related to the restrictions on sales by the closed gold mines. Order L-208 placed no restrictions on such sales. Nor did any other order which was called to the attention of the Court.

The only restrictions which existed on October 8, 1942, and for more than a month thereafter, were in Priorities Regulation 13. As already stated, Priorities Regulation 13 is not in the record and was not referred to below. Nor is the text of it given in the petitioner's brief.

The petitioner's summary of Priorities Regulation 13 ends with the following sentence (p. 52):

> "Thus, it is clear that only as to material other than war material were the mine operators free to do as they liked with material and equipment idled

by L-208; on the other hand, war material was subject to rigid WPB control."

This appears quite certainly to be a seriously incorrect statement.[23] Priorities Regulation 13 governed "special sales of idle or excess materials." 7 Fed. Reg. 5167-5173. The definition of a "special sale" expressly excepted "A sale of any tool, machinery, or other assembled commercial, industrial, production, agricultural, or household equipment." Hence, Priorities Regulation 13 did not restrict the sale of what the WPB later called "machinery and equipment".

It is true that the sale of "war material" was subject to the Regulation. In the sentence which we have just quoted from the petitioner's brief, the petitioner uses the term as though it were a generic term descriptive of all items needed for the war effort. In fact the term "war material" was a term defined in Priorities Regulation 13 to relate only to a list of what might be loosely described as "raw materials", contained in a schedule annexed to the Regulation. Furthermore, the Regulation contained exceptions in addition to that already mentioned and it also provided for several categories of "permitted special sales" of "war material", including sales to five different classes of buyers.

By citing an estimate made by the Homestake Mining Company of its requirements of various metals in 1942 (p. 52, Note 33) the petitioner apparently attempts to give the impression that Homestake had a substantial inventory of the "war material" referred to in Priorities Regulation 13 and that sales of such material would have been controlled by the Regulation. There is no basis for such an impres-

[23] While the quoted sentence is very involved, we read it as saying that the mine operators were not free to do as they liked with machinery. They were, since Priorities Regulation 13 did not regulate the sale of machinery.

sion. First of all, the figures quoted in Note 33 reflect a computation of the amount of base materials contained in various types of "equipment and repair parts and supplies" required by Homestake. To the extent that such "equipment and repair parts and supplies" fell into the category of a "tool, machinery, or other assembled commercial, industrial, production, agricultural or household equipment", sales of such items would have been expressly excepted from the Regulation. Furthermore, much the largest figure in Note 33 reflects a typographical error; the "8,453 tons fabricated iron and steel" should be "845.3 tons", a decimal having been omitted. The "80 (*sic*) tons mercury" should be "80 flasks of mercury".[24]

It is hard to imagine a more complete lack of evidence than there is as to the extent, if any, that Priorities Regulation 13 restricted sales by the gold mines after October 8, 1942. The only thing that appears quite certain is the Regulation did not restrict their freedom to sell, to whomever they pleased, machinery and equipment.

On November 19, 1942, Order L-208 was amended so as to restrict the sale of "any machinery or equipment of the types listed in Schedule A to Preference Rating Order P-56 which has been used in a nonessential mine".

As already stated, a memorandum summarizing the amendment of November 19, 1942 was introduced into the record below as Defendant's Exhibit 3 (R. 478-479, 1574C, 1574D, 1575). When it was introduced (R. 478-479), there was no intimation that it was of any importance. The absence of any such intimation did not, of course, restrict the right of counsel to the Government to treat the Exhibit as important in their briefs, exceptions and argument in the Court of Claims. However, we have found no evidence

[24] The explanations given above with regard to the figures quoted in Note 33 of the petitioner's brief appear at transcript pages 1616-1617 in a portion of the record which was not printed.

that the amendment was *ever* mentioned in anything that was submitted to the Commissioner or to the Court of Claims and we are certain that it was not mentioned on the oral argument.

The gist of the pertinent part of the memorandum (Defendants' Exhibit 3)[25] may be summarized thus:

> "The nonessential gold mines have been closed. Now that that has happened, their operators *'may wish to sell'* critical mining machinery or equipment. The amendment is intended to control any such sales so that they will go to more essential rather than less essential mines."

The memorandum realistically treated the closing of the "nonessential" gold mines as an accomplished fact. It undertook to deal only with a consequence of that fact. It related only to any machinery and equipment which the owners of the lode gold mines might wish to sell. No attempt was made to require them to sell anything, or to requisition anything.

The memorandum explaining the amendment did not suggest that the purpose of L-208 was to channel mining machinery or equipment into more essential mines and that through inadvertence appropriate provisions had been

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[25] The full text of the pertinent part of the memorandum reads:

> "2. A provision freezing the machinery in nonessential mines. Operators of closed gold mines may wish to sell critical mining machinery or equipment. This should be controlled so that it will go to more essential rather than less essential mines. The proposed new paragraph freezes such machinery and equipment, but does not tie up small and standard operating supply items. Provision is made to have operators report promptly to the Mining Branch a description of all frozen machinery and equipment. The Mining Branch is setting up a unit to help in the speedy disposal of such machinery and equipment as the operator *may wish to sell*. The complete list will be available in case it becomes essential at a later date to requisition the other machinery and equipment."

omitted. The amendment merely dealt routinely with an incidental consequence of the closure of the gold mines.

The memorandum explaining the amendment gave no indication that it had any special significance, the witness through whom it was offered did not suggest that it had, and it was never treated as of any significance by the Government before the Commissioner or the Court of Claims.

The amendment of August 31, 1943 (petitioner's brief, p. 118-125) is not in the record and was not referred to in any way before the Commissioner or the Court of Claims, either in writing or orally. The petitioner does not attempt to explain why the August 31, 1943 amendment was called for.

Even after the two amendments L-208 did not requisition anything or require the operators of the gold mines to sell anything.

In the light of the foregoing, two questions can be asked: What error, if any, did the Court below make? If the Court made any error, how significant is it?

The petitioner's brief quotes five statements in the Court's opinion (p. 50-51) which it characterizes as "demonstrably inaccurate." These statements refer to two very different things: (1) the absence of any requisitioning by the Government, and (2) the freedom of the owners of the gold mines to sell critical materials, equipment and facilities "to anyone they pleased."

The Court's statements about the absence of any requisitioning of critical materials, machinery or equipment were indisputably correct.

The Court's statements as to the effect of Order L-208 on the freedom of the owners of the gold mines to sell critical materials, machinery or equipment to "anyone they pleased" were also correct of the Order as issued (Finding 43, R. 102-105). Any restriction which had been previously imposed by Priorities Regulation No. 13 was apparently not

regarded as significant by counsel for the Government and was not called to the Court's attention. The restrictions imposed by the amendments of L-208 on November 19, 1942 and August 31, 1943, which were similarly not called to the Court's attention, did not make the Court's summary of the provisions of Order L-208, as issued, "inaccurate."

The petitioner would not seem to have any standing to contend that the Court of Claims would have been compelled to reach a different conclusion if counsel for the petitioner had called the amendments of November 19, 1942 and August 31, 1943 to its attention. In any event, it is clear that the two amendments have no legal significance.

The amendment of November 19 could not change the character of what was done on October 8. If there were a convincing showing that on October 8 the WPB issued Order L-208 with the intention of channelling machinery and equipment into the nonferrous metals mines and inadvertently omitted the provision which was added on November 19, a different case might be presented. But that is not what happened.

If there was a taking on October 8 through the issuance of Order L-208 for the purpose of maneuvering gold mine labor to the nonferrous metal mines, it certainly did not end on November 19 because of the issuance of the amendment, which merely undertook to deal routinely with one of the incidental consequences of the taking.

What we have said about the amendment of November 19, 1942 clearly applies also to that of August 31, 1943.

* * * * *

At pages 104-107 the petitioner's brief deals extensively with a meeting of the WPB held on June 15, 1943, at which the WPB determined that Order L-208 should be continued.

Although there was a major issue before the Commissioner and the Court of Claims as to the purpose of the

original issuance of Order L-208 (see above, p. 34-39), there was no issue below as to the purpose of the WPB in continuing the Order after it had taken the step of closing down the mines. The Commissioner made no finding on that subject; the Government's 24 pages of Exceptions to the Commission's Report (p. 350-373) contained no reference to the decision of the WPB on June 15, 1943 not to revoke the Order and the Court of Claims made no Finding.

If an issue had been raised below as to the reason why the Order was not revoked in June, 1943, it would have been pertinent to consider the Report, dated May 24, 1943, of Edward H. Rott, the Deputy Administrator of L-208 (Plaintiff's Exhibit 13, R. 857, 964, 1292-1311).

Mr. Rott thought that L-208 was a mistake; he said (R. 1300):

> "The magnitude of the effect of this order is very great, with but extremely limited accomplishment. The losses entailed by all mines through forced closing under Order L-208, promptly became potential claims for post war adjustment. Those claims are cumulative."

However, he thought that it was better policy not to acknowledge the mistake, and he opposed a revocation of the Order for that reason (R. 1304):

> "The general effect of the Order has been to antagonize the individual and the communities dependent on gold mining, and caused large losses to the operators. To repeal it would not calm the situation, but would stir up increased resentment from the many who have lost their liv-lihood (*sic*), relinquished leases, forfeited equity in equipment, or sold equipment in anticipation of no further need for the duration."

Since there was no issue below as to the reason why L-208 was not revoked in June, 1943, the mat .ial on pages

104-107 of the petitioner's brief could be pertinent only on the question whether the Order was a practical failure. Apparently, therefore, the petitioner has devoted three pages of its brief to the June 15, 1943 meeting (including two pages of quotation from the minutes of the meeting) in an effort to bring before the Court the statistics quoted at that meeting in support of the proposition that Order L-208 had been responsible for an increase in the production of nonferrous metals, for transfers of essential equipment and for the conservation of critical materials. However, *the minutes of the WPB meeting of June 15, 1943 (Defendant's Exhibit 51, R. 1605) were not received in evidence as proof of the figures contained therein.* The Defendant's Exhibits 49, 50 and 51 (R. 1599, 1601 and 1605) were all objected to by counsel for the respondent Homestake Mining Company on the ground that those Exhibits were not competent proof of the facts related and the figures set forth in them, and all three were received only for limited purposes (R. 963-966). The minutes of the WPB meeting of June 15, 1943 were received in evidence for the limited purpose of showing "the action taken by the Board and the discussion within the Board pertaining to the possible revocation of the Order" (R. 966).

Furthermore, the substance of many of the "facts" reported to the WPB at the June 1943 meeting, or conclusions sought to be drawn from them, were embodied in proposed findings of fact which the petitioner asked both the Commissioner of the Court of Claims and the Court of Claims itself to make. Both the Commissioner and the Court declined to make such findings on considering the objections thereto made by the respondent, Homestake Mining Company.[26] The petitioner does not now make any

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[26] Compare the material at page 105 of the petitioner's brief with petitioner's proposed findings Nos. 48 and 49 quoted above at page 56.

With respect to the estimate made at the WPB meeting that the

contention that the Court of Claims erred in failing to make the findings which it proposed. Instead the petitioner has attempted to embody the substance of its rejected findings in its brief by quoting, without qualification, from a document which was received in evidence for only a limited purpose.

V

The practical failure of Order L-208 to serve the purpose for which it was issued: the transfer of a substantial number of hardrock miners to the nonferrous metal mines.

As to the results of Order L-208, the Committees of the Congress concluded that (Plaintiff's Exhibit 178, R. 855, 1559, 1562):

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closing of the gold mines had resulted in a net gain in the 1943 output of nonferrous metals and had also resulted in transferring gold miners to "other war industries" (see petitioner's brief, p. 105) it is pertinent to note that this material is substantially similar to the petitioner's proposed finding, No. 52 in the Court below. That proposed finding read:

> "A result of the issuance of L-208 was the transfer of workers in the gold mines to other non-ferrous mines and to war industries. The degree of this transfer is not determinable because of inadequate statistics and numerous variable factors which precluded a definite calculation. However, L-208 was effective in that the transfers which occurred appreciably accelerated the mining of critical metals and were beneficial in respect to labor shortages in other war industries (Tr. 1496, 1503-1511, 1524-1527, 1553-1554; Pltfs'. Exs. 13A and 125)."

Actually the estimate that there had been a net gain in the production of nonferrous metals was predicated on the assumption that 500 hard-rock miners had transferred to the nonferrous metal mines (Defendant's Exhibit 50, R. 1604) and, in retrospect, the report of the WPB Policy Analysis and Records Branch concluded that (Plaintiff's Exhibit 1, R. 149, 1163, 1231):

> "* * * since the number of gold miners actually re-employed was negligible, their contribution in increased production of copper, lead, zinc, etc., was likewise small, and probably was counterbalanced by the loss of such metals as are normally produced as by-products of gold mining."

> "The net results of the order in accomplishing its avowed primary purpose of channeling manpower to 'essential' mines were negligible."

The Findings of the Court of Claims are in accord with this conclusion of the Congressional Committees, and they are abundantly supported by the evidence.

The Findings also set forth in detail their reasons why, as the Court of Claims found (Finding 51, R. 107), there was no "justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines".

The summary of the facts in the petition for certiorari.

The story of L-208 was told quite fairly in the petition for certiorari.

After explaining that by March 2, 1942 "the War Production Board had effectively eliminated the possibility of acquisition by the gold mines of critical materials or supplies", the petition said (p. 5):[27]

> "In the summer of 1942, *the Labor Division of the War Production Board became concerned with the problem of an acute shortage of hardrock or underground miners in the vital non-ferrous copper mines.* The primary reasons for this shortage were the draft, and the migration of workers out of the mine fields because of higher wages and better working conditions in other war industries. Accordingly, it was suggested to the War Production Board that, if the gold mines were closed, the unemployed miners would probably be diverted to copper mining, thereby alleviating a shortage which severely threatened the national war effort. In this connection, it was

[27] In quoting from the petition for certiorari we have omitted the citations to the pages of the Appendix to the petition which contained the Findings of the Court of Claims.

> recognized that there was no authority to require the miners to transfer to industries in which their services were more urgently required; and further that the workers thus made available by the closing of the gold mines might very well go to work in the West Coast war plants instead of in the non-ferrous copper mines."

The petition then summarized the provisions of the Order and told about its results as follows (p. 6):

> "Notwithstanding the Order, *only an insignificant number of hardrock miners actually transferred to the copper mines.* Eventually, the acute labor shortage in the copper mines was alleviated by the Army's granting of furloughs to four thousand men for work in the copper mines—an action the Army had not been willing to institute so long as the gold mines continued in operation."

It is hard to conceive of a more radical change of position than is to be found in the treatment of this subject in the petitioner's brief.

The pertinent statistics relate to hardrock miners employed by gold mines which did not produce substantial quantities of critical materials and hence were closed down by Order L-208.

The shortage which was responsible for Order L-208 was a shortage of miners and muckers, referred to in the record as "hardrock miners" (Finding 20, R. 77; Finding 47, R. 106; Finding 51, R. 107). Muckers are the men who remove the broken ore or muck. The term "miners" was sometimes used to cover muckers as well as miners who break the ore; sometimes there are references in the record to "miners and muckers" (Finding 36, R. 98) or to "hardrock miners and muckers" (Finding 37, R. 98). The men who work lode gold mines underground are called "hard-

rock miners" because the gold is "mainly [in] narrow quartz veins in hard rock" (R. 1206).

The ultimate Findings of the Court of Claims, that the shortgage was one of hardrock miners (not of mine employees generally), are fully supported by evidentiary Findings. When the representatives of the gold mining industry met with the WPB on October 1, 1942, Dr. Wilbur A. Nelson, the Chief of the Mining Branch, undertook to ascertain, and on October 3 he reported as to, the number of "hardrock miners and muckers" who were employed by the gold mining companies (Findings 36, 37; R. 98-99). When the two Under Secretaries sent their memorandum of October 5, 1942, they spoke of "hard-rock miners engaged in gold mining" (Finding 40, R. 99-100). The minutes of the October 6 meeting of the WPB referred to the number of "hard-rock miners", although giving other statistics also (Finding 41, R. 100). General Somervell's letter of October 11, 1942 said that (Plaintiff's Exhibit 127, R. 520, 1510-1511):

> "The gold mining industry has been singled for curtailment only because it constitutes the most readily available pool of 'hard rock' miners who are so urgently needed to further the war effort."

It follows that statistics about mining company employees (including employees in the mills, offices and other installations on the surface), as distinguished from hard-rock miners (miners and muckers), were and are meaningless and confusing.

Another source of confusion, which the petitioner has perpetuated, involved the use of figures relating to all mining companies that produce gold, whether they were shut down by Order L-208 or not. The great copper mines produce large amounts of gold and other mines which are exploited primarily for gold produce significant amounts

of lead, copper or zinc (Findings 20, 25; R. 77, 83). The only pertinent statistics are those that relate to the gold mines which did not produce "substantial quantities of critical materials" (Finding 17, R. 74-75) and which were shut down by Order L-208.

Both of these two kinds of confusion affected the first statistics that were cited by a Division of the WPB. Finding 20 reads in part (R. 76-77):

> "On July 4, 1942, the Acting Chief of the Priorities Branch of the Labor Production Division [of the WPB] sent a memorandum to the Director of Operations of the War Manpower Commission who was also in charge of the Labor Supply functions of WMC at that time. The memorandum pointed out the acute labor shortage in the nonferrous metal mining industry and observed that the 15 largest producers of gold in seven Western States had some 6,700 employees; that the gold mines of these producers were sometimes located in the vicinity of nonferrous metal mines and that in some cases one company would own both a gold mine and a nonferrous metal mine in an area. The statistics upon which the above figures were based were as of 1941, and were later found not to represent the situation in the summer of 1942, because the gold mines, as well as the nonferrous metal mines, had been losing workers to the war industries and the draft. *The 6,700 figure employed in the memorandum represented employees of all kinds, including clerical employees, and no figure was given of the number of hardrock miners which were the type of employee needed in the nonferrous metal mines. In speaking of the '15 largest producers of gold in seven Western States', the memorandum did not point out that several of such gold producers also produced nonferrous metals in substantial quantities and therefore would not be classified as gold mines for the purpose of any anticipated action.*"

The petitioner's brief gives, almost verbatim, the sentences which we have not italicized (p. 93).[28] Then in a footnote the petitioner says that "The 6,700 figure appearing in the memorandum represented employees of all kinds and no figure was given as to the number of hard-rock miners—the type of employees most needed in the nonferrous metal mines." (Note 15). By inserting the word "*most*" the petitioner has changed the sense of the Finding, which was that "hardrock miners * * * were *the* type of employees needed in the nonferrous metal mines". Furthermore, the petitioner has completely omitted the italicized portion of the Finding which pointed out that "the 15 largest producers of gold in seven Western States" included mines that "produced nonferrous metals in substantial quantities and therefore would not be classified as gold mines for the purpose of any anticipated action."

The only significant statistics relate to the hardrock miners employed by the gold mines which were shut down.

The Court of Claims was right in finding that "in issuing L-208 WPB acted without any justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines."

The WPB acted under pressure from the War Department, in disregard of the only study of the number of hardrock miners in the gold mines which were shut down and oblivious to the factors which would keep more than a small percentage of the released miners from transferring to the nonferrous metal mines.

The Court of Claims found (Finding 51, R. 107):

"It is reasonable to conclude that in issuing L-208 WPB acted without any justifiable anticipation

[28] The last sentence not italicized is given by the petitioner in its footnote 15.

> that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines."

In citing the abundant support for this Finding, we will review the period from the beginning of July, 1942 to the issuance of Order L-208 on October 8, 1942, with particular reference to the Findings that are pertinent in considering the audacious assertion in the petitioner's brief that the WPB acted "on the basis of repeated and careful studies" (p. 16, 25).

It will be recalled that the shortage of miners in the nonferrous metal mines had become acute by early July, 1942. Finding 18 sets forth the reasons for the shortage (R. 75):

> "The reasons for the poor production of nonferrous metals were found to be (1) the out-migration of workers in the nonferrous mines to other war industries offering higher wages and better working conditions, (2) drafting of the workers for the armed services by Selective Service, (3) excessive labor turnover within the industry, (4) low morale of the workers, (5) the short workweek in the mines, and (6) the lack of an organized and effective program of recruitment of workers for this industry."

On July 4, 1942 the Labor Production Division of the WPB prepared the confused memorandum about the labor shortage in the nonferrous metal mines which we have already discussed (see above, p. 72-73).

On August 14, 1942, Dr. Wilbur A. Nelson, Chief of the Mining Branch of the WPB, stated in a memorandum (Finding 22, R. 79):

> "The present critical situation developed when copper, lead, zinc, mercury and other miners left their jobs and went to the West Coast on shipbuild-

ing and on aircraft jobs, and into the mountain areas in new war industries work.

If we close down the gold mines while these same opportunities are available for work at substantially high rates of pay in other war industries, the miners will not move to a copper, lead or zinc mine but will do just as their predecessors have done, move on to other more fruitful jobs on the coast.

Logic dictates this, for when a copper miner at Butte is willing to leave his home and go to the coast, I am sure that a gold miner, living in the excellent living conditions at Lead, is not going to leave his family and stop at Butte if he could go to the west coast."

Late in August, 1942, Mr. Guy N. Bjorge, the Gener. Manager of the Homestake Mining Company conferred with several officials of the WPB and (Finding 23, R. 79-80):

> "In the course of these conferences Mr. Bjorge furnished figures as to the small number of men who might be obtained for work in the copper mines by such order. He pointed out that many men had already left the Homestake Mine in 1942 for the same reasons that men had left the copper mines, mainly to accept employment at West Coast aircraft factories and shipyards. Mr. Bjorge also pointed out that the miners remaining at Homestake were an older, more stable class of men, a large percentage of whom were home owners, and asserted his belief that it was improbable that they would leave their homes for the poor housing facilities and undesirable working conditions at the nonferrous metal mines."

On August 26, 1942, Senator McCarran of Nevada wrote a letter to the Chairman of the WPB setting forth various reasons why he believed the proposed closing of the gold

mines would not accomplish its purpose of obtaining any considerable number of miners for the nonferrous metal mines (Finding 24, R. 80). Senator McCarran wrote, *inter alia:*

> "In the first place, the transfer of necessary labor from closed gold and silver mines to mines producing copper, lead, zinc, etc., would be negligible, due to the fact that very few operations exist today where only gold and silver are mined, and in these districts (mainly, the Homestake Mining activity in South Dakota and the Mother Lode Mining district in California), the number of men who could be so transferred is small. Many of the usual workers have joined the armed forces; many are familiar only with the routines of this type of mining and cannot be successfully transplanted. Thus little good would result and great hardships would be inflicted upon affected families and communities.
>
> Secondly, there is no rule or procedure by which such workers could be legally forced to transfer to other mines. The labor that would be denied employment by reason of the shutting down of the mines producing gold and silver would most likely go to the places where they would receive higher wages than are paid in mines."

On September 1, 1942, the WPB held a meeting, the minutes of which show that Mr. R. J. Lund, Chief of the Miscellaneous Minerals Branch (Finding 27, R. 85), reported that there was "general agreement that the higher wages paid to workers in competing occupations in other industries are the prime factor causing the out-migration of labor from the [nonferrous] mines and mills" (Finding 25, R. 82). Mr. Lund gave some supporting detail (*id.*).

At the same meeting, Mr. H. O. King, Chief of the Copper Branch of the WPB (Finding 22, R. 78) made a statement that an order had "been prepared to prohibit

the use of materials in nonessential gold mines, which may free about 8,000 workers" (R. 83). There is no explanation as to where the figure came from or what was meant by the word "workers".

On September 9, 1942, Mr. R. J. Lund, Chief of the Miscellaneous Minerals Branch, submitted to the Deputy Director General of Operations a memorandum, which has already been discussed at pages 15-18 (Finding 27, R. 85-90). In that memorandum he said (R. 86):

> "Based on 1941 data, latest available from the Bureau of Mines, approximately 12,400 employees in lode gold mines will be thrown out of work by the order. Incomplete data indicate that about 70 percent of this labor is employed underground."

He then gave the geographic distribution of most of the 12,400 employees.

The use of 1941 figures made this part of Mr. Lund's memorandum worthless. That will be immediately apparent from an examination of the graph which is Appendix C to Plaintiff's Exhibit 1 and which shows the sharp decline in gold mining after 1941 (R. 1244A).

On September 15, 1942, the Interdepartmental Committee on Non-Ferrous Metals met and (Finding 30, R. 93):

> "Mr. Harbison [Army representative] expressed some concern over the delay in issuing the gold order. * * * He made it clear that the War Department was impatient at the delay."

The War Department was already "impatient at the delay", although there had not yet been anything which remotely approached a careful effort to find out how many hardrock miners would be "released" or to make an estimate of the percentage of those who might be induced to go to the nonferrous metal mines.

On September 15, 1942, Mr. Morris Creditor, Special Assistant to Chairman Nelson of the WPB, wrote his memorandum to the Chairman, which has already been quoted and in which he said (Finding 31, R. 95):

> "Even aside from the possible dissipation of these skilled miners into other occupations, there is a question whether the closing of all the gold mines will release any relatively large number of workers. As I understand it, in the case of Homestake Mine the proposed order would affect only about 450 miners. This is the largest gold mine and has from a third to a half of all the miners to be released. The Alaska-Juneau miners, incidentally, will be stuck in Alaska. Where are they expected to go?"

On September 30, 1942 there was a conference at Mr. Batt's office, which has already been referred to (see above, p. 24-25). At the conference: "Some discussion arose as to the number of gold mine employees who would be released by such a closing order" (Finding 35, R. 97). The Finding does not indicate that there was anything except discussion.

On October 1, 1942, the gold mining industry had its first opportunity to protest against the proposed L-208. Much of the Finding about the conference at the WPB on that date, which has already been mentioned (see above, p. 25-26), relates to the number of miners who would be affected by a close down of the gold mines and as to the prospects that they would move to the nonferrous metal mines (Finding 36, R. 97-98):

> "At the opening of the meeting Mr. Batt stated that he had brought the gold mine operators to Washington to tell them that a decision had been made to close the gold mines in order to transfer the released labor to the copper mines. In justification of such an order, Mr. Lipkowitz of WPB's Labor

Division stated that there were between 10,000 and 12,000 men who were then employed in the gold mines. The gold mine owners immediately protested that the figures stated were completely inaccurate; that the gold mines had already lost their most active men who had either gone to the shipyards and aircraft plants on the West Coast or had been drafted into the Armed forces; that the miners remaining in the gold mines were settled residents of their communities and that it was doubtful that they would move away to work in the copper mines if the gold mines were closed.

"In response to General McSherry's statement that the need for underground workers in the copper mines was urgent, Mr. Bjorge of Homestake pointed out that it was unreasonable to hope that gold miners would accept the jobs which the nonferrous metal miners were already leaving for more desirable employment, and that it was more likely to expect that miners forced to leave Homestake would go to the same type of more desirable jobs to which the copper miners were going.

* * * * * *

Late in the meeting, Wilbur A. Nelson undertook to determine how many miners and muckers would actually be released by a closing order."

The conference on October 1, which lasted for approximately five hours (Finding 36, R. 97), evidently made an impression on Vice Chairman Batt of the WPB. For on that very day he sent a memorandum to the Chairman of the WPB, saying (Finding 38, R. 99):

> *"Complete closing without exceptions will produce very serious economic dislocations, and the total possible gain in men is a small figure."*

However, the next day, October 2, the Under Secretary of War sent Mr. Batt a strong letter urging the closing of the gold mines (Finding 39, R. 99). He said:

> "The matter has hung fire for some time, and I trust that there will be no further delay."

The following day, October 3, Dr. Wilbur A. Nelson, Chief of the Mining Branch of the WPB (R. 66), made his report to Mr. Batt (Finding 37, R. 98, 99):

> "He reported that while there were 3,270 workers employed by gold mining companies at that time, only 896 of them were hardrock miners and muckers. He further reported that approximately 300 of these men would be needed to maintain the buildings, machinery and equipment in repair, and the access and development workings safe and accessible as provided for under the proposed order. His report concluded that if all the gold mines and dredges in the United States were put on a stand-by basis, it would make available only about 600 miners and muckers for other mining enterprises 'provided they [could] all be induced to go into other mines.'".

This was the *first* attempt to find out in any systematic way the *maximum* number of hardrock miners and muckers who would be thrown out of work by the close down order, some of whom might be expected to gravitate to the non-ferrous metal mines.

Dr. Nelson's figure, 896, is to be contrasted with the "6,700 employees" of "the 15 largest producers of gold in seven Western States" previously mentioned (see above, p. 72-3); with the reference made by Mr. H. O. King on September 1, 1942 to "about 8,000 workers" (see above, p. 76-77); with the statement in Mr. Lund's memorandum of September 9 that, based on 1941 data, there were about "12,400 employees in lode gold mines", of whom "about 70 percent" were said to be employed underground (see above, p. 77); and with the statement made by Mr. Lipkowitz at the October 1 meeting "that there were between

10,000 and 12,000 men who were then employed in the gold mines" (see above, p. 78-79).

But Dr. Nelson's study did not influence the course of events. Indeed, his study did not even slow down the momentum towards a shutdown of the gold mines which had developed when wildly inaccurate and confusing figures were being tossed about.

For on October 5, 1942, the Under Secretaries of War and the Navy sent their memorandum, which we quote again because it is so pertinent to the subject we are now discussing (Finding 40, R. 99-100):

> "The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.
>
> *There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production.* These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.
>
> The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step and others will not give complete relief if nothing is done to transfer gold miners to copper mining.
>
> *The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided.*"

There is nothing in the record to suggest the origin of the estimate that there were from "two thousand to three thousand hard-rock miners engaged in gold mining", which was the stated basis for the equivalent of a direction to the WPB to issue Order L-208. Evidently it was

realized that the earlier estimates were worthless and the Under Secretaries did not purport to accept them.

At the WPB meeting of October 6, 1942, at which the issuance of Order L-208 was agreed upon Vice Chairman Batt reported that (Finding 41, R. 100):

> *"On conferring with Brigadier General McSherry of the War Manpower Commission and representatives of the gold mining companies, it had been found that at present the gold mining industry employs 3,270 workers; 750 are engaged in dredging and only 896 are hard-rock miners."*

Apparently both the WPB and the War Manpower Commission accepted Dr. Wilbur Nelson's figures.[29]

With a mere 896 hardrock miners in the gold mines which would be closed down, only about 600 would be available for other occupations, since approximately 300 would be needed for standby maintenance (Finding 37, R. 98, 99).

Furthermore, there was no reasonable prospect that a large percentage of the 600 would find their way to the nonferrous metal mines. The reasons why the prospects were poor have already been adverted to (see above, p. 73-76). The Court of Claims found (Finding 50, R. 106-107).[30]

> "50. On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of

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[29] Reference was also made to the release of other Homestake "workers":

> "Loss of labor to the Services and to war industries, and higher costs have already sharply curtailed operations of all domestic mines except Homestake. Homestake's labor force has dropped from a peak of slightly over 2,000 workers to 1,876, including lumbermen and machine shop workers. If Homestake were shut down except for standby operations, all but 500 of these workers could be released for work elsewhere."

[30] The omitted portions of this Finding relate to other subjects and have been quoted elsewhere.

> L-208 knew * * * * * (2) that the closing of the gold mines would release only a small number of hardrock miners and helpers; (3) that no agency of the Government had the power to compel these men to accept employment in the nonferrous metal mines; (4) that in all likelihood unemployed gold miners would accept employment in shipbuilding, aircraft and construction industries rather than go to work in the nonferrous metal mines where wages were low and working and living conditions poor; (5) that L-208 was not in fact directed at the known reasons for the shortage of underground workers in the nonferrous metal mines, i.e., low wages, bad working and living conditions, and the refusal of Selective Service to defer miners; (6) that a substantial number of the employees of the gold mines were middle-aged men with families who owned their own homes and would not leave their communities if any alternative were possible; * * * *

That is what the record shows. Yet the petitioner's brief says twice that the WPB acted "on the basis of repeated and careful studies" (p. 16, 25)!

The results of L-208 in transferring hardrock miners to the nonferrous metal mines were negligible.

The Court of Claims found (Finding 47, R. 106):

> "47. The closing of the gold mines did very little to relieve the manpower shortage in the nonferrous metal mines because (1) a relatively small number of the type of workers needed in those mines, i.e., hardrock miners, were released (finding 37); (2) a number of these men were required to remain in the gold mines to keep them in safe condition; (3) the older and more settled experienced miners remained in their home communities doing what they could to make a living or remaining idle; (4) most of the younger hardrock miners released sought employ-

ment in the better paying war industries, construction projects, or were drafted in the armed services. *Approximately 100 hardrock miners are known to have gone to work in the nonferrous metal mines and to have remained there for a year.*"

Finding 52 contains an excerpt from the Report which was made in May, 1944 by the Policy Analysis and Records Branch of the WPB (R. 111):

> "It is generally agreed by the WPB divisions concerned with mining activities that a very small percentage of the released gold mine workers actually were employed by other mines. A majority of them probably went into work of greater value to the war effort than gold mining, such as lumbering, agriculture, construction, shipbuilding, aircraft manufacture;[96] but the fact remains that the primary justification for closing the gold mines was to get labor for the production of the strategic metals. Wilbur Nelson, Arthur S. Knoizen, present Director of the Mining Division, and F. H. Hayes, Chief of the Primary Production Branch of the Copper Division, concur in the statement that the number of gold mine workers who went into other mines and remained there for a year or more was not over 100.[97]

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[96] A partial analysis based on the records of the Social Security Board, indicates that the released gold mine workers went into a wide variety of occupations, including in addition to those mentioned in the text, coal mining, steel working, communications, transportation, and many others; they scattered, in short, through a fair cross-section of American industry. Letter, John J. Vorson, Director, Bureau of Old Age and Survivors Insurance, Social Security Board, to Stacy May, October 22, 1943.

[97] Wilbur Nelson and Arthur S. Knoizen, in interviews with the writer, March 7, 1944; F. H. Hayes, in an interview with writer, March 4, 1944."

The petitioner's brief says that "the success or failure of L-208, as an instrument for the diversion of manpower, remains a debatable question, difficult to resolve because of the understandably inconclusive information available with respect to the post-L-208 migrations of gold mine workers" (p. 65). It should not be debatable in this Court, because it was debated and decided in the Court of Claims and it would be preposterous to say that the Findings of the Court of Claims are not supported by substantial evidence.

The petitioner's brief now says that, "whether the limited finding of the Court of Claims is accepted, the incontrovertible fact is that the manpower displaced by L-208 did not disappear from the face of the earth, but in part moved to essential nonferrous mines, as WPB hoped, and to essential enterprises (R. 1230-1231) just as WPB anticipated" (p. 68, footnote omitted; see also p. 2). The petitioner's present position is radically different from the position which the petitioner took in the petition for certiorari.

In the petition for certiorari this Court was correctly told that the problem involved "an acute shortage of hardrock or underground miners in the vital non-ferrous copper mines" (p. 5) and that (p. 6):

> "Notwithstanding the Order, only an insignificant number of hardrock miners actually transferred to the copper mines. Eventually, the acute labor shortage in the copper mines was alleviated by the Army's granting of furloughs to four thousand men for work in the copper mines—an action the Army had not been willing to institute so long as the gold mines continued in operation."

Thus, the Court was told two very important things: *first*, that the Order was a practical failure and, *second*, that the Order was the result of the insistence of the Army

that it be issued if the Army was going to grant furloughs to miners.

We do not know what the petitioner means when it now refers to "the limited finding of the Court of Claims" (p. 68). We do not look upon the Findings of the Court of Claims (of which there were several) as "limited" except in the sense that all findings are necessarily limited. The Court of Claims made ample Findings which are ignored by the petitioner except for its reference (p. 67) to the portion of Finding 47 which stated that "approximately 100 hardrock miners are known to have gone to work in the nonferrous metal mines and to have remained there for a year".

It is true that when the gold miners were thrown out of work by L-208 they "did not disappear from the face of the earth", although in Lead, South Dakota, it might have been supposed that they had, since "more than 750 homes and apartments were left vacant and boarded up, and 36 business establishments which had served the communities were left vacant" (Finding 71, R. 115-116).

The petitioner's statement (p. 68) that the displaced miners "in part moved to essential nonferrous mines, as WPB hoped, and to essential enterprises (R. 1230-1231)[31] just as WPB anticipated," is not followed by a reference to any part of the record which supports the implication that the WPB threw the gold miners out of work in anticipation that a significant portion of them would move to essential industries other than nonferrous mines.

Earlier in the brief, and in a more prominent place (p. 8-9), the petitioner says that Order L-208 was issued "upon the expectation that a sizable number of the laborers released by a further restriction of the gold industry would be diverted to the nonferrous metal mines *as well as other*

[31] The citation here is to the paragraph of the Report of the Policy Analysis and Records Branch of the WPB which we have quoted at p. 84 above.

essential industries (R. 86-87, 92)". The record affords no support for the petitioner's implication that L-208 was issued with a view to having gold miners diverted to essential industries other than nonferrous metal mines. At both places cited by the petitioner the references are to *specific* nonferrous metal mines[32] and to *other* nonferrous metal mines,[33] not to essential industries other than nonferrous metal mines.

On the contrary, the record establishes quite clearly that the WPB did not want to have the trained underground gold miners, thrown out of work by the Order, go to work in essential businesses other than nonferrous metal mines.[34]

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[32] Copper at R. 87 and copper, lead and zinc at R. 92.

[33] The reference at R. 87 is to "other nonferrous metal mines", while that at R. 92 is to "mercury, molybdenum, tungsten, vanadium, chromium, manganese, etc."

[34] The memorandum, dated July 4, 1942, of the Acting Chief of the Priorities Branch of the Labor Production Division of the WPB, quoted at page 12 above, said that "it would be necessary to make sure that the workers released went into nonferrous metal mining and did not go into war plants in the vicinity or on the West Coast" (Finding 20, R. 77-78).

The memorandum dated August 14, 1942 of Dr. Wilbur A. Nelson, Chief of the Mining Branch, quoted at pages 74-75 above, expressed great concern that the miners "will not move to a copper, lead, or zinc mine but will do just as their predecessors have done, move on to other more fruitful jobs on the coast" (Finding 22, R. 79).

On September 15, 1942 Mr. Morris Creditor, Special Assistant to Chairman Nelson of the WPB, wrote a memorandum (quoted in full at p. 21-22) in which he expressed concern over "the possible dissipation of these skilled miners into other occupations" (Finding 31, R. 95).

Before L-208 was issued, the Chairman of the War Manpower Commission issued a directive on October 7, 1942, the purpose of which was to try to have all of the miners who would be thrown out of work by L-208 go to "essential nonferrous metal mining, milling, smelting, and refining activities" (Finding 44, R. 105).

Immediately after L-208 was issued, Chairman Nelson of the WPB and Chairman McNutt of the War Manpower Commission issued a statement "appealing to all workers in gold mines to transfer to nonferrous metal mines and *not to other war industries*" (Finding 45, R. 105).

In discussing the alleged accomplishments of L-208 the petitioner relies largely on a report made by the United States Employment Service (USES) on November 5, 1942 (Plaintiff's Exhibit 99; R. 438, 1495-1497). Much the largest part of that report relates to "the great Homestake mine". The petitioner ignores completely two long Findings which cover what happened at the Homestake mine (Findings 68, 69; R. 114-115). By comparing those Findings with the statements in the petitioner's brief which are based on the USES report, it will be found that the words "gold mine workers" and "workers", as used in the petitioner's brief, include personnel who were not even in the mining department of the Homestake mine, and that of the men in the mining department less than half were miners.

At page 66 the petitioner's brief sets forth certain points on which, it is asserted, "the Vice-Chairman of WPB was advised," and the figures are certainly superficially impressive—especially the assertion that as a result of L-208 "11,000 tons of copper, 4,000 tons of zinc, 2,400 tons of lead, 13,000 units of tungsten, and 6,000,000 pounds of molybdenum were added to the annual production of these metals". The advice cited by the petitioner was contained in a report made by Mr. Edward T. Dickinson, Jr., Executive Director, Planning Committee, dated April 22, 1943 (Plaintiff's Exhibit 125, R. 456, 1503-1504). The portions of that report cited by the petitioner were literally torn to shreds in a memorandum prepared by Dr. Wilbur A. Nelson, Chief of the Mining Branch, dated April 30, 1943 (Plaintiff's Exhibit 52, R. 454, 1352-1356). For example, with respect to the assertion that "6,000,000 pounds of molybdenum were added to the annual production", Mr. Nelson's memorandum said (R. 1355-1356, emphasis in the original):

> "The 6,000,000 pounds of additional molybdenum to be produced by workers from the gold mines was based on the figure of 125 workers from the gold mines working at Climax, whereas only ten such men are working at this mine at the present time. This would reduce this estimate from 6,000,000 pounds to a few thousand pounds of additional molybdenum. The 6,000,000 pounds of additional molybdenum which it is stated will be produced by the workers from the gold mines in 1943 is an absurd figure, as it represents 15% of the annual production of Climax, and such variation would be impossible. Actually the mine production at Climax for the first three months of 1943 is *10%* below the last quarter of 1942."

The next document referred to by the petitioner is a report which was transmitted on May 26, 1943 to Mr. Knoizen, the Director, Mining Division, WPB, and Administrator of L-208 (p. 66-67). The report itself, which was dated May 24, 1943, was made by Edward H. Rott (Plaintiff's Exhibit 13, R. 857, 1292-1311). The petitioner gives some statistics which will be found in a table at R. 1299 (p. 66-67). It was explicitly stipulated that the "statistics, figures, and so on" in Mr. Rott's report "are not proof of those facts" (R. 964). On the other hand, there was no restriction on the admissibility of Mr. Rott's expression of over-all judgment (R. 1300):

> "The magnitude of the effect of this order is very great, with but extremely limited accomplishment. The losses entailed by all mines through forced closing under Order L-208, promptly became potential claims for post war adjustment. Those claims are cumulative."

The petitioner's brief next attempts to distort the whole picture by suggesting that (1) there was a conflict between

Dr. Wilbur Nelson, who was Chief of the Mining Branch of the WPB in 1942 and 1943, and everyone else, including the USES and the War Manpower Commission (WMC) and (2) that the conflict related, among other things, to whether or not the statistics should be limited to "underground miners and muckers" (p. 67-68).

The suggestion that Dr. Nelson was in conflict with everyone else is as far from the fact as could be imagined. The report made in May, 1944 by the Policy Analysis and Records Branch of the WPB shows that those who concurred in the statement that "the number of gold mine workers who went into other mines and remained there for a year or more was not over 100" included not only Dr. Nelson but Arthur S. Knoizen, who on May 26, 1943 was the Director of the Mining Division and Administrator of Order L-208 and is mentioned at page 66 in the petitioner's brief, and also F. H. Hayes, the Chief of the Primary Production Branch of the Copper Division (Finding 52, R. 111).

The petitioner is quite correct in stating that there was and is a conflict between the statistics which related to underground miners and muckers and those which related to employees of gold mining companies generally. We referred to that conflict above and established that the only pertinent statistics are those which related to "hardrock miners and muckers" (p. 70-73).

The petitioner says (p. 67-68):

> "If L-208 is to be judged by the number of gold miners transferred to essential mines and other enterprises, the court's finding, confined as it is to 'hardrock miners' who remained in the nonferrous metal mines for a year, is arbitrary on its face (R. 994-995) and affords no sound basis for a conclusion as to the effectiveness of L-208 as a measure for diverting manpower to essential wartime enterprises."

It would be preposterous to say that the Court of Claims erred in confining its Findings to "hardrock miners" (see above, p. 70-73).

It would be plainly wrong to say that the Court of Claims' Findings were "confined" to the last sentence of Finding 47 that "approximately 100 hardrock miners are known to have gone to work in the nonferrous metal mines and to have remained there for a year". Finding 47 (R. 106), Finding 50 (R. 106-107), Finding 51 (R. 107), and the last paragraph of Finding 52 (R. 111), read together, establish the practical failure of the effort to "maneuver our manpower" to the nonferrous metal mines by Order L-208.

The petitioner asserts that the action of the Court of Claims in emphasizing the small number of hardrock miners "who remained in the nonferrous metal mines for a year" was arbitrary. *That was the test used in the report made in May, 1944 by the Policy Analysis and Records Branch of the WPB itself, and concurred in by Dr. Nelson, Mr. Knoizen and Mr. Hayes, all of whom have been identified* (*R. 111*). It did not accomplish much to have trained gold miners obtain transient employment in the nonferrous metal mines.

The only authority cited in support of the characterization of the Court of Claims as arbitrary is Mr. Samuel Lipkowitz, who testified for the Government at R. 994-995 (p. 67). It is absurd to advance Mr. Lipkowitz's theories as a basis for the assertion that the Court below was arbitrary, as will be evident from his testimony (R. 994-995). Mr. Lipkowitz was the man who, at the October 1, 1942, meeting when the gold mining industry had its hearing, "stated that there were between 10,000 and 12,000 men who were then employed in the gold mines", a truly fantastic example of statistical confusion (see above, p. 78-79).

The substance of the matter is that the petitioner shrinks from the task of trying to establish that L-208 accomplished its purpose of maneuvering a significant number of hardrock miners to the nonferrous metal mines. What the petitioner seeks to do is to establish something entirely different, viz., that by L-208 many men and women were thrown out of work; that they "did not disappear from the face of the earth"; and that, since a war was on, some of them must have obtained employment in essential enterprises. Although that may be true, it is certainly irrelevant in considering the judgment of the Court below and a very weak defense of L-208.

APPENDIX B

Text of Order L-208

LIMITATION ORDER L-208

The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.

SECTION 3093.1—LIMITATION ORDER L-208

(a) *Definitions.* For the purposes of this order, "nonessential mine" means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P-56.

(b) *Restrictions upon production.*

(1) On and after the issuance date of this order, each operator of a nonessential mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.

(2) In no event on or after 7 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any development work or any new operations in or about such mine.

(3) In no event on or after 60 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below

ground, or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair, and its access and development workings safe and accessible.

(4) The provisions of this order shall not apply to any lode mine which produced 1200 tons or less of commercial ore in the year 1941, provided the rate of production of such mine, after the issuance date of this order, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1000 cubic yards of material in the year 1941, provided that the rate of treatment of such placer mine, after the issuance date of this order, shall not exceed 100 cubic yards per month.

(5) Nothing contained in this order shall limit or prohibit the use or operation of the mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a preference rating of A-1-k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P-56.

(c) *Restrictions on application of preference ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the Director General for Operations issued after application made to the Mining Branch, War Production Board.

(d) *Assignment of preference ratings.* The Director General for Operations, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary

to maintain such nonessential mine on the basis set forth in subparagraph (b)(3) above.

(e) *Records.* All persons affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore.

(f) *Reports.* All persons affected by this order shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

(g) *Audit and inspection.* All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(h) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to:

War Production Board
Mining Branch
Washington, D. C. Ref: L-208

(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(j) *Appeal.* Any person affected by this order who considers that compliance therewith would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting forth the pertinent facts and the

reason he considers he is entitled to relief. The Director General for Operations may thereupon take such action as he deems appropriate.

(k) *Applicability of Priorities Regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the Priorities Regulations of the War Production Board, as amended from time to time.

(P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 1, 7 F. R. 561; E. O. 9024, 7 F. R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

Issued this 8th day of October, 1942.

ERNEST KANZLER
Director General for Operations

APPENDIX C

The Statutes

(In chronological order)

1. Section 120 of the National Defense Act of 1916, 39 Stat. 213, pertinent provisions.

"The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

"Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or

the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding $50,000.

"The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just."

2. The Act of March 4, 1917, 39 Stat. 1192, pertinent provisions.

"(a) That the word 'person' as used in paragraphs (b), (c), next hereafter shall include any individual, trustee, firm, association, company, or corporation. The word 'ship' shall include any boat, vessel, submarine, or any form of aircraft, and the parts thereof. The words 'war material' shall include arms, armament, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production, thereof. The word 'factory' shall include any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard. The words 'United States' shall include the Canal Zone and

all territory and waters, continental and insular, subject to the jurisdiction of the United States.

"(b) That in time of war * * * the President is hereby authorized and empowered, in addition to all other existing provisions of law:

* * * * * *

"FOURTH. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

"(d)[1] That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

3. Section 9 of the Selective Training and Service Act of 1940, 54 Stat. 892.

"The President is empowered, through the head of the War Department or the Navy Department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material

[1] This should be "(c)".

as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

"Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition or parts of ammunition, or any necessary supplies or equipment for the Army or Navy, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War or the Secretary of the Navy shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War or the Secretary of the Navy, or who shall refuse to furnish such arms, ammunition, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War or the Secretary of the Navy, as the case may be, then, and in either such case, the President, through the head of the War or Navy Departments of the Government, in addition to the present authorized methods of purchase or procurement, is hereby authorized to take immediate possession of any such plant or plants, and through the appropriate branch, bureau, or department of

the Army or Navy to manufacture therein such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and a fine not exceeding $50,000.

"The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just: *Provided*, That nothing herein shall be deemed to render inapplicable existing State or Federal laws concerning the health, safety, security, and employment standards of the employees in such plant.

"The first and second provisos in section 8(b) of the Act entitled 'An Act to expedite national defense, and for other purposes', approved June 28, 1940 (Public Act Numbered 671, Seventy-sixth Congress), are hereby repealed."

4. The Act of October 10, 1940, 54 Stat. 1090.

"That whenever the President determines that it is necessary in the interest of national defense to requisition and take over for the use or operation by the United States or in its interest any military or naval equipment or munitions, or component parts thereof, or machinery, tools, or materials, or supplies necessary for the manufacture, servicing, or operation thereof, ordered, manufactured, procured, or possessed for export purposes, the exportation of which has been denied in accordance with the provisions of section 6 of the Act approved July 2, 1940 (Public, Numbered 703, Seventy-sixth Congress), he is hereby authorized and empowered to requisition and take over for the said use or operation by the United States, or in its interest, any of the foregoing articles or materials, and to sell or otherwise dispose of any such articles or materials, or any portion thereof, to a person or a corporation of the United States whenever he shall determine such action to be in the public interest. Any moneys received by the

United States as the proceeds of any such sale or other disposition of any such articles or materials or any portion thereof shall be deposited to the credit of that appropriation out of which was paid the cost to the Government of the property thus sold or disposed of, and the same shall immediately become available for the purposes named in the original appropriation: *Provided, however,* That nothing in this section shall modify or repeal section 14 of Public Law Numbered 671, 76th Congress, approved June 28, 1940.

"Sec. 2. Whenever the President shall requisition and take over any article or material pursuant to the provisions of this Act, the owner thereof shall be paid as compensation therefor such sum as the President shall determine to be fair and just. If any such owner is unwilling to accept, as full and complete compensation for such article or material, the sum so determined by the President, such owner shall be paid 50 per centum of the sum so determined by the President and shall be entitled to sue the United States for such additional sum as, when added to the sum already received by such owner, such owner may consider fair and just compensation for such article or material, in the manner provided by sections 41 (20) and 250, title 28, of the Code of Laws of the United States of America: *Provided,* That recovery shall be confined to the fair market value of such article or material, without any allowance for prospective profits, punitive or other damages.

"Sec. 3. The authority granted in this Act shall terminate June 30, 1942, unless the Congress shall otherwise provide."[2]

5. The Act of October 16, 1941 (sometimes called the Requisitioning Act), 55 Stat. 742.

"That whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use

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[2] Such authority was extended to June 30, 1945, 56 Stat. 468, 58 Stat. 625.

of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act, but each such determination shall be made on the basis of the fair market value of the property at the time it is requisitioned or returned, as the case may be.[3] If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145

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[3] This sentence was amended by Title VI of the Second War Powers Act, 56 Stat. 181, so as to read as follows:

> "The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act, but each such determination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment of the Constitution of the United States."

of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. Such courts shall also have power to determine in an appropriate proceeding any questions that may arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act, regardless of the amount in controversy in any such proceeding.

"Nothing contained in this Act shall be construed—

(1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law),

(2) to impair or infringe in any manner the right of any individual to keep and bear arms, or

(3) to authorize the requisitioning of any machinery or equipment which is in actual use in connection with any operating factory or business and which is necessary to the operation of such factory or business.

"Sec. 2. Wherever the President determines that property acquired under this Act and retained is no longer needed for the defense of the United States, he shall, if the original owner desires the property and pays the fair value thereof, return such property to the owner; but, in any event, property so acquired and retained shall, if the owner desires the property and pays the fair value thereof, be returned to the owner not later than December 31, 1943.

"Sec. 3. The President from time to time, but not less frequently than once every six months, shall transmit to the Congress a report of operations under this Act.[4]

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[4] This subsection (3) was deleted by the Act of March 27, 1942, 56 Stat. 181.

"Sec. 4. The President may issue such rules and regulations and require such information as may be necessary and proper to carry out the provisions of this Act, and he may exercise any power or authority conferred on him by this Act through such department, agency, board, or officer as he shall direct or appoint."

6. Title II of the Second War Powers Act, approved March 27, 1942, 56 Stat. 177.

"Sec. 201. The Act of July 2, 1917 (40 Stat. 241), entitled 'An Act to authorize condemnation proceedings of lands for military purposes', as amended, is hereby amended by adding at the end thereof the following section:

'Sec. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended.' "

7. Title III of the Second War Powers Act, 56 Stat. 178, pertinent provisions.

"Sec. 301. Subsection (a) of section 2 of the Act of June 28, 1940 (54 Stat. 676), entitled 'An Act to expedite national defense, and for other purposes', as amended by the Act of May 31, 1941 (Public Law Numbered 89, Seventy-seventh Congress), is hereby amended to read as follows:

'Sec. 2. (a) (1) That whenever deemed by the President of the United States to be in the best interests of the national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy is hereby authorized to negotiate contracts for the acquisition, construction, repair, or alteration of complete naval vessels or aircraft, or any portion thereof, including plans, spare parts, and equipment therefor, that have been or may be authorized, and also for machine tools and other similar equipment, with or without advertising or competitive bidding upon determination that the price is fair and reasonable. Deliveries of material under all orders placed pursuant to the authority of this paragraph and all other naval contracts or orders and deliveries of material under all Army contracts or orders shall, in the discretion of the President, take priority over all deliveries for private account or for export: * * *'

'(2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

'(A) Contracts or orders for the government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled "An Act to promote the defense of the United States";

'(B) Contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States;

'(C) Subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this subsection (a).

Deliveries under any contract or order specified in this subsection (a) may be assigned priority over deliveries under any other contract or order; and the President may require acceptance of and performance under such contracts or orders in preference to other contracts or orders for the purpose of assuring such priority. Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

APPENDIX D

The Executive Orders

(In chronological order)

1. Executive Order No. 8629, dated January 7, 1941, 6 Fed. Reg. 191, pertinent provisions.

"ESTABLISHING THE OFFICE OF PRODUCTION MANAGEMENT IN THE EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING ITS FUNCTIONS AND DUTIES.

"1. There shall be in the Office for Emergency Management of the Executive Office of the President, an Office of Production Management which shall consist of (1) a Director General, and (2) an Associate Director General, each to be appointed by the President, (3) The Secretary of War, and (4) the Secretary of the Navy.

* * * * * *

"2. With such advice and assistance as it may require from other departments and agencies of the Federal Government, and subject to such regulations or directions as the President may from time to time prescribe, and subject further to the general policy that the Departments of War and Navy and other departments and agencies of the Government will be utilized to the maximum extent compatible with efficiency, the Office of Production Management shall:

a. Formulate and execute in the public interest all measures needful and appropriate in order (1) to increase, accelerate, and regulate the production and supply of materials, articles and equipment and the provision of emergency plant facilities and services required for the national defense, and (2) to insure effective coordination of those activities of the several departments, corporations, and other agencies of the Government which are directly concerned therewith.

b. Survey, analyze, and summarize for purposes of coordination the stated requirements of the War and Navy and other departments and agencies of the Government, and of foreign governments for materials, articles, and equipment needed for defense.

c. Advise with respect to the plans and schedules of the various departments and agencies for the purchase of materials, articles, and equipment required for defense, to coordinate the placement of major defense orders and contracts and to keep informed of the progress of the various programs of production and supply.

d. Plan and take all lawful steps necessary to assure the provision of an adequate supply of raw materials essential to the production of finished products needed for defense.

e. Formulate plans for the mobilization for defense of the production facilities of the Nation, and to take all lawful action necessary to carry out such plans.

f. Determine the adequacy of existing production facilities and to assure their maximum use; and, when necessary, to stimulate and plan the creation of such additional facilities and sources of production and supply as may be essential to increase and expedite defense production.

* * * * *

h. Perform the functions and exercise the authorities vested in the President by Section 9 of the Selective Training and Service Act of 1940.

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"5. There shall be within the Office of Production Management a Priorities Board composed of six members. A chairman and three other members shall be appointed or designated by the President; the Director General and Associate Director General shall be members, ex officio. The Priorities Board shall serve as an advisory body and from time to time as may be required by the Office of Production Management, shall make findings and submit recommendations with respect to the establishment of priorities, the placing of mandatory orders, the assignment of preference ratings, the allocation of deliveries, and other related matters. In making its findings and recommendations, the Priorities Board shall take into account general social and economic considerations and the effect the proposed actions would have upon the civilian population."

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2. Executive Order No. 8875, dated August 28, 1941, 6 Fed. Reg. 4483, pertinent provisions.

"DELEGATION AND COORDINATION OF PRIORITY AUTHORITY

"1. The Office of Production Management, in addition to the responsibilities and duties described in paragraph 2 of Executive Order No. 8629 of January 7, 1941, is authorized and directed to discharge and perform the following responsibilities and duties, subject to such policies or regulations as the Supply Priorities and Allocations Board, hereinafter described, may from time to time determine:

a. Serve as the coordinating center for the execution of the powers and activities of the several departments and agencies relating to priorities; in this connection, review, clear, and approve for execution all requests or proposals originating from other Federal agencies, private industry, or other sources for priority action with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities; issue or provide for the issuance of all priority orders, warrants, certificates, or ratings with respect to the supply, production, transmission, or transportation of materials, articles, power, fuel, and other commodities; and, with reference to specific priority authorities vested by law in established departments and agencies of the Government certify to such departments and agencies, when the Office of Production Management deems such action necessary to national defense, that preferential treatment is essential for certain materials, commodities, facilities, or services.

* * * * *

"2. The Office of Production Management may exercise the powers, authorities, or discretion conferred upon it by this Order through such officials and in such manner as it may determine, subject to such policies or regulations as the Supply Priorities and Allocations Board may from time to time determine.

"3. In order to assure unity of policy and coordinated consideration of all relevant factors involved in the supply

and allocation of materials and commodities among the various phases of the defense program and competing civilian demands, there is hereby established within the office for Emergency Management a Supply Priorities and Allocations Board. The Board shall consist of the Director General and Associate Director General of the Office of Production Management, the Secretary of War, the Secretary of the Navy, the Special Assistant to the President supervising the defense aid program, the Administrator of the Office of Price Administration, and the Chairman of the Economic Defense Board. The Chairman of the Supply Priorities and Allocations Board shall be designated by the President from among the members of the Board. The President shall also appoint an Executive Director of the Board, who will preside in the absence of the Chairman.

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"5. Consistent with the basic defense policies of the President, the Supply Priorities and Allocations Board shall:

a. Determine the total requirements of materials and commodities needed respectively for defense, civilian, and all other purposes; establish policies for the fulfillment of such requirements, and, where necessary, make recommendations to the President relative thereto.

b. Determine policies and make regulations governing allocations and priorities with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities among military, economic defense, defense aid, civilian, and other major demands of the total defense program.

"6. The Office of Production Management through its Division of Priorities or any other of its divisions or subdivisions shall formulate general plans and programs providing for allocations and priorities with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities among military requirements, economic defense needs, total

civilian demands, defense aid needs, and other major elements of the total defense program. Such general plans and programs shall be submitted to the Supply Priorities and Allocations Board for approval or modification.

3. Executive Order No. 8942, dated November 19, 1941, 6 Fed. Reg. 5909, pertinent provisions.

"PROVIDING FOR THE ADMINISTRATION OF THE REQUISITIONING OF PROPERTY REQUIRED FOR NATIONAL DEFENSE.

"By virtue of the authority vested in me by the Constitution and the statutes of the United States, and particularly by the Act of October 10, 1940, entitled 'An Act to Authorize the President to requisition certain articles and materials for the use of the United States, and for other purposes,' and the Act of October 16, 1941, entitled 'An Act to authorize the President of the United States to requisition property required for the defense of the United States' (hereinafter referred to as the Acts), and in order to provide for the effective administration of the requisitioning of property required for the defense of the United States, it is hereby ordered:

"1. The Office of Production Management, in addition to the responsibilities and duties described in Executive Order No. 8629 of January 7, 1941, and Executive Order No. 8875 of August 28, 1941, shall, except as may otherwise be provided hereinafter, exercise the powers and authorities conferred upon the President by the Acts.

"2. Whenever the Office of Production Management determines, in accordance with the provisions of the Acts, the necessity for requisitioning property, that Office may:

a. requisition and dispose of such property on its own account; or

b. provide for the requisitioning and disposition of such property through the Department of War, the Department of the Navy, or any other department or agency of

the Government authorized to engage in the procurement of property of the type subject to requisition under the Acts.

"3. Whenever requested by the Office of Production Management, any department or agency of the Government is hereby authorized to requisition and dispose of property in accordance with the provisions of the Acts and to make available to the Office of Production Management such personnel, including officers of the armed services, as may be necessary to enable that Office to carry out its functions under this Order. The United States Marshals also are hereby authorized and directed, when requested by, and in accordance with directions of the Office of Production Management or the head of any department or agency of the Government authorized to requisition property pursuant to this Order, to requisition and dispose of property.

"4. The Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Secretary of Agriculture, the Chairman of the United States Maritime Commission, the Executive Director of the Economic Defense Board, or the head of such other agency as the President may from time to time designate, may initiate action for the requisitioning of property by submitting proposals for the requisitioning and disposal of such property to the Office of Production Management, whenever he determines that:

a. such property is of the type which may be requisitioned under either of the Acts;

b. with respect to proposals for requisitioning property under the Act of October 16, 1941:

(1) the use of such property is needed for the defense of the United States,

(2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply,

(3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted,

(4) if the property to be requisitioned is machinery or equipment, such machinery or equipment is not in actual use in connection with any operating factory or business or is not necessary to the operation of such factory or business, and

(5) the property to be requisitioned is not a firearm possessed by an individual for his personal protection or sport, the possession of which is not prohibited by existing law;

c. with respect to proposals to requisition property under the Act of October 10, 1940, there exists a necessity for requisitioning the property in accordance with the provisions of section 1 of the Act.

The head of any department or agency acting pursuant to the provisions of this paragraph shall be authorized to requisition and dispose of such property, provided that the Office of Production Management determines that the proposed requisitioning and disposal of such property is consistent with the priorities and allocations program and the general production and supply plan of the Office of Production Management.

"5. The Office of Production Management or the head of any department or agency which requisitions property pursuant to this Order shall determine the amount of the fair and just compensation to be paid for any property requisitioned pursuant to the Acts, and the fair value of any property returned in accordance with section 2 of the Act of October 16, 1941."

4. Executive Order No. 9024, dated January 16, 1942, 7 Fed. Reg. 329, pertinent provisions.

"ESTABLISHING THE WAR PRODUCTION BOARD IN THE EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING ITS FUNCTIONS AND DUTIES.

"1. There is established within the Office for Emergency Management of the Executive Office of the President a War Production Board, hereinafter referred to as the Board. The Board shall consist of a Chairman, to be appointed by the President, the Secretary of War, the Secretary of the Navy, the Federal Loan Administrator, the Director General and the Associate Director General of the Office of Production Management, the Administrator of the Office of Price Administration, the Chairman of the Board of Economic Warfare, and the Special Assistant to the President supervising the defense aid program.

"2. The Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:

a. Exercise general direction over the war procurement and production program.

b. Determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production, including purchasing, contracting, specifications, and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect thereto as he may deem necessary or appropriate.

c. Perform the functions and exercise the powers vested in the Supply Priorities and Allocations Board by Executive Order No. 8875 of August 28, 1941.

* * * * * *

"3. Federal departments, establishments, and agencies shall comply with the policies, plans, methods and procedures in respect to war procurement and production as

determined by the Chairman; and shall furnish to the Chairman such information relating to war procurement and production as he may deem necessary for the performance of his duties.

* * * * *

"5. The Chairman may exercise the powers, authority, and discretion conferred upon him by this Order through such officials or agencies and in such manner as he may determine; and his decisions shall be final.

* * * * *

"7. The Supply Priorities and Allocations Board established by the Executive Order of August 28, 1941 is hereby abolished, and its personnel, records and property transferred to the Board. The Executive Orders No. 8629 of January 7, 1941, No. 8875 of August 28, 1941, No. 8891 of September 4, 1941, No. 8942 of November 19, 1941, No. 9001 of December 27, 1941 and No. 9023 of January 14, 1942 are hereby amended accordingly, and any provisions of these or other pertinent Executive Orders conflicting with this Order are hereby superseded."

5. Executive Order No. 9040, dated January 24, 1942, 7 Fed. Reg. 527, pertinent provisions.

"DEFINING ADDITIONAL FUNCTIONS AND DUTIES OF THE WAR PRODUCTION BOARD.

"1. In addition to the responsibilities and duties described in paragraph 2 of Executive Order No. 9024 of January 16, 1942, the Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:

a. Perform the functions and exercise the powers heretofore vested in the Office of Production Management.

b. Perform the functions and exercise the powers vested in the Supply, Priorities and Allocations Board by Executive Order No. 8942 of November 19, 1941.

c. Perform the functions and exercise the authority vested in the President by Section 120 of the National Defense Act of 1916 (39 Stat. 213).

* * * * * *

"4. The Office of Production Management, established by Executive Order No. 8629 of January 7, 1941 is abolished and its personnel, records, property and funds are transferred to the War Production Board.

"5. Executive Order No. 8629 of January 7, 1941 is rescinded and Executive Order No. 9024 of January 16, 1942 and any other Executive Orders, the provisions of which are inconsistent with the provisions of this order, are amended accordingly."

6. Executive Order No. 9125, dated April 7, 1942, 7 Fed. Reg. 2719, pertinent provisions.

"DEFINING ADDITIONAL FUNCTIONS, DUTIES AND POWERS OF THE WAR PRODUCTION BOARD AND THE OFFICE OF PRICE ADMINISTRATION.

"1. In addition to the responsibilities and duties described in Executive Order No. 9024, of January 16, 1942, and in Executive Order No. 9040 of January 24, 1942, the Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall perform the additional functions and duties, and exercise the additional powers, authority and discretion conferred upon the President of the United States by Title III of the Second War Powers Act 1942.

"2. The Chairman of the War Production Board may perform the functions and duties, and exercise the powers, authority, and discretion conferred upon him by this or any other order through such officials or agencies, including the Office of Price Administration (created by the Act of January 30, 1942, Pub. Law 421, 77th Cong., 2d Sess.), and in such manner as he may determine. In any and all such cases the decision of the Chairman of the War Production Board shall be final."

7. Executive Order No. 9138, dated April 17, 1942, 7 Fed. Reg. 2919, pertinent provisions.

"PROVIDING FURTHER FOR THE ADMINISTRATION OF THE REQUISITIONING OF PROPERTY REQUIRED FOR THE PROSECUTION OF THE WAR.

"1. In addition to the authority conferred upon the Chairman of the War Production Board and the heads of certain departments and agencies by Executive Order No. 8942 of November 19, 1941, and Executive Order No. 9040 of January 24, 1942, such officials shall exercise in the manner provided in such Executive orders the authority conferred by Title VI of the Second War Powers Act, 1942,[1] except that the determination described in paragraph 4 b (4) of Executive Order No. 8942 shall not be required.

"2. Paragraph 4 b (4) of Executive Order No. 8942 of November 19, 1941, is hereby revoked."

[1] See Appendix C, Footnote 3, p. 7.